

Comparing Legal Clinics: is there a way to a European Clinical Culture? The Luxemburg Experience

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"We dissect [legal] cases as great anatomists would do; and we make diagnosis as doctors do when they are at the sick man's bedside. But where shall we acquire such a medical-legal culture if not in a legal clinic?"

[Rudolf von Jhering, *Scherz und Ernst in der Jurisprudenz*, Fifth letter, 1884]

Introduction

1. Though many legal clinics were founded and are now operating in European Universities¹, clinical legal education still is a relative novelty in Europe². Despite the existence of a network, the European Network for Clinical Legal Education (ENCLE), and the publication of the well-documented report of Celia Bartoli on legal clinics in Europe³, no official statistics are available as to the numbers of existing clinics.

Novelty does not mean a small number, nor absence of variety. Information collected in this report shows that there are already many existing clinics (over a hundred⁴) that cover a huge diversity of legal areas. In fact, it identifies 17 areas of clinical action. It also demonstrates that clinical education is already strongly oriented toward the achievement of social justice and the development and transfer of legal skills⁵. From that perspective, the European landscape of clinical education is not much different from the American one, certainly because it originated in the US and one can come to the conclusion that the US clinical legal education model brought its legacy with it when it was transplanted and implemented in Europe. It is indeed difficult to find a publication on clinics, which does not refer to the American model⁶.

Nevertheless, differences between the American and the European context do exist. The main one certainly lies in the fact that theoretical reflection on clinical education and

* I am grateful to Lawrence Siry for his remarks on a first draft of this article and his proofreading.

¹ For an overview of the existing clinics see the website of the European Network for Clinical Legal Education : <http://encle.org/>

² On this issue, R. J. Wilson, Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education, *German Law Journal*, Vol. 10, No. 6, pp. 359-382, 2009 ; C. Bartoli, *Legal clinics in Europe: for a commitment of higher education in social justice*, in *Diritto & questioni pubbliche*, special issue, May 2016. The report is available at: http://www.dirittoquestionipubbliche.org/page/2016_nSE_Legal-clinics-in-Europe/index.htm

³ C. Bartoli, *op. cit.*

⁴ *Ibid.*, p. 42.

⁵ As it clearly appears from the reporting of the discussion with some exponents of the movement for clinical legal education in Europe in the report of C. Bartoli, *ibid.* p.

⁶ See for instance, in French language, E. Poillot (dir.), *L'enseignement clinique du droit, expériences croisées et perspective pratique*, Larcier 2014 and X. Aurey, M-J. Redor-Fichot, (dir.) *Les cliniques juridiques*, Presses Universitaires de Caen, 2016 that both contains contributions on legal clinics in the US.

construction of a “clinical doctrine” is still at its very early stages of development in Europe⁷, whereas in the US journals and textbooks have been dedicated to clinical legal issues for a long time⁸. It should yet be pointed that American scholars’ research on clinics mainly focuses on issues related to legal teaching. The links between clinical experiences and fundamental research have, by contrasts, hardly been explored. Starting from these points, this paper will argue that the American legacy is certainly to be taken into account but that the contextual differences between American and European clinics should not be underestimated and that the transplant of the American model into the European continental environment – on which this paper will focus, with a special interest for the French and Luxemburg ones – requires some adaptations. Among these adaptations, one main point certainly is the necessity to build a bridge between legal clinical experiences and legal fundamental research. Whatever the adaptations may be, to build our own model (II) we need to understand the American one (I).

I. Understanding the American model

2. It is usually assumed that the birth of legal clinics took place in the US, at least in American literature⁹. However, in reality, the emerging of a new type of legal education corresponded to a “pedagogical moment”¹⁰ that took place in continental Europe when new legal doctrines were developed: the “*libre méthode scientifique*” and the “*frei Recht*” in Europe. Additionally, the legal realism and the sociological jurisprudence movements, when the nature of the law was questioned under the influence of social sciences¹¹ contributed to its birth. However, the clinical experience flourished in the US, even as it did not meet success in Europe, more precisely on the European continent, probably due to the spread of the model of a “knowledge based” legal teaching, initiated in German Universities and that greatly influenced the French academic system¹².

⁷ Always relying on the example of the French speaking countries, few articles are dealing with this topic : H. Croze, “Qu’est-ce qu’enseigner le droit ?”, *D.* 2004, n°19 ; “Recherche juridique et professionnalisation des études de droit. Pour une filière hospitalo-universitaire en matière juridique”, *Recueil Dalloz*, 2005, p. 908 and ff. ; S. Hennette-Vauchez, D. Roman, “Pour un enseignement clinique du droit”, *Les Petites Affiches*, n° 218-219, 2006, pp. 5-6 ; N. Olszak, “La professionnalisation des études de droit. Pour le développement d’un enseignement clinique (au-delà de la création d’une filière “hospitalo-universitaire” en matière juridique)”, *Recueil Dalloz*, n° 18, 2005, pp. 1172-1173 and only two books are dedicated to this issue E. Poillot (dir.), *L’enseignement clinique du droit, expériences croisées et perspective pratique*, loc. cit. and X. Aurey, M-J. Redor-Fichot, (dir.) *Les cliniques juridiques*, loc. cit.

⁸ See *inter alia*: for textbooks, S. H. Krieger, R. K. Neumann Jr, *Essential Lawyering Skills*, 4th Edition (*Aspen Coursebooks*), Aspen Publishers; 4 edition, 2011, AA. VV., *Learning from Practice: A Professional Development Text for Legal Externs (American Casebook Series)*, West Academic Publishing; 2 edition 2007, for journals, the *Clinical Law Review*; the *Journal of Clinical Legal Education*, the *International Journal of Clinical Legal Education*, the *Journal of Legal Education*.

⁹ See, *e. g.*, G. S. Grossman, *Clinical Legal Education ; History and Diagnosis*, *Journal of Legal Education* Vol. 26, No. 2 (1974), pp. 162-193

¹⁰ End of the 19th century, beginning of the 20th. The expression is from S. Pimont, La place de l’enseignement clinique dans les facultés de droit, E. Poillot (dir.), *L’enseignement clinique du droit, expériences croisées et perspective pratique*, loc. cit. p. 15 and ff. , sp. p. 18.

¹¹ S. Pimont, *op. cit.*, p. 18 and G. S. Grossman, , *op. cit.*, p. 167.

¹² S. Pimont, *ibid.*, p. 19.

Implementing clinical legal education in continental Europe is about doing comparative law. Indeed, rather than talking about implementation one should talk about transplantation. And transplantation in the field of legal system is not easier than it is in the field of surgery. Recalling the words of Otto Kahn-Freund “[W]e cannot take for granted that rules or institutions are transplantable. [...] [A]ny attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.”¹³

In the field of legal clinics, as in any area where comparative law is to be used, contextualization is of extreme importance.

As European continental universities turn their eyes to the American experience, we must acknowledge that the model coming from the other side from the Atlantic is imbued with US common law principles. Besides, the differences due to the influence of the American common law tradition on clinics and the judicial – economic (*i. e.* social) context in the US play an important role in the understanding of how to introduce legal clinics in continental Europe. As with any legal model that is transplanted in another legal system/tradition, adaptation to the local environment is required. In order to do so, one should take into account the main differences existing between the common law and the civil law tradition, which have an impact on teaching methods (A). A comparison of the distinctive features of the so called “social context” in continental Europe and in the US will also help drawing a full picture of the adjustments that should be made when transplanting the American model (B).

