

Thinking Like a Lawyer: How clinical legal education transformed the law undergraduate

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ABSTRACT

The paper sets out the reasoning and motivation premising the timely path taken by the Faculty of Law & Government (as it is presently known) in introducing clinical legal education or professional skills training in its undergraduate programme in 2001. The paper focuses on the use of “ends-means thinking” to develop a pedagogical method comprising of effective techniques of learning from practical experience. The techniques employed serve to enhance the fundamental development of a law undergraduates’ critical thinking skills; the application of substantive legal principles to real-life scenarios; information gathering and research in formulating a hypothesis and legal solutions; and the use of an articulated expression in drafting. The paper further explores an additional goal of clinical legal education, which is the promotion of professional ethics in the context of the student's future role in advancing the interests of justice, through self-cognition. In the undertaking of this endeavour, the paper highlights a shortcoming in nurturing interest in public welfare and social justice. The paper also proffers the future direction of clinical legal education to equip undergraduates to deal with the shifts and direction arising from the exponential impact of LegalTech and the Fourth Industrial Revolution.

Keywords: Clinical Legal Education, Interest of Justice, Legal Technology

Background

Clinical legal education was introduced in the Faculty of Law & Government at HELP University in 2001 with the incorporation of two subjects - Legal Skills and Legal Practice as part of the two year UK degree transfer programme. The paper is based on the experience of the law school and observations made by the writers in their individual capacity of, firstly, in writing the course and introducing it in the programme; secondly, as a senior member of the faculty observing the transformation of the law undergraduate over the course of the programme; and finally, as the facilitator of the said subjects.

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“Thinking Like a Lawyer”

A significant challenge faced by legal education at the end of the 20th century was to expand traditional legal education to include more training in practical skills. Debates focusing on thinking like a lawyer were fuelled by the lack of preparation of law undergraduates for legal professional practice. The conversation and debate on this expansion commenced in the latter part of the 20th century. The idea was to include in the curriculum training in practical skills over and above domain knowledge.

Kreiger explains that domain knowledge¹ is the basis of doctrinal knowledge which is essential before law students can effectively learn problem-solving skills. He defines it as the “explicit knowledge of the concepts, principles, and structures of thinking about the particular domain in which the problem arises.”² Krieger contends that in order to be an able practitioner, there must be an acquiring of “sufficient knowledge in a field to know how to frame the question, evaluate information, generate options, and execute a plan effectively.”³

Three decades ago, the sole method of classroom instruction in most law schools in Malaysia, consisted of the study and memorisation of cases and legislation and, providing lectures that purported to set forth what ‘the law’ was. This method of teaching, popularly known as ‘didactic teaching’, was teacher centred, focusing on the law teacher as the main source of knowledge apart from reading law textbooks. It provided students with the required theoretical knowledge of the law and, most importantly, helped in achieving ‘productive’ learning and attaining required results. At the same time, didactic teaching turned students into passive listeners who were contented memorising rules, doctrines and decisions without questioning them and did not motivate students to develop an interest in the subject matter.

Today however, a student reading law at HELP University is introduced to the ‘Science of Law’⁴ where the Case Method, is used adjunctively with the Socratic Method. The Case Method, pioneered by Langdell at Harvard in the 1870s requires students to read precedents of the appellate courts. Gower, Patterson LeBrun and Johnston were of the opinion that by doing so, students will learn what courts will decide the future when dealing with similar facts and disputes based on what the courts have done in the past.⁵

In addition to the reading of actual judicial decisions, students are also exposed to the ‘Socratic Method’ where they are interrogated by the lecturer to elicit operative facts, legal issues and holdings of the cases read, which is then followed by a critical analysis of the arguments and conclusions contained in case reports through a series of

¹ Stefan H Krieger, ‘Domain Knowledge and the Teaching of Creative Problem Solving’ (2004) 11 *Clinical L Rev* 149, 153.

² *Ibid.*

³ *Ibid* 166.

⁴ Black quotes from the earlier Sweet’s Law Dictionary as follows: In the proper sense of the word ‘jurisprudence’ is the science of law, namely that science which has its function to ascertain the principles on which legal rules are based...to settle the manner in which new or doubtful cases should be brought under the appropriate rule; Henry Campbell Black, *A Law Dictionary* (2nd edn, West Publishing Co 1910) 992.

