

Global Actors: The Value and Ethics of Human Rights Clinics

March 6th: Yale Anniversary Conference

Laurel E. Fletcher: Opening Remarks

I would like to thank Judith Resnik and Sarah Russell and for the invitation to participate in this conference. In my opening remarks, I will focus on one question posed to us by the conference organizers: What ethical challenges does human rights advocacy involve, and how do these challenges play out in the clinical context?

I begin with a story. Several years ago, the International Human Rights Law Clinic at Berkeley Law joined with a national human rights group in the Dominican Republic to file suit against the Dominican state before the Inter-american Commission for Human Rights for refusing to recognize Dominican nationality of Dominican children of Haitian descent. Under Dominican law, children born in the Dominican Republic are entitled to Dominican nationality. However, in practice parents with Haitian surnames or who were presumed to be Haitian because of their dark skin were turned away at civil registries when they tried to obtain birth certificates for their children. We challenged this practice as a human rights violation. One summer after the suit was filed, a clinic student worked with the legal staff of our co-counsel in the Dominican Republic. The student accompanied our Dominican co-counsel on a visit to Bateyes –

communities originally built by sugar companies to house Haitian migrant workers -- to take testimony of witnesses. She relayed her initial shock to discover that the organization's lawyer brought no pen and paper and made no written record of what witnesses and potential clients said.

The student initially understood the lawyer's behavior as adapting his legal practice to the political context in Dominican Republic – one in which courts were hostile to claims of Haitians. The student learned that the organization had no intention or history of filing petitions in domestic court. Instead they sought to convince political decision makers to pressure state officials charged with issuing birth certificates to allow children of Haitian descent to be registered. Courts were irrelevant to their strategy.

But courts were central to our strategy. We needed to educate and persuade our local partners to investigate and document the case in a manner that would be persuasive to the judges at the Inter-American Court of Human Rights, the highest regional tribunal which would ultimately rule on our claims. This example illustrates some challenges common to transnational advocacy that are one of the distinguishing features of international human rights clinics.

By transnational advocacy, I mean legal advocacy that may involve any one of the following: (1) working in a foreign legal system; (2) collaboration with lawyers

from other countries; or (3) representing clients who are immigrants living in the United States or non-U.S. nationals living abroad.

One ethical challenge posed by transnational advocacy is how to work in a principled, professional manner when navigating a different *legal* culture. If we understand the challenges of transnational work primarily as negotiating cultural differences, we might miss the importance that legal culture plays in transnational work. Human rights clinics are different from other clinics to the extent to which they put U.S. law students in direct contact with a legal culture in a different legal system. Most commonly, this means contact with the civil law system.

Phil Genty's recent article in the *Clinical Law Review* explores the challenges in traversing civil and common law cultures in the context of promoting clinical education in eastern European countries.¹ Legal culture, shaped by the sources and conception of the law, as well as the role of those charged with applying it, is fundamentally different in common law and civil law countries. Pierre Legrand writes of profound impact that legal culture has on the lawyer: The difference between common law and civil law thinking about law "is irreducible so that it is not possible for a civilian to think like a common-law lawyer (or for a common-

¹ Philip M. Genty, "Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education," 15 *Clinical L.Rev.* 131 (2008).

law lawyer to think like a civilian).”² This profoundly different views about law permeate transnational legal practice in unexpected ways.

Our clinic frequently collaborates with lawyers from common law countries in Latin America on litigation in the Inter-american system. We have discovered that we have different conceptions of the role of lawyers vis-à-vis adjudicators; the relationship of the attorney to the victims we represent; and of the appropriate degree of hierarchy in relations between local lawyers and clinical supervisors as well as between local lawyers and clinic students, to name a few examples.

The work of traversing legal cultures can cause friction among collaborative partners. It can also provide transformative moments for students. In my example of the student working along side a Dominican attorney, her experience of working in the Dominican Republic became a frame of reference for the student to understand more fully than the Dominican lawyer or I could have explained the implications of working in the legal culture of lawyer-activists in the Dominican Republic. The clinic’s collective reflection about the meaning of the student’s experience offered opportunities to develop a sensibility to transnational legal practice that extended to clinic students who did not have the opportunity to work alongside our co-counsel. We discussed together the extent to which the student’s experience of working with co-counsel reflected a civilian lawyer’s conception of

² Cited in *Id.* at 139.

the active role of judges in investigating cases in the Dominican Republic (a civil law system) and to what extent it reflected the lawyer's understanding of what courts as opposed to politics could do for the clients. These conversations provide for fruitful learning opportunities for the transnational advocates we are training in our clinics. The case unfolded over several years and so initiated subsequent teams of students to the challenges of working with our co-counsel; each student team grappling with the challenges of traversing two distinct legal cultures.

These opportunities can cultivate a sensibility in our students to identify and attend to the ways in which their own legal culture may interfere with as well as enhance their effectiveness in transnational work. While our students may never understand the law the way a lawyer who was born, raised, studied, and practices in another legal system, they may become comfortable and adept at bridging these boundaries. In an increasingly globalized legal profession, human rights clinics are well-suited to cultivate professional habits needed to meet the ethical challenges in a transnational legal practice.