A. Taking into account the differences existing between Common Law and Civil Law

3. Who better than Konrad Zweigert and Hein Kötz expressed the gap existing between common law and civil law traditions? According to their words “Common law comes from the courts, Continental law comes from the study. The great jurists of England were judges, on the continent Professors. On the continent, lawyers faced with a problem, even a new and unforeseen one, ask the solution the rule provides. In England and the US, they predict how the judge would deal with the problem, given existing decisions. On the Continent lawyers think abstractly, in terms of institutions, in England concretely, in term of cases, the relationship of the parties, right and duties. On the continent the system is conceived as being complete and free from gaps, in England lawyers feel their way gradually from case to case. On the continent lawyers delight in systematic, in England they are sceptical of every generalization. On the continent lawyers operate through ideas, which often dangerously enough, take on a life on their own, in England they think in pictures: and so one could continue”.¹⁴

In France, “the law is not a “restricted domain”. It is not the business of judges and practitioners alone, because the law is not limited to litigation. The law is seen as a

¹³ O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Modern Law Review* 1 (1974)

¹⁴ K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. translated by T. Weir, Clarendon press, Oxford, 1983, p. 69.

method of social organisation, always changing, and is thus of primary interest to statesmen and I fact of all citizens”¹⁵. In Germany, the law “has developed in a systematic, logical, abstract and conceptual manner”¹⁶. Therefore “German law thinks in terms of general principles, rather than in pragmatic terms, conceptualising problems, rather than in working form case to case”.¹⁷ And if cases “have grown in importance in interpreting the Codes and statutes, they are still primarily considered to be illustrations of general principles which are universally acknowledged, or illuminations of statutory provisions which embody such principles”.¹⁸

4. While this description of the differences between the two legal traditions certainly cannot be ignored, as cannot be refuted the historical link between English and American law and their common emphases on procedure and remedies, a first mitigating factor of the perception of this gap between the legal traditions that could be considered as an obstacle to the implementation of legal clinics in continental Europe is the fact that English common law differs from American common law. In the US, “the rules of English common law were (...) much altered by legislation in the various states”.¹⁹ Notably, in the US, by the end of the 19th century, “the law took more fixed norms and the judges saw their primary task as being to put the existing stock of rules in dogmatic order”²⁰. In that sense, although American law still shares many characteristics with English law, it is closer to the civil law tradition, “aimed at making plans, regulating things in advance and therefore in terms of law, [...] drawing up rules and systematizing them”²¹. There may be an important difference as to the way we perceive the law but eventually we all tend to put it into order. In fact what may be the main dissimilarity between the American common law tradition and the civil law one is the manner in which its application is conceived. This is particularly obvious when one considers how international law, which is supposed to be less influenced by legal culture than domestic systems, is perceived by American and French jurists. An interesting view on this has been expressed by E. Jouannet, who considers that there is a U.S. allegiance to pragmatism and realism, versus a French (and German) loyalty to formalism and positivism.²² In the US, this pragmatism led, even before the clinical legal education movement emerged, to the view that “the study of law should be regarded as a practical preparation for the legal profession”.²³ On the contrary, for many years in continental Europe, legal education reflected the allegiance of the academia to formalism and positivism by aiming at training students to write rigorous and formal doctrinal analysis. They were trained to think as lawyers and not to act as lawyers.²⁴

¹⁵ R. David, *French Law : Its structure, Sources and Methodology*, translated by M. Kindred, Bâton Rouge, Louisiana State University Press, 1972, p. 57.

¹⁶ P. de Cruz, *Comparative Law in a Changing World*, loc. cit., 2nd ed. 1999, Cavendish Publishing Limited, London – Sydney, p. 91.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, loc. cit., p. 241.

²⁰ *Ibid.*

²¹ *Ibid.*, p. 70.

²² Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58, *Maine Law Review* 292, 294 (2006).

²³ K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, loc. cit., p. 244.

²⁴ On this issue, R. J. Wilson, *Western Europe. Last Holdout in the Worldwide Acceptance of Legal Clinical Education*, Washington College of Law Research Paper No. 2009-26, available at <http://ssrn.com/abstract=1474903>.

The question is of course whether these differences are antithetical to a transplant of clinical legal education in continental Europe Universities. The answer is indeed negative as shown by the existence of the many legal clinics as accounted by Celia Bartoli in her report. These statements should however lead to a reflection on how to incorporate the pragmatism of clinical legal teaching into a legal and academic formal context, where teaching fundamental principles seems to be more important than training how to apply remedies.

5. Another factor that should also be taken into account – but on which this paper does not insist – is the huge difference existing between the academic context in the US and in continental Europe. In the latter, mass education is often the rule. It is thus difficult to implement teaching models adapted to small numbers of students. Moreover, the nature and status of the professoriate is extremely relevant to understand continental European methods of teaching. In the civil law tradition, Professors are scholars, who happen to teach and are rarely practitioners.²⁵ Compared to American clinicians, who are operating in law schools in optional courses where the number of students is limited, who are rarely scholars, mainly come from practice and focus on teaching, the gap is tremendous. The professional future of students is also an important factor. In the US, students are taught to act as lawyers because this is what is expected of the majority of them, when leaving law schools. In continental Europe however, this is not the case. Law studies are a passport for many different professions. What is usually expected from jurists is to be able to structure their thinking. If graduated students then chose to become lawyers they will then be trained for this after or before the bar examination²⁶. How then to proceed in order to adapt clinical teaching to the civil law environment? The reconciliation with fundamental legal research is a good way to do it, as the second part of this paper this paper will attempt to demonstrate.

6. This being said, it must however be stressed that legal trends and their influence on legal teaching are not the only factors that differentiate the European context from the American one. The legal economic environment, which is determinant to what can be referred to as a “social context”, also plays an important role.

B. Understanding the different social contexts

7. Talking about social contexts is always hazardous. For the purpose of this paper, the expression will have a limited meaning that takes into account the factors that have an immediate influence on the role of legal clinics in a society, such as social assistance, legal aids and healthcare systems.

8. Since this paper does not aim at completing a sociological study of the difference of social environments in Europe and in the US, it will rely on several reports and

²⁵ *Ibid.*, p. 373 and 374.

²⁶ For instance in Italy the future lawyer/attorney will have to practice before taking the bar examination whereas in France the practical training is provided once the exam has been passed. For detailed information on Lawyers' training systems in the Member States, see the fact sheets describing the training systems in the Member States at: https://e-justice.europa.eu/content_lawyers_training_systems_in_the_member_states-407-en.do?init=true

articles providing information regarding this environment²⁷. As highlighted by these documents, redistributive policies are more important in Europe than in the US. Poverty relief, healthcare systems programs and legal aid are more developed, creating a more favourable social context for poor people in Europe than in the US. With special regard to legal aid, it is relevant that, in a report on “practical operation of legal aid in the EU”, it clearly appears that no European continental State relies on private systems, whereas in the US, legal aid for civil cases is currently provided by a variety of public interest law firms and community legal clinics. Besides, in the US, civil legal aid does not handle cases for money damages such as medical malpractice, car accident cases or traffic violation cases or criminal cases, which is not the case in Europe. If the European system taken as whole is not free of criticism (many practitioners of European countries report long and bureaucratic processes, as well as low compensation for legal aid lawyers), broadly speaking the European legal aid context is more favourable to poor people than the American one.

However, besides this reason, one may also identify an ideological one, related to the history of legal clinics in the US.