⁵ Edwin W Patterson, ‘The Case Method in American Legal Education: Its Origins and Objective’ (1951) 4(1) *J Legal Educ* 1; M L Brun and R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Law Book Company, 1994); Laurence C B Gower, ‘English Legal Training’ (1950) 13(2) *MLR* 187.

hypothetical variation of the facts of cases. The use of the case and Socratic methods diverted students' focus away from legislation to the decisions of appellate court opinions forcing them to 'think like lawyers' rather than to mechanically memorise rules and doctrines.

At the turn of the century and with the advent of information technology, the law was expanding and changing so rapidly that it could no longer be predicted merely through the study of precedent. The mind-set and attitudes of students had begun to change and the methodologies which were once employed to teach law were slowly losing their effectiveness. Students could not focus only on case reading, doctrinal analysis, logical conceptualisation, criticism and reform to resolve legal problems. Favouring a variety of active learning methods over mundane and sometimes non-interactive lectures combined with shorter attention spans, resulted in the learning process to shift from being teacher-centred to student-focused. Although tremendous inroads had already been made in improving the way our students thought by introducing ends-means thinking, hypothesis formulation and decision making, we realised that these efforts would not be meaningful unless our students had the hands-on experience of legal practice.

There was naturally a reluctance for this change as the argument was that this shift will be at the expense of traditional strengths of legal education such as the acquisition of domain knowledge and will lead to an erosion of the strengths of traditional legal education. The primary focus of legal education has traditionally been to instruct students to "think like lawyers" and as Gantt states, this was primarily problem solving.⁶ This leads to understanding of the ability of problem-solving. Mudd defined it as "the ability to analyze facts and appreciate the shifting legal results produced by factual nuances, to separate a complicated problem into its component parts, to assemble facts into a meaningful whole; and, in running through it all, a capacity of ferreting out of a problem those features relevant to its resolution."⁷ Drawing from this definition, there are clear parallels that can be drawn between thinking like a lawyer and critical thinking skills. For instance, Mudd⁸ makes reference to Dressel and Mayhew who identify five critical thinking skills: "(1) The ability to define a problem; (2) The ability to select pertinent information for the solution of the problem; (3) The ability to recognize stated and unstated assumptions; (4) The ability to formulate and select relevant and promising hypotheses; (5) The ability to draw conclusions validly and to judge the validity of inferences."⁹

Therefore, if thinking like a lawyer is essential in legal education, the role of legal educators is to then assist their students to be better thinkers by improving the quality, precision and clarity of their thinking.¹⁰ Legal educators have been criticised in failing to prepare the students for the profession. These failings include the failure "to be precise about what it means to think like a lawyer" and the failure to be "precise about the way

⁶ Larry O Natt Gantt, 'The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving' (2012) 45 Creighton L Rev 699, 700.

⁷ John O Mudd, 'Thinking Critically About "Thinking Like a Lawyer"' (1983) 33(4) J Legal Educ 704, 705.

⁸ Ibid 706.

⁹ P L Dressel and L B Mayhew, *General Education: Explorations in Evaluation* (American Council on Education, 1954) 179-180.

¹⁰ Mudd (n 7).

in which the process is accomplished”.¹¹ In the same vein, Amsterdam¹² in his essay makes a case for a shift in transforming legal education for the twenty-first century by highlighting the failings of legal education at the end of the twentieth-century stating that it was too narrow as it failed to teach students how to practice law and that it failed to nurture an array of practical skills necessary for competent performance of legal practice as there was an underlying erroneous assumption that the role of law schools was to part to students a self-contained instruction of the law which was more focussed on imparting effective techniques in learning the law as opposed to practising the law. Amsterdam extends the discussion of the limitations of law school education by indicating the extent of analytic thinking that was taught, which are essential but are inadequate for professional practice of the law. These are case reading and interpretation; doctrinal analysis and application; and, logical conceptualisation and criticism.¹³

Clinical Legal Education (CLE)

