How do we assess in Clinical Legal Education? A "reflection" about reflective learning

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Abstract

I suggest this hypothesis and these premises from the perspective of my experience in Clinical Legal Education and the use of experiential learning methods in other "traditional" courses.

Firstly, institutional assessment must be distinguished from the assessment of learning. Traditionally, assessment is reduced to institutional assessment: that is, to give a mark depending on the achievement of knowledge instead of focusing in the student's learning. However, I propose (to remember) that: 1) (Formative) assessment is part of learning; 2) Reflective learning (and reflective skills) is/are a part of assessment. This implies a process of continuous evaluation instead of summative evaluation, for example, through an exam or a similar procedure.

So, I agree with the idea that assessment "is not a measurement problem but an instructional design problem." (Van der Vleuten & Schuwirth).

To clarify what assessment is, we have to discuss several interlinked aspects (validity, reliability and fairness), which are connected to questions that must be answered: When is the assessment considered valid…? How do we assess…? What do we assess…? Some ideas to answer these questions may include the need to provide space (s) and time (s) to reflect on the learning (as a way of learning and as a skill to be acquired), which in turn implies a multiplicity of assessments and/or reflection about learning. This should also include a variety of assessments: self-assessment, peer-assessment, team-assessment, and (external) assessment. And last, but not least: as it is said, reflection should be considered not only a skill but a part of learning. Reflection about learning is an exercise that promotes life-long learning (including that among future lawyers). A reflection about context and experience is the first step for future professional action. The benefits of experiencing autonomy and reflection are the same in a real or in realistic environments. But the experience of responsibility requires a real environment.

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1. INTRODUCTION

Assessment, supervision, giving feedback, and (non) directiveness have been identified as perpetual challenges for new and experienced legal clinicians alike (Dunlap, 2004:60 and 61). Indeed, accurate assessment of the process of learning is in and of itself a complex task. The ideas and comments presented in this article derive from the experience and practice not only in our clinic[2] but also from other "traditional" courses in which I have used experiential learning methods[3]: *Basic Legal Skills*[4] and *Legal Ethics* [5].

[2] In our clinics we use a problem based learning methodology, as a part of our training program at the beginning of each term, and at the same time the students work with real cases. Legal Clinic for Social Justice, Universitat de València (www.uv.es/clinica). The *Legal Clinic for Social Justice* is a university project running from 2006 at the School of Law in the University of Valencia. (www.uv.es/clinica), recognized as an educational innovation project and a Consolidated Group for Innovative Teaching. In this academic year (2014-2015) we have around 50 students, 3 pro bono lawyers and 30 professors supervising from 9 different areas of law. We develop a variety of activities and methodologies across five different clinics: Penitentiary Clinic, Public Interest Law Clinic, Private Interest Law Clinic, Migration and Foreigners' Rights Clinic, and International Human Rights Clinic. We work in several areas (disabled people, prisons, human rights, migration...) giving advise and support to NGOs, organizations, associations and non-profit entities. Our students learn through clinics as a part of compulsory credits in the Law Degree, Criminology Degree, Double Degree in Law and Business, and the Master Degree on Human Rights. We have volunteers too. The aim of the legal clinic is to train law students with real cases. Students provide free legal advice under the supervision of teachers and professionals connected to the University. Students provide assistance with legal research, drafting legal arguments, and meeting with clients. Previously they have been trained in client interviewing exercises, simulations, research, drafting, legal ethics and professionalism and other contents not developed in the curricula.

[3] I have used a problem based learning methodology based on Font Ribas 2004, 2009, 2013 and Grimes, 2013.

[4] *Legal skills* is a basic course of first year in the Law Degree with a load of 6 ECTS (European Credit Transfer System). The course aims to introduce students to university life from a legal point of view It provides tools that can help to study Law and to work with the Law: legal research, oral skills, writing skills... The subject is an approach or introduction to the legal methods and the fundamental legal skills that can be developed in the years of Degree and Post-graduate studies and that will be used in the professional or academic life. Since 2013-2014 I use a problem based learning methodology to teach.