9. Karl Llewellyn, who along with Jerome Frank, was in the forefront of the Realist movement, denounced the “emptiness of rules without facts” and urged law schools to give consideration to the “problem of turning legal or human knowledge into action”.²⁸ Jerome Frank, who is considered as the father of legal clinics, is said to have recommended “the establishment of legal clinics” in law schools to handle cases, not only for legal aid groups, but also for government agencies and “quasi-public bodies” to remedy this situation.²⁹ According to him, “the clinics should teach students to be sensitive to the place of the lawyer in the social process, and to the behavior of juries, witnesses and judges as well as to appreciate the “uncertainty of facts” in litigation and develop the skills of negotiation, draftmanship, and planning”.³⁰ Nothing seems in Frank’s view on clinical legal education however, to enhance the social justice function of clinics, social justice being here considered, according to Rawls’ theory as a way to assure the protection of equal access to liberties, rights, and opportunities, as well as taking care of the least advantaged members of society. Thus, whether something is *just*

²⁷ See *inter alia*, OECD Social Expenditure Update (November 2014) available at <https://www.oecd.org/els/soc/OECD2014-Social-Expenditure-Update-Nov2014-8pages.pdf>; *adde*, A. Alesina, E. Glaeser and B. Sacerdote, Harvard Institute of Economic Research, Discussion Paper Number 1933 Why Doesn’t The US Have A European-Style Welfare State? available at: http://scholar.harvard.edu/files/glaeser/files/why_doesnt_the_u.s._have_a_european-style_welfare_state.pdf; on legal aid: Report The practical operation of legal aid in the EU available at: <https://www.fairtrials.org/wp-content/uploads/2012/09/Legal-Aid-Report.pdf>; Note de synthèse du Sénat français sur l’aide juridique, available at: http://www.senat.fr/lc/lc1/lc1_mono.html#toc6; Documenting the Justice Gap in America. The Current Unmet Civil Legal Needs of Low-Income Americans, Report from the Legal Services Corporation 2009, available at: http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf

²⁸ K. Llewellyn, “On what’s wrong with So-called Legal Education”, 35 *Columbia Law Review*, 651 (658) 1935.

²⁹ Jerome Frank, Why not a Clinical Law School? 81 *University of Pennsylvania Law review*, 81 (1933), pp. 917, 918.

³⁰ *Ibid.*, p. 918.

or *unjust* depends on whether it promotes or hinders equality of access to civil liberties, human rights, opportunities for healthy and fulfilling lives, as well as whether it allocates a fair share of benefits to the least advantaged members of society³¹.

The social justice shift of clinical legal education is dated in the 60's. A concern for the conditions of the poor emerged at a governmental level and the holding of the Supreme Court in *Gideon v. Wainright*, which made the counsel for defendants in felony criminal cases mandatory³², certainly can be regarded as an important step of the reflection of lawyers as to their roles. As a consequence, "it became a standard motto of the times that professional responsibility applies not only to the ethics involving the individual attorney's relationship with his client, but also the responsibility of the profession as a whole to see to it that legal services area made available to all segments of society".³³ Many lawyers then felt "that the evident social concern of students should be harnessed and student manpower should be used to aid the legal profession in meeting the sudden new demands for legal assistance to indigents".³⁴ In the late 60's/early 70's, the civil rights movement came on top of the poor's legal assistance. Clinical education had become a legal expression of social justice.

To cite P. Kosuri "Many of today's clinical law faculty members presume that "social justice" should be a fundamental characteristic of any clinical offering. In fact, if you attend a clinical conference, you will hear clinicians proudly extol the social good their clinics do and the audience dutifully applaud this ideology. Rarely, if ever, will you hear any comment about a clinic that does not at least presume social justice".³⁵ Clinical legal education is about ideology. But this is an American story. And the contemporary European context is not the one of the civil rights era.

10. The development of clinical legal education in continental Europe takes place in a complex political and regional context. Today, the regional context is the one of the European Union, its single market and its harmonized legislation while the political context is the one of the middle orient crisis and the wave of refugees fleeing the war in Syria. Combined with the fact that Europe is not a single State, but a supranational entity with many different economic contexts, this creates a very different environment than the one in which American clinics were developed. The picture drawn in Celia Bartoli's report is very representative of this actual European "clinical landscape". The report demonstrates that the main areas of European clinics are the protection of asylum seekers and refugees law, consumers' protection, women and LGBT people, for gender issues³⁶. It is not disputable that these topics are highly related to social justice, at least if the definition of the latter is derived from the Rawlsian tradition³⁷. However, both the

³¹ See J. Rawls, Justice as Fairness, *The Philosophical Review*, Vol. 67, n° 2 (Apr. 1958), pp. 164 - 194.

³² 372 U.S. 335 (1963)

³³ G. S. Grossman, "Clinical Legal Education ; History and Diagnosis, *Journal of Legal Education*", *loc. cit.*, p. 173.

³⁴ *Ibid.*

³⁵ P. Kosuri, "Losing My Religion: The Place of Social Justice in Clinical Legal Education", *Boston College Journal of Law & Social Justice*, Volume 32, Issue 2 The Way to Carnegie: Practice, Practice, Practice— Pedagogy, Social Justice, and Cost in Experiential Legal Education, Article 6

³⁶ See the chart on page 53 of the report, *loc. cit.*

³⁷ See *supra*, n° 9.

emergence of refugees and non-discrimination clinics are also related to a specific political context.

11. The massive arrival of asylum seekers caused by the Syrian war and the ensuing generated humanitarian crisis³⁸ has provoked an important extra demand on legal support, which cannot always be easily dealt with by the responsible institutions, at least in a short term. Clinics were thus naturally considered as alternative solutions, whether they operate independently³⁹ or in collaboration with associations.

Regarding non-discrimination matters and the clear gender oriented issues dealt with by many clinics, one could also argue that the issue at stake is in line with an opportunist environment. Gender issues were first legally tackled in the European context (EEC and the ECHR) since the mid 50's on the ground of the prohibition of discrimination on the basis of sex in the context of employment⁴⁰. From a more social perspective, if the emergence of the gay rights movement is said to have started in the US in 1969 with the Stonewall Riots⁴¹, in Europe it is however only in the year 2000 that the scope of discrimination went far beyond the context of employment and social security⁴² and the ground of sex orientation and gender identity started to be more invoked and applied in litigations. It thus took a long time before discrimination could be considered as a real legal issue. This is also an area that can be seen as more political than legal and is still in the hand of legal militants (mainly associations) for its treatment⁴³. There again, the relative lack of official means facilitated in the last 15 years the development of legal actions that could have been considered as overlapping the activity of the bar, an issue of utmost importance in Europe "where the reserved areas of legal practice (subject to a monopoly of legal advice) might be considered excessive and pose a hindrance to the

³⁸ See for example the statement on the webpage of the Clinique du droit de Paris I "La Clinique s'engage dans l'accueil des réfugiés Syriens par l'Université Paris I !" @ <http://www.cliniquejuridiquedeparis.com/> as still appearing on the 15th of July 2016. See the *Guide on Establishing a Refugee Law Clinic*, published by the United Nations High Commissioner for Refugees (UNHCR) and available at http://helsinki.hu/wp-content/uploads/Refugee-Law-Clinic-Guide_ENGLISH.pdf

³⁹ For example, in France, since 2015, the Clinique juridique de Paris provides assistance to refugee students coming to the University of Paris I. Within the programme Migrations, the Clinique de l'École de Droit de Sciences Po collaborates with "France terre d'asile" an association specialized in supporting refugees and asylum seekers. EUCLID, the clinic of the University of Nanterre drafted a paper on *Protection of Foreign Isolated Minors* for the Groupe d'information et de soutien des immigrés (GISTI).

