

УДК: 371.3

DOI <https://doi.org/10.32836/2521-6473.2021-4.14>

J. G. A. Hannemann¹, The president of the German legal clinic umbrella organization

Dr. M. Psol, Ph.D. in Neuroscience

CLINICAL LEGAL EDUCATION AND PRO BONO WORK IN GERMANY TO HELP THOSE IN NEED AND TO ESTABLISH A BETTER AND MORE SUSTAINABLE SOCIETY

This essay will explore the development of law clinics in Germany and the influence of the pro bono work on those who are in need and otherwise would not find legal consultation.

The essay will first draw historical analyzes and explain the development of law clinics – which found its original in the early 19th century in Germany.

Furthermore, the specific situation and legal requirements in Germany will be explained. Especially the need of any law clinic to have the supervising legal expert on hands as well as the liability question and the different possibilities to limit liability, will be analyzed. Furthermore, the very new approach of ensuring law clinics will be addressed.

Finally the essay will focus on the question whether law clinics can be considered to be a competition to lawyers or not. This is a question that especially at the beginnings of the law clinic wave in Germany from 2011 to 2016 was highly discussed.

Eventually, the authors will try to work out the advantages for students to take part as legal advisors in the law clinic and point out the benefits for society in general.

Key words: legal clinics, clinical legal education, pro bono, Germany, legal responsibility.

А. Ханнеманн, М. Псол. Юридична клінічна освіта та робота про бонo в Німеччині для допомоги тим, хто її потребує, для встановлення кращого та сталого суспільства

У статті досліджено розвиток юридичних клінік у Німеччині та вплив про бонo роботи на тих, хто потребує допомоги та в іншому випадку не має змоги отримати юридичну консультацію. У статті спочатку проведено історичний аналіз та пояснено розвиток юридичних клінік із початку XIX ст. в Німеччині. Окрім того, пояснено конкретну ситуацію та законодавчі вимоги до юридичних клінік у Німеччині. Особливо проаналізовано необхідність юридичної клініки бути під керівництвом юриста, а також питання юридичної відповідальності та різні можливості обмеження відповідальності. Розглянуто сучасний підхід до страхування юридичних клінік.

Авторами встановлено, що поєднання теоретичних та практичних аспектів у правознавстві стає більш важливим. Клінічна юридична освіта може допомогти студентам розвинути необхідні та корисні навички, яких німецька правова освітня система наразі не надає. Робота в юридичній клініці також високо цінується за кордоном і розуміється як цінний метод навчання.

Загальновідомо, що майбутні роботодавці цінують студентів, які, окрім того, що мали відповідні оцінки під час випускних іспитів із теоретичних предметів, також набули важливих практичних навичок протягом навчання. При цьому не можна забувати й про етичне розуміння, яке встановлюється, коли студенти на ранніх етапах навчання вже мають взаємодіяти з тими, хто належить до найслабших груп суспільства, і безкоштовно надавати їм допомогу з різних юридичних проблем.

Нарешті, все зосереджено на питанні, чи можна вважати юридичні клініки конкуренцією професійним юристам чи ні. Це питання особливо обговорювалося на початку хвилі заснування юридичних клінік у Німеччині з 2011 по 2016 р. Автори спробують проаналізувати професійні переваги для студентів, які беруть участь як консультанти в юридичній клініці, та вказати на переваги для суспільства загалом.

Ключові слова: юридичні клініки, клінічна юридична освіта, про бонo, Німеччина, юридична відповідальність.

Clinical legal education – a historical analyzes. The clinical legal education as we know it today was inspired by developments in this field in the United States in the 1960s [29]. However, the clinical legal education in the US has even a much longer tradition and was already established at the end of the 19th century [10, no. 907 et seq.; 36].

In 1931 the first formal law clinic was established at the Duke University. And in 1950 more than 25 of the 115 law schools audited by the American Bar Association offered law clinic training [8, p. 98].