To make up the deficit of legal education, debates surrounding this issue at the end of the twentieth century concerned whether CLE should be the focus in law schools. CLE can be defined in broad terms as the study of law through real, or simulated, casework, enabling students to experience the law in action and to reflect on those experiences. In other words, it is viewed as education for practice, making part of the standard legal curriculum the students’ preparation for the transition to practice. The core goal of legal education should be the same as all other forms of professional education, which are “to initiate novice practitioners to think, to perform, and to conduct themselves (that, is to act morally and ethically) like professionals.”¹⁴

For the purposes of the paper and discussion on thinking like a lawyer, one of the processes propositioned by Amsterdam is the teaching of ends-means thinking.¹⁵ The process involves taking a factual scenario (a client interview, for instance) from a starting point to an end-point. The starting point is a problem that needs a solution or an opportunity that could be realised (this could take the form of a letter of opinion or advice). The end-point is the solution to the problem or the realisation of the opportunity. In order to get from one point to the other, the process requires the listing of an inventory of possible means of routes to reach the end-point where at this stage, there are a plethora of possible goals and objectives. The process further requires an assessment of compatibility or incompatibility between the possible goals or objectives which includes either reconciling the various goals or objectives, or where irreconcilable, prioritise the goals or objectives. Throughout the process, students are expected to estimate the possibilities that specific means lead to specific goals; undertake an analysis of the best or worst-case scenarios; and, strategise decision-making by keeping options open.

Amsterdam explains that actions taken in the thinking process involve reasoning backwards from goals, mapping pathways to be taken to each goal, taking steps

¹¹ Ibid 707.

¹² Anthony G Amsterdam, ‘Clinical Legal Education: A 21st-Century Perspective’ (1984) 34 J Legal Educ 612.

¹³ Ibid 613.

¹⁴ William M Sullivan and others, *Educating Lawyers: Preparation for the Profession of Law, The Carnegie Foundation for the Advancement of Teaching* (Jossey-Bass, 2017).

¹⁵ Amsterdam (n 12) 614.

backwards or forwards, and, asking what steps to be taken before the next step can be taken.¹⁶

Introduction of CLE at the Faculty

In 2001, the faculty adopted the motto “Grooming the Employable Lawyer”, a turning point in a shift from a traditional law school to one embracing CLE in preparing undergraduates for professional practice. The faculty adopted ends-means thinking by introducing two additional subjects on the UK degree transfer programme. The primary aim of arose from the need to meet the sufficient credit hours set by the then Malaysian Accreditation Board (the *Lembaga Akreditasi Negara*, in Malay). A fifth module was introduced in Years 1 and 2 called Legal Skills and Legal Practice, respectively. This was in place of having to introduce another substantive law subject, which served the secondary of introducing CLE in the programme.

The initial reaction of the undergraduates towards these subjects reflected in the wanting attendance in class and the lack of commitment in the various assessments adopted, was that the subjects were not taken seriously. The subjects were viewed as just “add-on”s. However, from 2001 and the years following the introduction, the undergraduates who embarked on the Bar course in the UK began to provide feedback on their experience on the course, stating that the two CLE subjects served well in preparing them for the challenging course including providing them with an advantage over other peers, in the way of familiarity with some key skills. The Bar course admissions which involve a point system whereby HELP law graduates who had undertaken the two CLE subjects were successful in gaining admission to a place on the Bar course which can be seen as competitive owing to limited places available.

For the faculty, it has resulted in differentiating our law programme from other providers. Undergraduates now view undertaking these subjects as an added advantage, in particular, the exposure obtained from the various components and assessments covered in preparing them for the Bar course and professional practice.

Curriculum Content of Legal Skills and Legal Practice

The current content and structure of the respective modules are based on a combination of learnings from the Bar Professional Training Course (BPTC) in the UK and experiences of lawyers actively engaged in the practice of law in Malaysia. In Year 1, students cover nine core areas which are set out in Table 1 below. The modules are designed to introduce students in a systematic manner to essential skills that will be required of them immediately upon entering the practice of law. This is done by taking students through the lifespan of a case beginning with meeting a client for the first time, subsequently formulating a legal path and finally the exploration of legal solutions to the problem.

¹⁶ Ibid.

The modules contain both theoretical and practical learning. Unlike Year 1 which clearly has a focus on students exploring the breadth of practical skills, the Year 2 subject of Legal Practice reduces the number of modules (see Table 2 below) but dives deeper into technical application of the law in specific circumstances.