⁴⁰ Handbook on Europe non Discrimination Law, *European Union Agency for Fundamental Rights*, 2010, pp. 11 – 12.

⁴¹ It is said to have started when a group of transsexuals, lesbians, drag queens, and gay male patrons at a bar in New York resisted a police raid, V. Bullough, "When Did the Gay Rights Movement Begin?", History News. Network of George Mason University, April 17, 2005.

⁴² See Protocol 12 (2000) to the ECHR, not yet ratified by all EU Member States; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁴³ For instance the legal clinique of the Université de Nanterre, EUCLIDE which deals with discrimination cases does it to support the work of associations like "Choisir la cause des femmes" or le "Haut Conseil pour l'égalité entre les femmes et les hommes".

emergence of legal clinics with lawyers (and Bars) opposing the emergence of legal clinics because they conflict with the lawyers' monopoly".⁴⁴

12. The political European context demonstrates that the history of legal clinics is quite different in Europe than in the US. That does not mean that social justice is not a relevant argument. The title of Celia Bartoli's report, *Legal clinics in Europe: for a commitment of higher education in social justice*⁴⁵ clearly shows that, on the contrary, many actors of legal clinics are convinced of the dominance of this factor in the reasons for developing clinics. Whether or not this is reality is another question. There are two main reasons suggesting that the clinical experience as mainly such may be misleading. The first one leads us back to the historical context of clinics in the US. To demonstrate it the French example will be relied on. In France, when the first articles on legal clinics were published, the reasons invoked for implementing the American model were primarily pedagogical⁴⁶.

The second one can be derived from the study of European consumer law. Consumers in Europe have many rights. Their access to them is neither worse nor better than access to rights from any other categories of citizens. Among them, there are certainly vulnerable persons, as there is again among any other categories of citizens. Besides, consumer legislation, which is mostly derived from a political action of the EU⁴⁷, did not only deal with individual interest but also tackled the issue of collective redress⁴⁸ in order to ensure an efficient protection of consumers. Consumer law could be thus considered as a branch of legislation that both guarantees equal access to rights and take care of weak parties who can be considered as economically disadvantaged compared to stronger economic ones.

There are two issues that are fundamental with regard to consumer protection's effectiveness. The first one is effective information as "while the legal system creates a battery of measures that are designed to protect consumers, there can be no meaningful protection unless those rights are readily accessible".⁴⁹ The second one is the implementation of their rights. This has been a concern expressed at the CJEU level after the Court was referred several preliminary rulings related to the effectiveness of the protection granted by EU legislation. To make a long story short⁵⁰ according to the jurisprudence of the Court the exercise in practice of the rights conferred on consumers

⁴⁴ J. Lonbay in C. Bartoli, *Legal clinics in Europe: for a commitment of higher education in social justice*, *loc. cit.*, p. 70.

⁴⁵ *Ibid.*

⁴⁶ This is very clear in the two articles that first addressed the issue: H. Croze, "Recherche juridique et professionnalisation des études de droit. Pour une filière hospitalo-universitaire en matière juridique", *Recueil Dalloz*, 2005, p. 908 and ff. ; S. Henneville-Vauchez, D. Roman, "Pour un enseignement clinique du droit", *Les Petites Affiches*, n° 218-219, 2006, pp. 5-6.

⁴⁷ See, *inter alia*, for an overview of EU legislation S. Weatherill, *EU Consumer Law and Policy*, Elgar European Law Series, 2nd ed. 2013.

⁴⁸ The Injunctions Directive 2009/22/EC ensures the defence of collective interests of consumers in the internal market. It provides means to bring action for the cessation of infringements of consumer rights granted by EU law.

⁴⁹ B. McCabe, "The effectiveness of the legal system in protecting the rights of consumers", Vol. 7: Iss. 1, Article 5: <http://epublications.bond.edu.au/nle/vol7/iss1/5>

⁵⁰ A. Beka, *The ex officio doctrine in European consumer law, a procedural tool reinvigorating individual consumer litigation*, PhD thesis, Luxembourg 2015, E. Poillot (dir.).

by European Union must not be impossible or excessively difficult. At a jurisdictional level this means "the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract".⁵¹ Such a position led to award national judges an *ex officio* power they may or must exercise in many consumer disputes.⁵² Outside the jurisdictional frame, the effectiveness of consumer law is often related to the amount of the dispute and the fact that consumers are unlikely to go to court for amount below 500 euros.⁵³ At the legislative level, alternative dispute resolution processes (ADR) were considered as a remedy to such a problem. Consumers' clinics certainly are another way to address the issue. Running in parallel with consumer associations, they have the undeniable advantage to be supervised by academics specialised in consumer protection. While it is not disputable that consumers associations also have highly qualified lawyers, it must however be stressed that many employees or volunteers in these entities have no legal training. As a matter of fact, consumer clinics or clinics acting in the field of consumer law often collaborate with them.⁵⁴

In Europe, consumer clinics operate therefore in a specific context. Again, it would certainly be not appropriate to dissociate their activities from social justice concerns. To some extent, consumer law effectiveness is a matter of social justice. It is however not only and not primarily a matter of social justice.

13. This being said, another important factor should be taken into account, that of the ideological frame in which clinical legal education is now integrated in Europe. As already stated⁵⁵, the social justice ideal is perceived among the European community of clinical lawyers as one of the main goal of clinical legal education. This is very clear in the interviews of many clinicians reported by Celia Bartoli. José García Añón for example, talks about the necessity to solve "lots of needs and injustices" and this "also not just in Europe, because clinics have a universal perspective".⁵⁶ According to M. Tomoszek "legal clinics are very important for the development of social justice and community awareness of law schools. Scholars sometimes tend to live in a porcelain tower, without connection to the society around them. Legal clinics bring the engaging and troubling social justice issues right to the doorsteps of legal academics and law students. Helping people in need with day-to-day legal trouble is a core principle of clinical legal education, which naturally makes both teachers and students think about what is right and wrong about law and its effects on society. In this way, clinics help educate lawyers for future challenges, who will be empathic, socially sensitive and understand the responsibility of

⁵¹ See for instance case C-240/98, *Océano Grupo Editorial and Salvat Editores*, paragraph 27.

⁵² There is a faculty to raise legal issues regarding out of premisses contracts and an obligation when it comes about unfair terms, consumer sales and consumer crédit. See E. Poillot, *Chronique de droit de la consommation, Journal de Droit européen*, sept. 2016, to be published.

⁵³ European Union Citizens and Access to Justice (October 2004), Special Eurobarometer 195 / Wave 60.0- European Opinion Research Group EE, p. 19 available at: http://medsos.gr/medsos/images/stories/PDF/eurobarometer_11-04_en.pdf

⁵⁴ This is the case in France for EUCLID, the legal clinic of the University of Nanterre, as well as the Clinique de l'École de Droit de Sciences Po and in Luxembourg for the clinique du droit de la consommation.