¹About the authors: Mr. Hannemann is the president of the German Law Clinic umbrella organization BSRB and published – next to several legal essays – the first book on clinical legal education in Germany (Studentische Rechtsberatung und Clinical Legal Education in Deutschland) with Springer publishing house in 2015. Mr. Hannemann used to study in Oxford and Singapore.

Mrs. Psol was for many years engaged with the German Journal of Legal Education (GJLE), which is the Journal of the German law clinic umbrella organization. She used to study in Ukraine, the US, and Germany and holds a Ph.D. in Neuroscience. Currently, she is finishing her law degree and preparing to become a patent lawyer in Biotechnology.

The end of the 1960s can be considered the breakthrough of law clinics in the United States. In 1973 there were at 125 of 147 US American law schools at least one law clinic to be found [38, p. 181].

From this time on law clinics were established in many other countries. Nonetheless, in Germany, scholars and practitioners were hesitating to adopt this concept. Most scholars argued relentlessly that simulated court hearings might be an educational option but law clinics not [32].

What is not that well known is that the original idea though was first established in 1847 by the famous German law professor *Rudolf von Jhering* who established the first form of legal practical training in the city of Rostock which can be considered to be the first direct forerunner of the Legal Clinics, the so-called *Pandekten-internship* [24, p. 5 et seq.]. In 1862 *Rudolf von Gneist* was presenting the idea of law clinics at the German jurisprudence day (*Deutscher Juristentag*) in Vienna [30, p. 180]. In 1900 the first law clinics were established by the German scholar *Georg Frommhold* who was arguing that it is necessary to establish legal clinics at universities [11, p. 448–450].

Introduction to the development in Germany. With the significant legal change of the former “*Rechtsberatungsgesetz*” (RBERG) to the legal services act (RDG), which came into force in 2008, students as well as others throughout Germany are allowed to provide free legal advice as long as this is provided under the guidance of a fully qualified lawyer. In the beginning, many German legal institutions were quite frightened of this development. In particular, since 2011, an exponential increase in the number of law clinics established has been observed – initially through law student initiatives, later particularly within the universities. In the meantime, almost every German university which also provides a full law degree program lists such a law clinic program where those who are in need can receive free pro bono legal advice from students who are under the supervision of either professors, lawyers, or those who qualify under the German law to work as a judge and provide a profound legal education according to § 5 I DRiG.

These law clinics usually specialized and have – besides regular civil law which is quite common – also sometimes very specific purposes such as for example asylum law (refugee law clinics), internet-, media or even start-up law. A list of all student legal advice clinics in Germany at the end of 2015 can be found in *Hannemann / Dietlein Studentische Rechtsberatung und Clinical Legal Education in Deutschland, Berlin / Heidelberg 2016* (Springer Verlag). At that time, over 70 legal clinics were counted, from which 57 projects were classified as established and self-sustainable. [13, p. 131 et seq; 15, p. 18–41]. The number of scientific publications that have dealt with this topic in recent years is correspondingly large [17, p. 483; 9, p. 1150; 19, p. 833; 26, p. 272 et seq; 14, p. 79; 16, p. 644; 5, p. 721; 25, p. 848; 21, p. 357; 36, p. 3389; 35, p. 4061; 34]. In the meantime, a first textbook has even been published on this topic, which is also suitable as a practical guide for founders of student legal advice [15]. Since 2014, the German Journal of Legal Education (GJLE) is published which is conceived as a medium of communication within the scene of law clinics in Germany and which more than 80 authors used to publish articles about the development of law clinics and pro bono work throughout Germany [37].

Nevertheless, Germany is still lagging behind the European and international trend because elsewhere, student legal advice has long been part of the establishment of university legal education (clinical legal education) [3]. There are initial attempts to integrate student legal advice into the university’s focus area, but these can only be found sporadically [20, p. 177 et seq]. The importance of clinical legal training seem to be recognized by the legal professions in Germany, which is why the call for a practical (more) enriched legal training (legal clinics, moot courts, client interviewing trainings) is getting louder and louder [28, p. 93–124]. This article attempts to outline the framework conditions for student legal advice in Germany and its value in pro bono work for society and its weakest members.