[5] *Legal Ethics in the criminal justice program and in the undergraduate Criminology Degree.* It is a Legal Ethics mandatory course of 4.5 ECTS (European Credit Transfer System) for private detectives in the Criminology Degree. I have taught these courses using different active

While it will be described in greater detail later, it should be noted at the outset that our approach to assessment is based on several methods: (1) supervision (giving feedback, advising and assessing), (2) weekly reflective journals using portfolios in a *Virtual Platform* (reflective learning and self-assessment), and (3) monthly rounds (peer assessment). This means that we apply several different approaches in assessing: self-assessment, peer-assessment, team-assessment, and (external) assessment. Our goal is to promote responsibility through experience and reflective learning not only as a skill but also as a tool for life-long learning. At the same time, we use rubrics[6] as grading tools to ensure that standards of performance are based on concrete, objective, and well-defined competences/learning outcomes.

As a starting point, in our view, clinical legal education (CLE) should be defined as a space of active learning, in which law students' training experience is designed and planned, in a real or realistic context, in such a way that they are able to take responsibility for the outcomes of their learning through a process of reflection (García-Añón, 2014a, 2014b).

Whereas the real context is developed in the clinic by working with real cases, a

learning techniques: problem based learning, collaborative learning and creative writing (with micro-stories). However, last two years (since 2013-2014) I introduced a pure problem based learning methodology.

[6] A rubric, as a " a standard of performance for a defined population", is a scoring tool that lists the criteria for a piece of work, articulates the expectations for an assignment and describes its levels of quality. (Andrade, 1997). See http://rubistar.4teachers.org

realistic context is developed in the other courses (*Basic Legal Skills* and *Legal Ethics*) or in the first stage of clinical training using *Problem Based learning* methods of teaching.

If we focus on the general scope of our inquiry, we have to answer the question: why assess? The obvious answer should be to know what students are learning; however, the reality is that most of us have in mind assessment which is not centred on the student's learning, but rather on institutional goals. In my opinion, this is part of the problem that I'll try to explain. We are going to start from the following premises: first, assessment cannot be reduced to *institutional* assessment; and second, a *competence approach of learning* better reflects the connection between learning and assessing.

If we were asked about what the nature and (implied) purpose of that assessment is, the answer should be to understand assessment of learning. Institutional assessment (that is, to certify a level of knowledge) must be distinguished from assessment for learning (that is, whether the student really learns). Traditionally, assessment is reduced to institutional assessment: that is, to give a mark depending on the achievement of knowledge instead of focusing on student's learning. As it is said: "… assessment is not merely a measurement problem, as the vast literature on reliability and validity seems to suggest, but that it is also very much an instructional design problem and includes educational, implementation and resources aspects." (Van der Vleuten & Schuwirth, 2005:309)

But we don't have, as law professors, strong evidence about what the relationship between learning and assessment is. In fact, in our years of experience teaching by using traditional methods and preparing exams, it is our conviction that we are not doing things in the wrong way, although other alternatives in teaching and assessing exist.

A second premise is that a *competence approach of learning* better reflects the connection between learning and assessing and provides for more effective learning. Learning is improved when all tasks are integrated: "… This 'whole-task' approach is reflected in the current competency movement. A competency is the ability to handle a complex professional task by integrating the relevant cognitive, psychomotor and affective skills. In educational practice we now see curricula being built around such competencies or outcomes." (Van der Vleuten & Schuwirth, 2005:312-313)[7].

That is, learning is better-served when there is an alignment between learning outcomes, teaching activities and assessment. As it is stated by Biggs in his *theory of constructive alignment*: "When there is alignment between what we want, how we teach and how we assess, teaching is likely to be much more effective than when it is not (aligned)... Traditional transmission theories of teaching ignore alignment."(Biggs, 2003) Or, put in another way: "The best teaching practices include regular assessments that are carefully tied to clearly

[7] "Competence for the purposes of this report has been defined primarily as the cluster of knowledge, skills and attributes necessary for a person to function effectively in a legal role."(Webb et al, 2013:274)

articulated teaching goals." (Barry et al 2008: 226; Stuckey, R. et alter, 2007, pp. 235-264).