⁵⁵ See *supra*, n°12

⁵⁶ In C. Bartoli, *Legal clinics in Europe: for a commitment of higher education in social justice*, *loc. cit.*, p. 66.

the legal profession and role of lawyers in society.”⁵⁷ Dissenting opinions are however already expressed. On the word of Filip Czernicki “legal clinics should focus on improving teaching methodology and pay more attention to the teaching component than to solving social problems. This is mostly true in Western Europe where there are already well developed state organised systems of access to legal aid and every citizen most probably knows where to go in order to get free legal advice.”⁵⁸

14. Given the political context in which legal clinics were developed in Europe, such orientation certainly results from a “doctrinal” influence of the many American literature existing in the field of clinical education and the personal interactions between clinicians from the two continents. This being said, the Bartoli’s report also clearly shows that legal clinics serve teaching purposes enhancing the fact that “legal clinics put law into a practical context and allow for experiential learning”⁵⁹ and that “through legal clinics, universities serve not only the traditional role of spreading knowledge, but also the modern role of developing practical skills to enhance competitiveness of their alumni on job market, but, even more significantly, clinics are probably the best teaching method to develop professional ethics and professional values”⁶⁰. This must be kept in mind when creating clinics in Europe. As the traditional role of academia is to educate students, the first goal of clinics should be an educational one. An overfocus on social justice could take away from this purpose. Clinics train students to become lawyers *i. e.* to solve real life issues on a legal basis. Clinics should raise their awareness about real life issues, economic difficulties, injustice, yet particular attention should be paid in order to teach students the significance of their role as lawyers. At times lawyers cannot solve a client’s problems with the tools provided for within the legal framework. An over emphasis on social justice could derail this goal, potentially leading to disillusioned students who may miss the complete benefit of clinical education. Additionally, there is a danger (at least in Europe where governments are charged with a duty to provide social benefits) that if clinics would be considered as social justice tools, this would encourage states to disengage from acting in this field – the refugees’ issue is, in my opinion, a good example of such a risk.

15. In the end, that social justice is or is not the most relevant issue in developing and providing clinical teaching may not be the most crucial point as long as legal clinics, “focus on social impact does not impede [the] goal to train and educate great [...] lawyers”, as stated by an American clinician⁶¹. And as always, when doing comparative law, one realises that if all roads lead to Rome, the – regional/national – landscapes are different. Because these landscapes are different, there is a necessity to adapt the American model to the European – continental – context. Such adjustment will then give the opportunity to re-think the role and the position of legal clinics in the academia in order to build a European model

II. Building a European model of legal clinics: the way forward

⁵⁷ *Ibid.*, p. 64.

⁵⁸ *Ibid.*, p. 71.

⁵⁹ J. Lonbay, *ibid.*, p. 70.

⁶⁰ M. Tomoszek, *ibid.*, p. 71.

⁶¹ P. Kosuri, “Losing My Religion: The Place of Social Justice in Clinical Legal Education”, p. 342.

16. With a tradition of legal clinics of almost one century, the American model has much to teach us. One should also remember that clinics were founded on the assumption that legal teaching was not satisfying and could be improved. This demonstrates that the American academic system was able to do what most European academies on the continent were not or not enough able: questioning themselves as to the quality of their graduate and undergraduate programmes.

Legal teaching has a long history in Europe as the first law Faculties are dated from the 11th century. The role played by universities in the shaping of the civil law tradition is extremely important and may explain to some extent, why although regularly criticized⁶². What is considered as the core of the civil law system, the *jus commune*, *i. e.* the interpretation of the *Corpus Juris* by scholars is not only defined as “the basis of a common body of law and legal commentaries”⁶³ but also as “a common legal language and a common approach to teaching and scholarship”⁶⁴ Continental Europe legal education is still strongly influenced by this historical moment. On the continent one does not teach the law, one teaches legal science. Thus continental European Universities do not train lawyers, they educate jurists.

Teaching the law mainly consists in presenting statute provisions and their interpretations by courts and scholars. On continental Europe the goal is to transfer legal knowledge rather than developing students’ legal skills.

17. This approach has never really been questioned. In France, the 1968 movement led to the reform of the institutional systems with Universities becoming autonomous from the State⁶⁵ This statute allowed University to freely determine the content of their programmes, but no reflection was initiated as to teaching methods in the field of legal education. The first real attempt to address this issue was made in 2006 when the financial crisis struck Europe. A working group was designated by the General Director of Higher Education in order to “elaborate “a doctrine” on which law faculties and universities could rely to reflect on their future developments”.⁶⁶ The word “doctrine” speaks by itself, there was from the very beginning something very dogmatic in the way the issue should be addressed. In fact, the conclusions of the working group are rather conservative. It formulates general principles – such as giving more visibility to law faculties – rather than concrete proposals. For instance the recommendation regarding pedagogy is just an acknowledgement of the quality of the existing scheme and the only problem identified is the lack of material means mainly due to the “mass education”

⁶² In 1845, around 40 years after the promulgation of the French civil code which led to a reorganization of legal studies as to their content was already proposed by Édouard-René Lefebvre de Laboulaye, Ministre de l’instruction publique, in his report “Quelques reflexions sur l’enseignement du droit en France à l’occasion des réponses faites par les Facultés concernées”, available at:

https://fr.wikisource.org/wiki/Quelques_r%C3%A9flexions_sur_l%27enseignement_du_droit_en_France

⁶³ P. de Cruz, *Comparative Law in a Changing World*, 2nd ed. 1999, *loc. cit.*, p. 57.

⁶⁴ *Ibid.*

⁶⁵ Loi n°68-978 du 12 novembre 1968 d’orientation de l’enseignement supérieur.

⁶⁶ Groupe de travail sur l’enseignement juridique, p. 5, available at <http://www.afsp.msh-paris.fr/observatoire/metiers/rapport2007enseigndroit.pdf>

characteristics of the French educational system⁶⁷ The Report primarily insists on the fact that the proposed changes are not drastic and are easy to implement⁶⁸. However there is hope as one of the recommendations of the working group mentions legal clinics⁶⁹. But the most encouraging signal certainly lies in the recommendation to give up the distinction between academic and “professional oriented” research⁷⁰. Beyond this discrete signal, the existence of many law clinics in Europe demonstrates that adaptation is already a reality. A very quick look at the existing clinics in Europe shows that there is an important diversity as to their functioning and their position in the academic curriculum (from 1st⁷¹ to 5th year of legal studies, with or without previous lectures as to the legal topics related to the clinic scope).

The following developments present a personal opinion as to how the American model should be adapted (A) grounded on the reflection I conducted before founding my own clinic at the University of Luxembourg (B).

A. Adapting the American model

18. There are many views that American and European lawyers share on clinics. The first one certainly is the necessity of their existence as they “enhance students’ understanding of the substantive law”⁷² because “students learn more effectively when

⁶⁷ *Ibid.*, p. 18: La pédagogie relève de l’autonomie des établissements et de la liberté des enseignants. Au demeurant le modèle « cours magistral – travaux dirigés » est bien adapté à l’enseignement du droit. Sa mise en œuvre pose davantage de problèmes matériels que de question de principe.

⁶⁸ *Ibid.*, p. 8: “Nombre de recommandations sont applicables « à droit constant » et peuvent être mises en œuvre immédiatement : c’est affaire de volonté et de discours”.

⁶⁹ In a confusing manner as it is assimilated to “internships” and put in an hybrid category that also refers to the Erasmus exchange programme... See recommendation n°109, p. 19: Le programme « Erasmus » donne d’excellents résultats et doit être systématiquement développé. Tant en licence qu’en master (surtout s’il s’agit de master en quatre semestres: V. Recommandation n° 115: “les stages doivent être encouragés. Ils peuvent déboucher sur ce que l’on nomme “enseignement clinique du droit”, qui se répand dans de nombreux pays étrangers: il consiste à mettre l’étudiant en contact actif avec la pratique juridique quotidienne dans le cadre d’une pédagogie adaptée. Il est recommandé de développer dans toute la mesure possible les “semestres Erasmus” et les stages et d’envisager des formules « d’enseignement clinique du droit”.