The Legal development and the legal frame of law clinics in Germany. On 13th December 1935 the national socialists in Germany established the so-called “*Rechtsberatungsgesetz*“ (short form: RBERG). This law was made so that those who seem inappropriate for the national socialist system would be pushed out all of the legal advisory markets through repression and chicanery [15]. It took the German government more than 70 years to abandon this law and establish the new so-called “*Rechtsdienstleistungsgesetz*” (RDG), which came into power in 2008.

A significant change was that from this date on, students and others were – according to § 3 RDG – allowed to provide legal advice as long as they act on a pro bono basis supervised by someone qualified to be a judge under the German law.

Another essential qualification that has to be fulfilled is according to § 6 I RDG that legal advice will be provided for free. This means that there is no (not even just distant) connection with a paid activity.

Law clinics in Germany must therefore deal particularly intensively with the requirements of § 6 II RDG. Otherwise, the competent public authority might threaten to prohibit its legal services according to § 9 I RDG.

Only if the law clinic is directly connected to the university it might be possible to apply the § 8 I Nr. 2 RDG which allows public institutions (which also includes universities) within the scope of their duties and responsibilities to provide legal advice as social support for students which are connected to the university according to § 41 Abs. 1 HRG, itself [15, p. 91 et seq; 9, p. 1150]. In this case, law clinics usually will only provide advice in a direct connection to the university, such as questions concerning the University law, student dorms, student jobs etc [15, p. 92; 8, § 8 no. 30]. Also, the clients of the law clinic are usually students as well.

Nonetheless, § 8 RDG does not apply to other law clinics that are not directly connected to universities.

Instructions from a fully qualified legal expert. In Germany, it is of great importance to secure that the legal advice provided to people is not based on unqualified legal understanding or expectations, which eventually are wrong. Therefore, the government decided to force those who want to provide legal advice but do not have the full qualification to team up with someone fully qualified according to § 6 II S. 1 RDG.

The fully qualified person must either be a person who is allowed to work as a judge (so every lawyer who passed the bar exam according to § 5 I DRiG) or a university professor following § 7 DRiG. Therefore cooperation with a fully qualified professional is mandatory and cannot be circumvented [4, p. 1068; 21, p. 357].

In most cases, lawyers are best suitable for a law clinic because of their practical experience. Besides that, it is also an advantage for lawyers to get in touch with talented young students on early-stage to build a trust relationship and find potential future employees for their law firm. This also contains the advantage that fully qualified lawyers can prepare students – based on their daily work experience – better for emotionally challenging situations which might occur in a legal consultation with clients of law clinic. In tough cases, the guidance through client interviews is of immense help.

Also, members of university faculties who have the qualification to work as judges under German law might provide students on a didactic knowledge transfer level with valuable insights.

Depending on the size of the law clinic, it might be necessary to have several fully qualified legal experts supporting the law clinic.

Most of these legal experts understand the value that pro bono work provides to society and the educational advantage for aspiring law candidates, providing them insights and practical experience early. Therefore, the pro bono work became a vital part of the administration of justice and a sustainable interaction within society.

It is recommendable to write down the expectations from both parties (the student from the law clinic and the qualified person) concerning the pro bono work with the law clinic. The clearer the outline of the scope of the instructing activity and cooperation is, the more fulfilling the outcome for all parties will be.

Especially important is that lawyers, for example, do not try to use students in an anti-competitive way to “recruit” new clients for their law firm, which is prohibited by § 43b BRAO. Also, it is recommendable if a professor or a qualified faculty member is using cases from the law clinic practice as examples for educational purposes, to ask clients of the law clinic in advance for their allowance.

Liability questions. Liability questions of great importance to law clinics. There are several options for law clinics to minimize their liability. The first one is new to the legal form they choose. There are legal forms that contain limited liabilities or shift liabilities in a comfortable way to the organization behind the legal clinic away from the individual student.