If this is the point, we should focus on how we learn. And according to the level of learning that we intend to foster, we should propose a corresponding kind of assessment. And "…choosing an assessment method inevitably entails compromises and that the type of compromise varies for each specific assessment context." (Van der Vleuten & Schuwirth, 2005:310). It is not only important to decide what the learning objectives and learning outcomes of a course and its design are, taking into account abstract levels/areas of knowledge in the process of learning, but also their relationship with the methods of teaching used and their evaluation.

I think this is a training process in which professors and supervisors of our clinics have participated--thinking about and designing the main learning outcomes, the learning activities and the assessment rubrics.

For this reason, in CLE, as in other parts of the curricula: 1) (Formative) assessment is part of learning, 2) and reflective learning (and reflective skills) is/are a part of assessment.

Only to clarify concepts, it should be mentioned that *formative assessment* is a systematic and systematized reflection that aims to improve student learning: "it has been described as assessment that "refers to all those activities undertaken by teachers, and by the students in assessing themselves, which provide information to be used as feedback to modify the teaching and learning

activities in which they are engaged" (Black and Williams, 1998)." (Kennedy, 2007:20)

To explain what assessment is implies discussing the different interlinked aspects: validity, reliability and fairness (LETR, 2013:4.123), all connected to questions that must be answered: *When is the assessment considered valid…? How do we assess…? What do we assess…?*

First, the question, when is the assessment considered valid…? This refers to the aspect of *validity*. That is, it must be capable of assessing that which it sets out to assess. The problems to be discussed focus on the dilemma of the assessment's context: what are the best conditions for doing assessment. For example, a controlled place through simulations, or the experiences of the real world.

Second, the question about how do we assess…? This refers to the aspect of *reliability.* That is, the assessment must produce consistent and replicable results. The problems are related to the *objectivity/subjectivity standards or* the (lack of) consistency of results.

Third, the question stated is what do we assess…? This refers to the aspect of *fairness* treatment. That is, it must assess against the syllabus and learning outcomes that have been set out, as well as the problems that are related to the (lack of) transparency or the clarity of outcomes.

Aspect			**Problem/dilemma**	**Proposal**
Scope of assessment	To know what students are learning	Why assess?	Institutional assessment/student's learning assessment	No reduction to institutional assessment. Provide the possibility of reflection about learning.
Validity	Authenticity and realism. *It must be capable of assessing that which is set out to assess*	When is the assessment considered valid…?	*Real environment/ realistic environment (real world, simulations…) Direct assessment?*	Provide scenes for responsibility/autonomy Link learning outcomes with what the learner should be able to do at higher and complex stages of learning.
Reliability	*It must produce consistent and replicable results*	How do we assess…?	*Objectivity/subjectivity standards Reproducibility of scores?*	Use methods of assessment focused on the student's learning and give the possibility of reflection about learning.
			(Lack of) consistency	Variation in assessment methods and practices. Sampling: quantitative and qualitative information.
Fairness	It must assess against the syllabus and learning outcomes that have been set out	*What do we assess…?*	*+(Lack of) transparency*	Rubrics with clear learning outcomes and performances to be achieved provide trust

Below, I will try to develop some of these aspects introducing why reflective learning is needed as part of this process of assessment.

2. VALIDITY: WHEN IS THE ASSESSMENT CONSIDERED VALID?

In CLE if we have to assess that which we set out to assess, we should do so in a real environment. Some clinics around the world do it, others do not. And some

academics discuss that legal clinics should be developed only with real cases and clients (for example, Wilson 2004).

As Van der Vleuten & Schuwirth explain, it is not important if the assessment is developed in the *real world or with simulations…* (Van der Vleuten & Schuwirth, 2005:312) Even though the setting is not (entirely) significant, it is important to create a situation in which the student becomes autonomous and responsible.

But in CLE, the final goal should be learning with real clients. In this sense, learning with simulations should be a preliminary step in training with real cases.