⁷⁰ See recommendation n°203, p. 26: “L’opposition courante entre une recherche professionnelle et une recherche universitaire ne correspond pas à la réalité. Elle accrédite l’idée fausse que le métier de chercheur (essentiellement dans le secteur public, mais aussi dans le secteur privé) ou d’enseignant-chercheur ne serait pas une profession! Elle détourne du travail doctoral de bons étudiants qui souhaitent acquérir une expérience de recherche attestée par un diplôme, mais ne souhaitent pas faire carrière dans l’université ou au CNRS. Il est recommandé de renoncer dans les textes, le discours (et si possible dans les esprits) à une distinction abrupte entre la recherche professionnelle et la recherche universitaire: la recherche doit être appréhendée dans son unité, même si ses finalités, ses voies et moyens peuvent différer selon les personnes”.

⁷¹ To remain in a French perspective, the Clinique juridique of the University of Paris 8 involved students from the 1st to the 5th year of legal studies while the Clinique du droit of Bordeaux is a programme open to 5th year students, trainee judges or lawyers.

⁷² A. Lamparello and Ch. MacLean, “No Shoehorn Required: How a Required, Three-Year, Persuasion-Based Legal Writing Program Easily Fits Within the Broader Law School Curriculum”, *Perspectives: Teaching Legal Res. & Writing* Vol. 23, 2014, pp. 3 – 19, spec. p. 7.

they combine “analysis and its application”⁷³ through “acting like a lawyer and engaging in lawyer activity.”⁷⁴ The second one is that we do not only want to produce lawyers who understand context, exercise sound judgment, and practice strategic decision making but also to produce good legal thinkers and writers. However, there are also huge differences in the way American and European conceive the role and the place of clinical teaching students curriculum.

19. The American clinical model has focused on teaching professional skills, as students are trained to become lawyers. In Europe, the clinics should also take into account the fact the law schools are educating future jurists. Some of them may become lawyers, in the sense of “attorney”, to use an American term, some of them not. And jurists’ education should also be shaped according to the legal system it stands in. Therefore, I strongly support the view that clinics should have a “substantive and procedural law teaching” and a “legal writing methodological” component that can be integrated or not to clinics but that must in any case precede any kind of clinical teaching. Theoretical knowledge is “the bridge that connects analytical to experiential learning, and theory to practice.”⁷⁵ This vision of clinical legal education implies that clinics should not be special programmes taught by Professors who have a particular status within law schools.

In the US there is a rather strict separation between clinical professors and academic law professors. While both have often practiced the law, clinicians generally have not attained a PhD degree and their teaching is different from that which is offered in other areas of the law faculty. Several reasons can explain this compartmentalization. Among those, is that although the acquisition of professional skills are of utmost importance in the curriculum, there is still an important gap existing between the academia and the practice, the academia serving the purposing of teaching knowledge and the clinics the one of teaching skills. Reconciling the two ways of teaching would not make sense because “clinical training would be burdened by excessive collaboration with legal writing or analytical faculty”⁷⁶ and because the “separation between each component of legal education is vital to a law student’s step-by-step progression from thinker (analytic), to writer (practical), to lawyer (application).”⁷⁷ It ought to be left up to American specialists to decide whether or not this argument is convincing in the US context. In continental European environment however, it would be a real risk to separate clinics from the rest of law schools and to leave them to practitioners or researcher only specialised in legal teaching.

In my opinion, transplanting this distinction would be both a mistake and a danger as I will now explain and I really fear it could be the case if we are not cautious, since clinics are not considered as “usual subject matter” in law schools and appears to be, for the moment, a field that young researchers have predominantly occupied. Whether or not

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, p. 5. This view is also supported by American clinicians and perfectly expressed in the article cited above.

⁷⁶ A. Lamparello and Ch. MacLean, “No Shoehorn Required: How a Required, Three-Year, Persuasion-Based Legal Writing Program Easily Fits Within the Broader Law School Curriculum”, *loc. cit.*, p. 14.

⁷⁷ *Ibid.*

they will be able to qualify as professors is another story. If clinical education remains considered as an instrument to promote practical legal training and social justice, this could be an important obstacle to the full integration of clinics in law schools and to their acceptance by the “classical academic world” and to the integration of those researchers in the academic world. This would be very regrettable especially because there are ways to avoid such a situation.

20. Law does not operate in a vacuum. In other words “legal rules and legal doctrine cannot be understood outside of the lawyer’s activities in which rules are actualized in the world”⁷⁸. Therefore, clinical education is substantially linked to lawyers’ activities. If in the US there is a strong separation between clinical professors and law schools professors, in continental Europe, academia and legal practice are two worlds that never or hardly meet. Clinics could and should be places where they will not only meet, but also talk and reflect together. This will contribute to a better perception of the law both on the side of academics and practitioners. One should add that in the clinical context “lawyers” should be widely understood. Judges, prosecutors, police officers, employees of legal department of businesses, mediators are lawyers. None of them should be excluded from clinics, as should not be excluded anyone who can have an influence on the legal world and who could contribute to clinical programmes. Depending on the legal field covered by clinics, psychologists, economists, financial traders, entrepreneurs, specialists of marketing etc. are more than welcome to participate in clinical programmes.

In this multicultural legal environment, academics should however have a fundamental role to play. They are those who have the skills and the time to step back and look at the overall picture of “the law manufacture” and reflect on it. Clinics are law laboratories where research can be stimulated by a real world context. It is a place where academics have the privilege to look at how “at more subtle yet pervasive levels, lawyers participate in the creation and interpretation of law.”⁷⁹ Clinics can and should challenge the way we do research. This brings me back to one of the recommendation formulated by the French working group report to give up the distinction between academic and “professional oriented” research⁸⁰.

21. Clinics and “clinical legal education [have] great potential for strengthening another traditional role of universities, which is to be a centre of research and science”⁸¹. Indeed, “legal clinics encourage academics to involve in research with practical application, using data from real cases and addressing pressing issues.”⁸²

Clinical education has been a fertile field of research on methods of legal teaching and conceptualization of “lawyering skills”. Continental Europe will undoubtedly benefit from the emphasis that clinical education “puts on skills development, including legal

⁷⁸ A. Shalleck, M. Ahmed “Toward a Jurisprudence of Clinical Thought: Investigating the Contours, Urges and Trajectories”; Focusing on Clinical Stance” paper presented during the Naples conference, p. 10.

⁷⁹ *Ibid.*, p. 21.

⁸⁰ *V. supra* n°17.

⁸¹ As stated by M. Tomoszek in his interview in C. Bartoli, *Legal clinics in Europe: for a commitment of higher education in social justice*, loc. cit., p. 71.

⁸² *Ibid.*

writing, legal analysis and other skills, involvement in a legal clinic requires that clinical teachers master these skills”⁸³ who will not “only transfer them to students, but also apply them in their own academic work and especially research”⁸⁴. Besides “with growing international collaboration in the area of legal clinics, there are several international research projects dedicated to clinical legal education already being carried out and even more are being designed. This definitely creates Europe-wide and possibly even world-wide communication about how we teach law and how can we improve.”⁸⁵ Of utmost importance as to the impact it will have on legal education of students, this process does not need to be adapted to the European model. On this issue the transplant will be direct and will not need any kind of methodological circumvolutions.