Another way to deal with liability is by signing a contract with an insurance company for the whole law clinic or connecting the liability insurance of an advising lawyer to the law clinic.

Finally, it is also possible to do so-called “Ad Hoc” advisory [13, p. 141]. In this case, the client will explain his problem to the law students and ultimately receive legal advice. With receiving this very narrow first legal advice consultancy is done. There will not be a second meeting nor the possibility to discuss the problem further [15, p.109]. That this is, in many cases, unsatisfying is obvious. Nonetheless, this might work out surprisingly well with very simple and easy to solve (so-called standard issues).

Possible legal forms for clinical legal education in Germany. In 2015 the German Journal of legal education conducted the first survey, which provided a detailed overview of statistical information regarding clinical legal education in Germany [13, p. 131 et seq].

55 law clinics took part in this evaluation. 25 of them were directly connected to universities (Körperschaft des öffentlichen Rechts), 21 were registered non-profit associations (e.V.), 2 non-profit company with limited liability (gemeinnützige UG – haftungsbeschränkt) and 7 can be classified as GbR (Gesellschaft bürgerlichen Rechts) in the absence of specific information on the legal form.

The majority of the refugee law clinics are primarily organized in non-profit associations (e.V.) which might find its reason in the simplicity of forming such an organization and the absence of liability issues in the specific field of legal consultancy [15, p. 70].

Special insurance contracts follow clinics. Indeed the topic of liability is of great importance to law clinics. Arguing that clients of law clinics are financially weak and therefore are not a liability risk speaks against any faithful understanding of legal consultancy. Looking abroad, one can recognize that, especially in Poland, there are many liability cases. There even seem to be clients who deliberately try to bring about a liability case to assert claims for damages against the legal advice center [15, p. 73]. Even though there is no case yet known of a liability case in Germany, [13, p. 139 et seq]. this is undoubtedly a problem that has to be addressed early.

Even though law clinics have no concrete duty to ensure liability cases, lawyers have regulations to do so according to § 51 IV 1 BRAO [34, § 6 RDG no. 18]. Lawyers have to ensure every case they provide legal advice to with at least €250,000. There is also no specific regulation in the legal services act (RDG) that regulates the law clinics in Germany [35, p. 4068].

Looking abroad, one can recognize that in Poland, the law clinic umbrella organization made it compulsory for every law clinic that wants to join their umbrella organization to have its insurance [1, p. 85 et seq].

Also, the Higher Regional Court Brandenburg in Germany decided in 2014 that a law clinic could not be signed in the association register if it does not have the financial resources that can absorb to a certain extent the liability risk from incorrect provided advice [23].

Even though this court decision was in many ways understood to be incorrect, incomplete, and applying even wrong legal basis [7, p. 1122], but shows that this field still has to be focused on.

It is not difficult anymore to obtain legal insurance with a legal insurer for a law clinic in Germany [12, p. 119 et seq]. For a few hundred Euros it is possible to have complex insurance for a law clinic [31, p. 760].

Furthermore, law clinics can even minimize the amount of money they have to pay to insurance companies by specializing its the legal advisory field and by professionalizing their internal legal education of their advisors and by that already in advance in anticipation of minimizing their liability complications [22, p. 169].

Considering all this, it becomes evident that most of the German law clinics already took such insurance possibilities into account and minimized the outcome of potential liability cases.

Minimizing the liability risk by the insurance of an advising lawyer. Another possibility is to use the already mentioned Professional liability insurance according to § 51 IV BRAO of an advising lawyer. Therefore it is necessary to present the idea to the insurer and explain why and how the particular form of cooperation might be reasonable. There has to be an agreement on that that also covers the special relationship between the student legal advisor, the client, and the lawyer [15, p. 75].

Law clinics as competition to lawyers? From time to time, the unnecessary fear of lawyers comes up that law clinics might be a direct and vicious competition that takes potential clients of the market. Indeed there are lawyers whose income is relatively pure why they have to rely on welfare transfer services such as Hartz IV to secure the income [15, p. 145].