For this reason, what matters is linking learning objectives as concrete elements of what is required at any stage of the formation. *Miller's Pyramid of Assessment* provides a framework for *assessing clinical competence* in education and can assist clinical teachers in matching learning outcomes (clinical competencies) with expectations of what the learner should be able to do at any stage. CLE provides opportunities for performing the skills and competencies required to be a lawyer. In fact, in the 30s, in the legal realist challenge to the case method and formalism tradition, Jerome Frank said that it was important to understand the "atmosphere of a case" or "cases as living processes" *vs*. the case method because "the practice of law and the deciding of cases constitute not sciences but arts -**the art of the lawyer and the art of the judge**. Only a slight part of any art can be learned from books. Whether it be painting or writing or practicing law, the best kind of education in an art is usually through **apprentice-training**

under the **supervision** of men some of whom have themselves become skilled in the actual practice of the art." (Frank, 1933a:923) We are interested in his emphasis of the importance of lawyering tasks as a part of how students should learn law and how "the law school would resemble a sort of sublimated law office" (Frank, 1933b:723-724).

Moreover, the development of the CLE movement from the 1960s onward focuses on the connection between learning and the provision of a service to society (Spiegel, 1987: 589-590). This activity can hardly be achieved without a connection with reality, and with the needs borne out of the difficulties of accessing justice. For this reason, CLE "seeks to relate the teaching of legal skills to the social justice issues that law students experience through dealing with indigent and marginalized clients" (McQuoid-Mason, 2008:2; McQuoid-Mason et al, 2011:23) and "to make students socially aware of the problems faced by poor people in society and how these can be addressed." (McQuoid-Mason & Palmer, 2013:81)

3. RELIABILITY: HOW DO WE ASSESS? METHODS OF ASSESSMENT(S) IN CLE

Reliability means that assessment methods must produce consistent and replicable results. It is true that no method has an inherent or immutable value: "The degree to which the various quality criteria are attained is not an inherent,

immutable characteristic of a particular instrument. (…) There is no such thing as *the* reliability, *the* validity, or any other absolute, immanent characteristic of any assessment instrument." (Van der Vleuten & Schuwirth, 2005:310, 312) That is, objectivity is one sort of influence in the measurement because some subjective exams could be reliable too. So what is needed is the use of methods of assessment focused on the student's learning and that give the possibility of reflection about learning.

First, this means to provide space(s) and time(s) to reflect about learning (as a way of learning and as a skill to be acquired) in real or realistic contexts and provide tools for transparency in the discussion about learning. And although objectivity and subjectivity are not the point of discussion, to develop reliability it must imply to develop public possibilities to discuss about the learning got.

Second, it means to use methods of assessment focused on the student's learning and that give them the possibility of reflection on learning.

And third, from the point of view of the professor, it implies multiplicity of assessments or reflections about learning. Various sources of information or evidence of learning are necessary to evaluate complex competencies: "…Assessment … complex competencies… requires quantitative and qualitative information from different sources as well as professional judgement." (Van der Vleuten & Schuwirth, 2005:309)

As has been noted, our experiences about assessment are based on several methods: supervision (giving feedback, advising and assessing [8]), weekly reflective journals using portfolios in a *Virtual Platform* (reflective learning and self-assessment) and monthly rounds (peer assessment). That includes self-assessment, peer-assessment, team-assessment, and (external) assessment[9].

The use of a reflective journal as portfolio is the main tool we use as a part of the continuous assessment[10]. The *portfolio* is a weekly individual report to be uploaded in the Virtual Classroom platform. The *content* of this report is, first, a description of the activities that the student has done that week in this subject (in class and outside class). All of them are evidence of a student's learning that must be shown at the end of the term. Second, it must include the report done by the team on the delivered scenario they have been working on or the activities carried out in the clinic. And third, a reflection and assessment of everything the student has learnt or thinks that he has to learn. It must include

[8] It is true that engaging in formative assessment in clinical practice with a genuine impact on learning is complex. It is shown that the factors to be taken into account are individual perspectives on feedback, a supportive learning environment and credibility of feedback. (Dijksterhuis et al, 2013)

[9] In the health domain you can see the same kind of experiences in Schuwirth et l, 2011; Van der Vleuten et al, 2012; and Van der Vleuten et al, 2015. It is shown in the "Programmatic assessment" as an integral approach that maximization of learning is achieved with the aggregation of several methods of assessment including the value of feedback.