Outside this area, however not much has been done yet to build a bridge between clinics and legal research, may it be applied or fundamental research. The links between clinics and applied research are obvious. Applied research – which, assuming the French working group considers under the name of professional research – aims to solve specific problems and thus findings of applied research do have immediate practical implications. By working on practical problems with their students, academics face the reality of law and turn the deep knowledge of law impact resulting from clinical activities into a capacity to identify where problems arise and suggest how to reform the law. If not much reflection has been conducted as to the links of legal clinics with such research, the consultation of several clinics web pages demonstrates that many of them do applied research⁸⁶, not to mention the fact that sometimes applied research is the core activity of the clinic⁸⁷. Still no real reflection has been elaborated as to the methods⁸⁸ or the problems that may arise from such research (how to chose the associations supported by clinics, how to deal with conflicts of interests etc.).

Despite this empirical approach, from that perspective, the development of applied research in the civil law tradition through clinics is interesting. It clearly demonstrates how the legal tradition consciously or unconsciously has adapted legal clinics to its

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ See for example the Report drafted by the Clinique de l'École de Droit de Sciences Po and France terre d'asile on “L'effet de la rétention administrative sur les parcours migratoires”, in *Les Cahiers du droit social* n° 36, January 2015, available at:

http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr/ecole-de-droit/files/Rapport%20sur%20l'effet%20de%20la%20r%C3%A9tention_0.pdf

adde the paper drafted by EUCLID, the clinic of the University of Nanterre on the Protection of Foreign Isolated Minors for the Groupe d'information et de soutien des immigrés (GISTI) available at:

http://euclid.u-paris10.fr/fichier/travaux/3/document/redaction_euclid_version_definitive.pdf

⁸⁷ For instance EUCLID or the clinique juridique of HEC Paris and New York University School of Law.

⁸⁸ For example, the paper drafted by EUCLID, the clinic of the University of Nanterre on the Protection of Foreign Isolated Minors for the Groupe d'information et de soutien des immigrés clearly follows the classical French academic method of a two sections paper always subdivided in two parts subsections and perfectly matches the form of academic Master thesis while the report drafted in collaboration by Sciences Po students and France terre d'asile looks more like an empirical research which presents the criteria applied to the research in its introduction.

environment, not to say its culture, by pointing out the potential of clinics to operate at the level of concepts, may they be used for practical purposes.

In the civil law tradition however, applied legal research was not far developed by academics and is still not much practiced⁸⁹. Clinics can create the perfect context to develop it but, in my opinion, unless a link will have been established with fundamental research, the integration of clinical education will not be totally successful as it will be considered as a “professional training tool” more oriented toward the benefit of practitioners both from a training and research point of view.

22. Fundamental research mostly serves the purpose to become part of the academic world and the outcome of research was mostly books published on theoretical arguments. Doctorate theses in France, “Habilitation Schrifts” in Germany and monographs in Italy are clearly designed to make a specific contribution to the academic body of knowledge in the research area. They belong therefore to what is considered as fundamental research, *i. e.* a research that is driven by curiosity and the desire to expand knowledge in specific research area, a type of studies that is often describes as “gathering knowledge for the sake of knowledge”. Even articles serve this purpose. Research in the civil law tradition is a matter of expanding legal knowledge by systematizing the legal rules and their interpretation in an attempt to answer the question of how can we rebuild the law and its interpretation in order to keep the legal system unity and coherence. Something rather incomprehensible for a common lawyer. Thus, to comply with the vision of academia of what teaching the law is, that is also part of the civil law tradition, clinics should be able to prove they can benefit fundamental research. Achieving this goal may not be as difficult as one could think. In the frame of clients clinics, *i. e.* clinics which deal with real cases, the solving of the cases often implies that students ask themselves very theoretical questions, which may not be essential as to the final solution, but demonstrate that concepts that have long been considered as undisputable may not be so and that the coherence of the legal system could not resist a deeper analysis of the issue. From that perspective, the contribution of legal clinics to fundamental research is crucial, as it will contribute to dispel the myth of a necessary unity and coherence of legal systems in the civil law tradition world. Practicing the law in a consumer legal clinic allowed me for example to start reflecting on the concept of legal effectiveness or on the meaning of the law itself in a way I never had the possibility to do before. In fact, my vision of the legal system as that of many academics in the civil law tradition, was only related to what I had been taught at a the university. Connecting clinics to fundamental research will also avoid developing “a legal teaching system in the legal teaching system” by guaranteeing the participation of academics, lecturers and professors in clinical legal education.

23. With regard to research, one last thing should be said. Clinics can very positively influence European continental research, both applied or fundamental, because of the transdisciplinary and interdisciplinary context in which they can operate.

⁸⁹ Though it has been increasing lately under the influence of EU institutions and especially the EU commission, which often launches “research tenders”, most of the time to assess the effectiveness of EU regulations. See for example the Review of EU Consumer law (Fitness Check) launch of contracts to assist the Commission in the gathering and assessment of relevant information and evidence for the Fitness Check.

Transdisciplinarity is complimentary to legal practice. There are very few cases that involve only one branch of law. Most of the time, to solve a case, students must appeal to their theoretical knowledge in different areas such as civil, commercial, criminal and public law. For many years, scholars in the civil law tradition tended to approach research in a compartmentalized manner. Clinical legal teaching will modify this vision and impact both applied and fundamental research. The same can be said about interdisciplinarity. In the real world, a lawyer often needs an expert to get a full picture of the facts. When dealing with a client, a lawyer equipped with psychological training will better handle an interview than one who was never taught how to deal with clients' feelings. Though interdisciplinarity will certainly more fit into applied research, it cannot be excluded that it could also be integrated in fundamental research.

24. The last important point related to the adaptation of the American model to the continental European environment concerns the stage of the curriculum in which students can attend clinical programmes. In the US, there is no official position as to this issue. In my opinion, there are several reasons that, in Continental Europe, clinical programmes should only be proposed to mature students, *i. e.* students from third to 5th year of law studies⁹⁰, as well as PhD students. The main reason for this is the style of the civil law tradition, which is seen as a method of social organisation and operates in terms of general principles⁹¹. But maturity of students is another issue. Law school students completing their JD degree are older than their European counterparts. American students finish their secondary education when they are normally 18 years old. When entering law schools they have already completed a four years Bachelor degree and are usually 22 years old. First year law students in continental Europe are in between 18 and 20 years old. They are neither sufficiently mature, nor equipped with the appropriate theoretical knowledge in order to apply rather abstract and conceptual rules to real cases or, if the clinic is counsel oriented, to draft legal memorandum on complex issues. The marriage between thinking and applying works best when students have a core foundation of legal knowledge.

25. To summarize, there is a lot than we can and must learn from American clinical legal experience in continental Europe. But in order to ensure that the transplant is not rejected, the following adaptations are in my view strongly recommended:

First, clinics should be fully integrated in law schools and clinical teaching should not be left to a special class of Professors. On the contrary, clinics should be a place of active transdisciplinary and interdisciplinary collaboration between full law professors, young researchers any practitioners related to the clinical programme.

Second, clinics should not be only operating at a practical level but should also be organized as law laboratories, where both applied and fundamental research should be conducted⁹².

⁹⁰ Or equivalent for the Member States that did not enter the LMD frame established by the Bologna process.

⁹¹ See *supra* n° 3.

⁹² Empirical research, as part of applied research as it aims at answering special research questions for practical purposes, could also be integrated in legal clinics as it t is a way of gaining knowledge by means of direct and indirect observation or experience.

Third, clinical programmes should only be open to mature students equipped with a strong theoretical legal knowledge.

These factors are what I have tried to implement and achieve when creating my own clinics that I will now briefly present in order to give a concrete example of how to implement the adaptations required when transplanting the American model.