Especially smaller chambers are terrified of this competition with students who might advise on a pro bono basis for potential clients.

However, this fear has not come true. Most clients who turn to student legal advice do not have any financial means to hire a lawyer. In doubt, they don't get any legal advice at all. Due to that recognition, law clinics fill a gap in legal care that has not yet been closed, and that is of no economic importance [18, p. 2640; 2, p. 3388].

There's also the argument that the government provides social welfare aid (*Beratungshilfe*) for those who cannot afford a lawyer. But to receive this support, the client already has to go through a lot of administrative and bureaucratic effort. The fact that the offer exists does not mean that it is available to everyone [15, p. 145].

Student legal advice is a low-threshold offer. On the other hand, going to the lawyer represents a higher threshold because those seeking advice have a certain reluctance to consult a lawyer, worry about high bills, and perhaps – in some cases – even the feeling of shame prevents them from considering consultation [15, p. 145 et seq].

Student legal advice is active in an area where there is little supply on the part of lawyers but high demand for citizens. Since cases with a liability volume of € 750 to € 1200 are rarely accepted, student legal advice should not be seen as competition with the legal profession [27, p. 585].

The target group of student legal advice is people who have little or only very limited access to the law, who shy away from going to a lawyer anyway and are not familiar with advice / legal aid or the like. [15, p. 146 et seq]. Even the group of students – from which most cases of student legal advice feed – is only in the rarest cases a lucrative target group for a lawyer [18, p. 2640; 2, p. 3388].

And the cases that could ultimately come into consideration for a lawyer would be rejected by a student legal adviser due to the liability limit or even referred to the legal profession. Many of the clients would not have gone to a lawyer without contact with a legal advice center. Student legal advice ultimately serves to gain access to the law and has become part of the administration of justice without being a severe competitor for established lawyers.

Benefits for students to take part in clinical legal education. Students profit in many ways. First of all, practical experience is not well integrated within German legal education itself. Besides, students can, on an early stage, already apply their theoretical knowledge with real clients and solve existing problems that are not just written down in books but laid out to them by life. This way, they can get in touch with what it means to be a legal advisor. They can understand what it means to have an actual client of flesh and blood sitting in front of them and dealing with their problems in a pleasing way. It is not about just simply learning legal theory but rather the interaction with the client, the talent to analyze, to question two identify problems, and anticipate uprising problems in solving real cases. This is very close to life, makes circumstances understandable, and connects the theory of law and real-life legal issues.

Furthermore, the students have to reflect on themselves and their case solutions which is usually missing in the standard University study programs. Also, legal ethics is a topic they cannot circumvent by real-life interaction. This way, students can find out whether the law studies are really fulfilling them and in which area they could later imagine working. So far, there are no other educational modules that give such a detailed reality-close experience. And the impression experience to help pro bono other humans is quite enriching, especially if they are crowned by success.

We should not forget to mention all the benefits students went through, such as a law clinic program obtained for their career in the field of law. They built up a network, and possible future employers might

understand the advantage by employing someone who has already obtained practical experience in a law clinic [15, p. 149 et seq].

Conclusion. Connecting the theoretical and practical aspects in legal studies becomes more important. Clinical legal education can help students develop essential and usable skills that the German legal educational system otherwise would not provide. Working in a law clinic is also highly appreciated abroad and is understood as a valuable learning method.

Also, future employers appreciate students who – besides having suitable grades in the final German bar exams – also built up such practical skills within the starting time [39, p. 1143]. Not to forget the ethical understanding that is established when students on early-stage already have to interact with those who belong to the weakest groups within society and help them on a pro bono basis for free without legal problems [6, p. 148].