Table 1: Legal Skills Curriculum Content

Module	Title	Description
Module 1	Overview of the Legal Profession	Introduction to the history and development of the legal profession as it stands now.
Module 2	Research Skills	Introduction to the various research resources available in legal research and how to utilize them in common legal queries.
Module 3	Client Counselling	How to deal with a new client in an initial meeting setting.
Module 4	File Management	Management of a typical litigation file i.e. being able to identify documents and ascertain missing documents.
Module 5	Legal Writing	The basics of legal language and phrasing with application in letters of demand.
Module 6	Negotiation	A practical approach to the various types of negotiation in the legal field with application to scenarios.
Module 7	Legal Drafting	A review of court documentation and drafting of a Statement of Claim.
Module 8	Advocacy	An in-depth module on court procedure, advocacy tips, submission drafting and appeal court preparation.
Module 9	Professional Conduct & Ethics	A brief overview of rules of ethics that apply in the legal profession in the UK and in Malaysia.

Table 2: Legal Practice Curriculum Content

Module	Title	Description
Module 1	Opinion Writing	The rendering of advice to a client on evidence and on chances of defending a claim.
Module 2	Legal Drafting	The preparation and drafting of a Statement of Defence in a personal injury matter.
Module 3	Advocacy (Trial)	Advocacy in the context of an appeal to the High Court from the Sessions Court based on the Malaysian jurisdiction.
Module 4	Civil Procedure - Personal Injury (Appeal)	An end to end consideration of legal proceedings from commencement to enforcement.
Module 5	Will Drafting	The drafting of wills and analysis of the general law of probate.
Module 6	Settlement Agreements	Law of drafting of agreements and a practical approach to the simplest form of agreement i.e. settlement agreements.

Collectively, the modules in both Year 1 and Year 2 can be categorised into 3 broad groups of intended learning outcomes (set out in Table 3 below) namely (i) information gathering and research; (ii) critical thinking skills and application to real life scenarios; and (iii) use of articulated expression.

Table 3: Learning Outcomes of Legal Skills and Legal Practice

Information Gathering & Research	Critical Thinking Skills & Application to Real Life Scenarios	Use of Articulated Expression
Client Counselling Research Skills Civil Procedure (Appeal)	Negotiation Advocacy Professional Conduct & Ethics	Legal Writing Legal Drafting (Statement of Case & Statement of Defence) Opinion Writing Settlement Agreements

In information gathering and research, students will be guided through the process of directed research with the aim of forming a hypothesis and legal solution. Research here references traditional legal research and the wider scope of practical research to gain

information such as industry specific knowledge. There is a significant focus on critical thinking skills which is the application of substantive legal principles gained through research to real life scenarios. Here students are expected to formulate on the spot solutions in fluid scenarios such as negotiation and advocacy while recognising the boundaries imposed upon them both legally and ethically. Lastly, in this often overlooked and undervalued component, students are expected to develop use of articulated expression particularly in the drafting of legal documents. In these modules students are directed away from the common misconceptions fuelled by fictional drama to the reality that legal drafting forms a component equal to if not more important than oral advocacy in modern practice.

With the introduction of these modules, the faculty endeavoured to promote experiential learning where knowledge results from a combination of grasping and transforming information. In these modules, students are given the opportunity to role play as a legal practitioner. They were given the first-hands personal experience of preparing for trial and going through the process of the trial itself. They were encouraged to consider, ponder and reflect on the experience obtained through the exercise. Once they understood the defining characteristics of the experience, they could decide on what they would do differently the next time. Bellow¹⁷ states that this “experience produces a qualitative change in the mode and content of knowing which cannot be replicated by the transmission of information or discussion of cases in a classroom environment.” He explains that “the way an idea is understood after it has been used feels different in a sense that cannot be fully explained by the fact that it is more readily remembered, especially in the case of ideas about value, much of the whole is lost when understood in a purely intellectual way.”¹⁸

David Kolb, in his Experiential Learning Model states that “Learning is the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping experience and transforming it”.¹⁹ He uses the term ‘experiential’ in his theory which is based on reflection of experiences. Kolb's learning model is based on two continuums that form a quadrant - The Processing Continuum which is the approach to a task, and the Perception Continuum which involves emotional response. By applying his theory to the teaching of the two practical modules, we are aware that our students possess an abstract conceptualisation of the idea of legal practice and the skills required, they have executed numerous active experimentations to realise that idea and have been given opportunities to make reflective observations after each experiment. But, the modules have been executed without the necessary concretisation of the experience to make it a meaningful one. Our students have been progressing through this intellectual process of acquiring lawyering skills with hypothetical scenarios and make-believe clients, while missing out on the most important element of this whole process of learning, which is, connecting with the real world.