[10] "Journal writing provides a space for personal, declarative discourse that is stifled in most law school writing assignments. The second contribution that journals can make is to help the law student to maintain a sense of self throughout the process of professional socialization that takes place in law school. By using the journal to relate the values that she brought to law school to the methods and materials of law study, the student can appropriately evaluate what is being taught and learned. Journals provide a space for students to work through how they feel about the roles that they are asked to assume in the law school, whether in the traditional classroom of the clinic." (Ogilvy, 1996:81)

the problems and difficulties found in this process. For this reason, a portfolio designed as a "programmatic assessment" of an integrated clinical placement, as proposed by Van der Vleuten & Schuwirth (2005, 2011) has sufficient evidence of validity to support a specific interpretation of student scores around passing a clinical placement, although with some modest precision in some competencies that could be reduced focussing more on feedback and supervision. (Roberts et al, 2014)

Additionally, each month we hold a "round" in which students talk and discuss their cases together, and show the problems they had, including ethical issues. Rounds in law clinics are meetings in which all the students discuss their real work with their classmates and professors. Participants exchange information about what they have done, discuss issues they are working through, identify next steps, and ask their classmates for assistance in thinking through the issues in the scenario.

4. FAIRNESS. WHAT DO WE ASSESS…? RUBRICS IN CLE

The third question was about what do we assess…? It refers to the aspect of fair treatment. It must assess against the syllabus and learning outcomes that have been previously set out, as well as the problems related to the (lack of) transparency of these tools.

Learning outcomes specify the minimum acceptable standard to enable a student to pass a module. *Grading criteria* are statements that indicate what a student

must demonstrate to achieve a higher grade. These statements help to differentiate the *levels of performance* of a student. By making these *criteria clear* to students, it is hoped that students will aim for the highest levels of performance.

For us, the use of general rubrics previously published is a good tool for students and professors. Students don't usually know what their performance levels are. They only want to know what has to be written in a final exam. With the rubrics and samples provided they could know what is expected of them in the activities that require different levels of performance and that cannot be "measured" in an exam.

In the case of professors, we use rubrics for two reasons. First, to avoid a complete "subjectivity" in the assessment and as a tool that lets to justify and to give reasons about a decision. And second, in supervising tasks we work with professors of different departments and styles, and a common base that shows a fair treatment to the students is needed. It should be shown as a minimum of what is intended.

5. CONCLUSIONS

It is not decisive if the assessment is developed in the *real world or with simulations…* However, it is important to create a situation in which the student becomes autonomous and responsible. In CLE the final goal should be learning

with real clients, so learning with simulations should be a preliminary step in training with real cases.

Various sources of information or evidence of learning are necessary to evaluate complex competencies. Our experiences about assessment are based on several methods: supervision (giving feedback, advising and assessing), weekly reflective journals using portfolios in a *Virtual Platform* (reflective learning and self-assessment) and monthly rounds (peer assessment). That includes self-assessment, peer-assessment, team-assessment, and (external) assessment.

The *Problem Based Learning* method, combined with others, benefits an effective learning in an interactive environment and "It is based on constant feedback to the student." (Font, 2013) Benefits of the experience of autonomy and reflection are the same in a real or in realistic environments. However, the experience of responsibility requires a real environment.

Students complain about the lack of a "text-book" to consult and see all the contents of each part of programme. But, at the same time, they recognize they are putting in practice most of the theoretical contents they have studied in other subjects. With this method Law is "integrative": you can analyse and define what the problems are, as well as links with legal institutions or legal subjects, because most of the problems can include different perspectives of Law and permit different ways to solve them.

Through the process of reflection about learning students become aware of what they have learned and do this from the first moment: a) they are working

with all the tools needed and all parts of syllabus, b) they are learning from their mistakes, c) they are reflecting about the learning. And reflection about learning is an exercise for life-long learning.

The use of rubrics is a good tool for students to understand what the highest levels of performance are. For professors rubrics are a common base, a minimum of what is intended.

By these reasons the described methods of assessment and the "programmatic assessment of performance" provide a more valid, reliable and fair tools for learning than traditional methods.

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