References:

1. Bartos K. Die studentische Rechtsberatung am „Collegium Polonicum“ in Słubice. *German Journal of Legal Education*. 2014. P. 82–96.
2. Bälz K., Moelle H., Zeidler F. Rechtsberatung pro bono publico in Deutschland – eine Bestandsaufnahme. *Neue Juristische Wochenschrift*. 2008. P. 3383–3388.
3. Bloch F.S. *The Global Clinical Movement. Educating Lawyers for Social Justice*. Oxford : Oxford Scholarship Online, 2010. 428 p.
4. Bücken A., Woodruff W. A. Clinical Legal Education – eine Option für die deutsche Juristenausbildung. *Juristen Zeitung*. 2008. P. 1068 et seq.
5. Dastis/Udich, *AnwaltsBlatt*. 2013. P. 721.
6. Dietlein G., Hannemann J.G.A. Am Anfang: Studentische Rechtsberatung in Deutschland. *JURACON-Jahrbuch 2014/2015*. 2014. P. 148 et seq.
7. Dietlein G., Hannemann J.G.A. Rechtsberatung durch Studentenverein. *Neue Juristische Wochenschrift*. 2015. P. 1122–1124.
8. Dux B. Die pro bono-Tätigkeit des Anwalts und der Zugang zum Recht. Übertragbarkeit eines US-amerikanischen Modells auf Deutschland? Bonn: Deutscher Anwalt Verlag, 2011. 300 p.
9. Dux B., Prügel J.-W. Studentische Rechtsberatung in Deutschland. *JuS*. 2015. P. 1148–1150.
10. Frank J. Why not a Clinical Lawyer-School? *University of Pennsylvania Law Review*. 1933. Vol. 81. P. 907 et seq.
11. Frommhold G. Juristische Kliniken. *Deutsche Juristen-Zeitung*. 1900. Jg. 5. P. 448–450.
12. Georgescu L. Die Gründung einer Studentischen Rechtsberatung am Modell der Universität Passau. *German Journal of Legal Education*. 2014. P. 109-121.
13. Hannemann J.G.A. Erste statistische Erhebung zur Entwicklung der Studentischen Rechtsberatung in Deutschland. *German Journal of Legal Education*. 2015. P. 132-147.
14. Hannemann J.G.A., Dietlein G. Studentische Rechtsberatung. *Ad Legendum*. 2014. Vol. 1. P. 79-82.
15. Hannemann J.G.A., Dietlein G. Studentische Rechtsberatung und Clinical Legal Education in Deutschland, 2016.
16. Horn, *JA* 2013, 644.
17. Kilian, *AnwBl*. 2016, 483.
18. Kleine-Cosack, *BB* 2007, 2637 (2640).
19. Meyer, *AnwBl*. 2015, 833.
20. Möslein, *GJLE* 2016, 177 ff.
21. Müller, *MDR* 2008, 357 f.
22. Nguyen/Romeike, *Versicherungswirtschaftslehre*, S. 169.
23. *OLG Brandenburg*, Beschluss vom 10.09.2014 – 7 W 68/14.
24. Pagenstecher, *Pandekten-Praktikum zu Puchta's Pandekten und Girtanner's Rechtsfällen*, Heidelberg 1860/Leipzig 1970, S. 5 ff.
25. Piekenbrock, *AnwBl*. 2011, 848.
26. Remmert, *BRAK-Mitteilungen* 2015, 266 (272 ff.).
27. Rüdiger, *ZJS* 2011, 585.
28. Singer, Studentische Rechtsberatung. Legal Clinical Education an der Humboldt-Universität, in: Barton / Hähnchen / Jost (Hrsg.) *Anwaltsorientierung im Studium. Aktuelle Herausforderungen und neue Perspektiven*. 12. Soldan-Tagung am 25. und 26. Juni 2015 in Bielefeld, 2016, 93–124; Wissenschaftsrat, *Perspektiven der Rechtswissenschaft in Deutschland. Situation, Analysen, Empfehlungen*, 2012, 58.
29. Stuckey, 'Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses' *13 Clinical Law Review* 807 (2007).
30. Von Gneist, in: *Verhandlungen des Vierten Deutschen Juristentages 1862 in Wien*, Berlin 1863, Bd. 2, S. 180.