In line with the faculty's direction on this subject, as a first step, a shift in assessment methodology has been made based on two predominant factors namely (i) the lack of

¹⁷ Gary Bellow, ‘On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology’ (CLEPR Conference Proceedings, Buck Hill Falls, Philadelphia, USA, 1973) 382.

¹⁸ Ibid.

¹⁹ David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (1st edn, Prentice Hall, 1984) 41.

awareness and involvement of law graduates in social justice activities; and (ii) the increasing breaches of ethical standards by young lawyers. Prior to July 2019 students in Year 1 undertook 3 practical assessments (Client Counselling, Negotiation and Advocacy) and one final written assessment that covered the Drafting and Ethics modules. In addition, students were required to submit a group work written assignment that focused on the Legal Research component. In this structure, the course leaders noticed that students generally delivered well on the practical components and the written assignment however the same effort was not incorporated into the final examination, particularly in the Ethics component in Year 1.

The new assessment methodology removed the written assignment and written assessment components. In Year 1 students undertook the traditional 3 practical assessment modules where a new group presentation assessment was introduced. In this new practical assessment, students were required to conduct a formal presentation of a predetermined area relating to a current legal social justice issue i.e. rights of refugees in Malaysia, rights of the child in the SEA region etc. As it stands, the Year 2 assessment structure has been maintained but is scheduled to be changed in September 2019 to mirror the new Year 1 assessment methodology. Currently Year 2 students are assessed by way of 3 practical assessments (covering the Advocacy and Civil Procedure), a written assignment and a final written examination that covers the topics of Will Drafting, Statement of Defence Drafting, Settlement Agreement Drafting and Civil Procedure.

Prima facie, the introduction of the new modules, did yield very positive outcomes as students were taught to employ their legal knowledge, theory and skills to meet individual and social needs and understood clearly the professional obligation required to perform public service. We saw the importance and effectiveness of introducing the ‘hands-on’ experience but soon came to realise that, in reality, the modules were merely instructional programmes, physically located within the premises of the law school building and intellectually situated within the law school curriculum as expressed by Wizner and Curtis.²⁰

Future Initiatives

a. Inculcating the Value of Pursuit of Justice

Despite the efforts undertaken by the Faculty to improve on the teaching methods employed, two questions constantly come to mind - firstly, have we sufficiently exposed our student to the law functions either to improve or to undermine public welfare and social justice and secondly, have we equipped them with the ability to challenge inclinations towards unscrupulousness and social irresponsibility? The answers to these questions seem to be in the negative. The legal programme currently offered by the Faculty is still by and large theoretical and even as it introduces ‘ordered practical experience’²¹ which according to the legal realist, Professor Karl Llewellyn, “disassociates theory from practice thus depriving students of the experience of learning to respond to social needs and to further social ends.” Pincus adds that “students have been well insulated from the more miserable facts of the administration and

²⁰ S Wizner and D Curtis, ‘Here’s What We Do: Some Notes about Clinical Legal Education’ (1980) 29 Clev St L Rev 673.

²¹ Karl N Llewellyn, ‘On What Is Wrong with So-Called Legal Education’ (1935) 35 Colum L Rev 651, 658.

maladministration of justice by being confined to the classroom and casebooks.”²² In this respect, the Faculty strongly believes that students must be exposed to the real world in order to confront moral, ethical and social issues related to the practice of law with the hope that they would return to the classroom with a deeper realisation of how legal doctrines and theories work or do not work.

Today, a great many students graduate from law schools without the remotest idea that a vast number of low-income people cannot afford legal services which are essential to resolve their legal problems. Such a fundamental failure in the legal system effectively renders the ideal of ‘equality before the law’ meaningless maxim. Therefore, according to Wizner,²³ it is the responsibility of the law school to remind students that ‘justice’ does not exist ipso facto in a legal system and that law is not simply a value-free or value neutral mechanism to be used only for dispute resolution but a useful instrument to equalise the social balance in society.