B. A case study: the Consumer Law Clinic of the University of Luxembourg

26. As a comparative and a consumer law specialist, when I started conducting a research on the effectiveness of consumer law, I immediately thought of legal clinics for the reasons already mentioned above⁹³. As the study director of a the LLM in European Private Law, including a 40 hours teaching component of European Consumer Law, I had the feeling that a consumer clinical programme would perfectly fit the purpose of consumer law effectiveness and could easily be integrated in the Master programme. This is why the *Clinique du droit de la consommation* was created⁹⁴. The clinic can be presented as a client and consulting clinic since students help consumers in finding solutions regarding disputes with businesses. Legal services are of course provided for free.

27. When I started the clinic, I was strongly supported by my colleagues of the law department. The University of Luxembourg is a young university with academics coming from many different countries⁹⁵. Innovative approaches are always welcomed and it was very clear from the very beginning that the clinic would be fully integrated to the law school and run by full professors. I would like to thank them all for their support with a particular thought for Professor Pascal Ancel who immediately agreed to participate in the clinic and helped me supervising the students.

The clinic is directed by me. The teaching staff is composed of my colleague Pascal Ancel, professor of civil law, of a post doctoral researcher specialised in Private International Law, of a judge of a civil law first instance Court, of senior and junior lawyers and of an associated professor in social psychology. Participating lawyers are not specialised in consumer law. Their role in the clinic is to provide students with professional skills. Most of them are “generalist lawyers”. In addition to the substantive law classes organized within the clinics, students are taught lawyering skills throughout workshops where they interact with “fake consumers” played by employees of a French state administration intervening in the field of consumer protection. Students initially work on anonymized real cases under the supervision of the lawyers and the psychologist.

⁹³ See *supra*, n°10.

⁹⁴ See its description at:

http://www.en.uni.lu/formations/fdef/master_in_european_private_law_ll_m/clinique_du_droit, adde E. Poillot, “La Clinique de Droit de la Consommation de l’Université du Luxembourg” in *L’enseignement Clinique du droit. Expériences croisées et perspectives pratiques*, E. Poillot (ed.), Pref. S. Braum, *loc. cit.*, pp. 171-192. The clinic deals only with cases that can be solved on the basis of a provision of the Luxembourg Consumer Code and if the amount of money at stake does not go over 5000 euros.

⁹⁵ See the multicultural background of the academic on:

http://www.en.uni.lu/research/fdef/research_unit_in_law/people

They have three days to prepare the case before interviewing the “fake consumers”. After the interview, the clinical staff debriefs them at different levels: professional skills by lawyers, social interaction with the consumer by the psychologist and legal treatment of the case by the academic staff. One week after the workshop, students review the videotapes of their interview with the psychologists in order to manage the feelings students experienced as a result of the interview.

Such processes imply a strong collaboration with the Bar. After a tough negotiation, which lasted two years, the Bar accepted not only the existence of the clinic but also agreed to support it by integrating the clinic into its professional training scheme⁹⁶. Experts of consumer protection are also welcome to participate in the workshop. The Luxembourg consumers association – Union Luxembourgeoise des Consommateurs (ULC) – has been closely associated with the clinic. Without their understanding and support, the clinic could never have been created.

28. Operating at the Master level has the advantage to involve mature students, more precisely 5th year students, as the clinical programme is taught during the second year of the Master. These students have attended the 40 hours class on European Consumer Law during the first year of the programme and have therefore a good theoretical knowledge in that field. During the second year of the Master, they also attend a class of 10 hours on consumer jurisdictional protection. Once the basic knowledge has been acquired, students participate in the “interactive workshop” described above, where they are trained to deal with real cases and to interview consumers. Students never meet real consumers before having completed these steps. This training component of the programme is taught during the first part of the fall semester. For the rest of the year (second half of the fall semester and spring semester) students deal with the cases submitted to the clinic through an on-line platform and work on legal problems referred to them by the ULC (the so-called counselling part of the clinic). This could, at a later stage of development of the clinic, also be done for governmental and supranational entities. When interviewing consumers, a lawyer, who acts as a mere observer and never intervenes during the discussion, always assists students. The Bar imposed this condition. I must confess that I was somehow reluctant to implement it at first. I had the impression it would not help students to be considered as professional lawyers, which is part of the exercise. However, it has proven to be an excellent *modus vivendi*. Students feel much more comfortable during the interview having a lawyer in the room and lawyers can debrief students once the interview is over. As of yet, it has not impaired the professional credibility of students.

29. Students participating in the clinic are rewarded with credits (8 ECTS for the fall semester, 10 for the spring), which means they have a final assessment of their work, consisting in the evaluation of one of the cases submitted to them for the interactive workshop. Students draft a memo in which they present and discuss the legal issues at stake. The assessment of their work for the second semester is based on a research paper they are required to write on a legal question they came across in the frame of one of the cases they have been working on. This paper is not a memorandum but rather a long essay in which they are required to implement the methods of applied research. To take an example, students have been required to draft a paper on how to take into

⁹⁶ In Luxembourg, lawyers must undergo a professional training during their career. The bar integrated the participation in the clinic in its professional training scheme.

account the jurisprudence of the CJUE on evidence matters in consumer sales law contracts⁹⁷ in practice.

30. Last but not least, the Luxembourg clinic has been conceived as a law laboratory. Applied research is already implemented through the works of the students and the possibility to draft memorandums for the ULC. The clinic could also be used to answer tenders launched by the EU in the field of consumer law. Every year, the clinic drafts an annual report of its activity in which problematic fields of consumer law are identified and solutions eventually suggested. The aim of this yearly report is to improve or promote the establishment of legislation and policy dealing with the needs of Luxembourg society in terms of consumer protection.

Due to its transdisciplinary and interdisciplinary context, the clinic will also give a fresh impetus to applied research that will be conducted with the different partners of the clinics, who are not only lawyers⁹⁸.

Regarding fundamental research, the clinic will provide an opportunity to develop research on legal teaching, an area hardly covered by European researchers. It will also allow the identification of topics of interest for fundamental research in the field of consumer, contract and private international law, given the special geographical context in which the clinic operates. Luxembourg is a small country, cross-borders cases are numerous.

Conclusion

31. Having a model to be inspired from is a privilege. In terms of clinical education, there is much we can learn from the American model. As I tried to demonstrate in this paper, there is also much we should reflect about before deciding to copy it. Transplanting foreign models is indeed about reflection: on the other legal system, on our own legal system. Besides the reflection on legal clinics, this transplant is as great opportunity for us, comparative lawyer to also think about the process itself and to step back and take the time to look at our legal and educational systems and ask us questions. Where do we stand? In what direction do we want to go? How do we want to proceed? Because after all, implementing a model is a matter of contextualization, and if you do not know the context, that is definitely something you cannot do.

Establishing legal clinics in continental Europe is a challenge for civil lawyers and for European law schools. I strongly believe the best road to achieve this, is through dialogue, networking and exchange of best practices. In a field where we are all beginners, this is definitely the way forward. Clinical education should be thought and framed at both the domestic and European level. But clinics roots should not be ignored, our future is European but our past is American. European clinics may well not be defined by their past, but they are prepared by it. My last wish in this paper is that we, European lawyers, do not forget this and keep being engaged in a fruitful dialogue with our American colleagues on what clinics are and what they should be.

⁹⁷ CJEU 4th June 2015, *Faber*, Case C-497/13, EU:C:2015:357.

⁹⁸ At a further stage of development, the integration of behavioral studies of relevance in consumer law (see *inter alia*, O. Bar-Gill, "The Behavioral Economics of Consumer Contracts", 92 *Minnesota Law Review*, 749, 2008), could be an option.