To this end, setting up a law clinic that exposes students to social and economic injustices in society, will not only teach them about the role played by lawyers in resolving clients’ legal problems, but also experience first-hand the effects of poverty and the challenges endured by the poor, not just as a study of statistics or as a social policy. We believe, that the time has come for us, as a law school, to commit our intellectual and financial resources to play a critical role in teaching our students to study the state of the judicial system and its shortcomings and advocating the necessary reforms. By creating awareness among students of the reality of a client’s legal situation and his need to be legally represented, they will become acutely conscious of their responsibility in representing the client. This sense of personal responsibility in representing a client will eventually metamorphosis into the feeling of social duty for the provision of legal services. According to Maslow, this act of self-realisation will not only build on their self-confidence and self-actualisation,²⁴ which in turn will promote self-reliance and independence, and most importantly will encourage them to be free and responsible citizenry who are capable of contributing meaningfully to the development of humanity. It must be noted that what law graduates they do with the legal education is not an inherent quality. It is affected by the education they receive at the law school and is later moulded by the perception acquired in the society in which they serve as lawyers. While the law school plays a distinctive role in revealing to students the social and economic injustices in society, it rests upon us to nurture our students about their societal and professional obligations in exercising the power of the law. This, we believe can be achieved by the introduction of Clinical Legal Education in the interest of justice.

²² William Pincus, *Clinical Education for Law Students: Essays* (Council on Legal Education for Professional Responsibility 1980) 131.

²³ Stephen Wizner, ‘The Law School Clinic: Legal Education in the Interests of Justice’ (2002) 70 *Fordham L Rev* 1929, 1936.

²⁴ Maslow refers to ‘self-actualisation’ as a person’s desire for self-fulfilment, namely, to the tendency for him to become actualized in what he is potentially. The specific form that these needs will take will of course vary greatly from person to person. In one individual it may take the form of the desire to be an ideal mother, in another it may be expressed athletically, and in still another it may be expressed in painting pictures or in inventions’ See Abraham H Maslow, ‘A Theory of Human Motivation’ (1943) 50(4) *Psychological Review* 370, 382–383.

b. Other initiatives

The faculty has identified 3 areas of potential future development in the CLE subjects. First, in addition to the above stated revised assessment methodology, the Department recognises a need to place more emphasis on the Ethics module. In this regard, drawing inspiration from the BPTC, the Department is considering a revision to the teaching methodology to ensure relevant components of the Professional Conduct & Ethics module are incorporated into all other modules with the objective of providing context to the practical application of existing rules. Such an approach would introduce students to the concept of ethics at a very early stage of the subject and encourage self-cognition.

Second, to incorporate public welfare and social justice elements into the subjects the faculty aims to develop a systematic approach to engagement with key players in this field i.e. non-profit organizations, humanitarian charities, awareness groups. Such engagement must however, must be well measured to ensure that both students and the participating organizations receive a measurable benefit from the exercise.

Third, the Faculty is reviewing a module to be incorporated into the subject dealing with legal technology i.e. technology that competes or complements the practice of law. Legal technology has been receiving significant attention in Europe and the United States however it has been slow to pick up in this region. Nevertheless, it is imperative that students are made aware of these tools at an early stage to encourage development of the same or at the very least increase adoption in practice.

As it stands, students are introduced to legal technology in a very basic and brief manner under the “Overview of the Legal Profession” module in Year 1. This is found to be ineffective as most students disregard its significance especially when they lack the required understanding of technologies such as chatbot development, predictive modelling in machine learning and natural language processing. To achieve any learning of significance it would seem necessary to approach this subject from a multi-disciplinary approach with portions of the module development contributed by software development professionals and legal practitioners. At the time of publication of this paper a pilot module is being implemented where students are guided through a rules-based chatbot²⁵ development process that aims to solve a specific problem related to the field of law. Initial responses are positive with students taking more ownership and initiative in the subject as a whole.

²⁵ Students use www.landbot.io as the platform builder based on its simple interface and ease of use.