XCBL2 - LAWSG175A

by Benedict Tan

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XCBL2

Access to Justice in Theory and Practice

Final (Summative) Assessment

Question 3: '*Corporate Law Firms must better design and evaluate their pro bono programmes in order to serve the access to justice needs of society*'. Discuss.

XCBL2

Access to justice, the ability for people to acquire "legal services necessary to protect and vindicate their legal rights",[1] or more normatively, as an "ideal of equal access",[2] is a "constitutional principle".[3] It enables the proper functioning of democratic societies,[4] allows "the rule of law" to be created and preserved,[5] and encourages as well as safeguards the means to unbiased "human dignity".[6] Unfortunately, as governments globally reduce their provision of legal aid, access to justice is increasingly being compromised.[7] To compensate for that erosion, the other avenues facilitating access to justice must be strengthened.[8] Pro bono, a Latin term lacking any ubiquitously understood meaning,[9] but translating to mean "for the public good"[10], and typically involving the provision of "legal advice or representation" by lawyers without cost,[11] is such an alternative.[12] Although pro bono has seen significant growth,[13] and greater institutionalisation,[14] it has been argued that corporate law firms only act for self-interested reasons,[15] to train lawyers,[16] or to build relationships with potential clients.[17] Nevertheless, the 5.57 million hours contributed to pro bono by United States' (US) top 200

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[1] Tom Cornford, 'The Meaning of Access to Justice' in Ellie Palmer and others (eds), *Access to Justice Beyond the Policies and Politics of Austerity* (Hart 2016) 28.
[2] ibid.
[3] Constitution Committee, *Legal Aid, Sentencing and Punishment of Offenders Bill* (HL 2010-12, 222) para 5. See also *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198 (CA) 210.
[4] Low Commission, 'Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales' (Legal Action Group 2014) 22.
[5] Julinda Beqiraj and Lawrence McNamara, *International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014)* (International Bar Association 2014) 8.
[6] ibid.
[7] Rowena Maguire, Gail Shearer and Rachael Field, 'Reconsidering Pro Bono: A Comparative Analysis of Protocols in Australia, the United States, the United Kingdom and Singapore' (2014) 37 UNSWLJ 1164, 1164. For reductions in the United Kingdom, see Legal Aid, Sentencing and Punishment of Offenders Act 2012; Ministry of Justice, 'Legal Aid Reform: Scope Changes, Impact Assessment' (Ministry of Justice 2010) 186; Low Commission (n 4) 1. For reductions in the United States, see Jolie L Justus, 'Using Business Strategies and Innovative Practices to Institutionalize Pro Bono in Private Law Firms' (2003) 72 UMKC L Rev 365, 365.
[8] Steven A Boutcher, 'Private Law Firms in the Public Interest: The Organizational and Institutional Determinants of Pro Bono Participation, 1994-2005' (2016) 42 Law & Social Inquiry 543, 561. It is not the scope of this essay to consider whether the government's role is replaceable.
[9] Maguire, Shearer and Field (n 7) 1164. Many authors argue against pro bono as a replacement, see The Law Society of England and Wales, 'The Joint Pro Bono Protocol for Legal Work' <https://www.lawsociety.org.uk/Support-services/Practice-management/Pro-bono/The-pro-bono-protocol/> accessed 1 March 2018; Low Commission (n 4) 101; National Pro Bono Taskforce, 'Recommended Action Plan for National Co-Ordination and Development of Pro Bono Legal Services' (Australian Law Reform Commission 2001) 12.
[10] Christopher Arup and Kathy Laster, 'Introduction' in Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro bono and the legal profession in Australia* (Federation Press 2001) 7.
[11] Low Commission (n 4) 101.
[12] ibid 3; Maguire, Shearer and Field (n 7) 1165; Richard L Abel, 'State, Market, Philanthropy and Self-Help as Legal Services Delivery Mechanisms' in Robert Granfield and Lynn Mather (eds), *Private Lawyers & the Public Interest: The Evolving role of Pro Bono in the Legal Profession* (OUP 2009) 295; Scott L Cummings and Rebecca L Sandefur, 'Beyond the Numbers: What We Know - and Should Know - About American Pro Bono' (2013) 7 Harvard Law & Policy Review 83, 91.
[13] Latham & Watkins LLP, 'A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions' (Pro Bono Institute 2016) 186; Francesca Bartlett and Monica Taylor, 'Pro bono lawyering: personal motives and institutionalised practice' (2016) 19 Legal Ethics 260, 260.
[14] Scott L Cummings and Deborah L Rhode, 'Managing Pro Bono: Doing Well by Doing Better' (2010) 78 Fordham L Rev 2357, 2359.
[15] Deborah L Rhode, 'Pro Bono in Principle and in Practice' (2003) 53 J Legal Edu 413, 430. For a summary of the reasons lawyers undertake pro bono, see Bartlett and Taylor (n 13) 263. For a summary of the reasons corporate law firms undertake pro bono, see Cummings and Rhode (n 14) 2361.
[16] Lorne Sossin, 'The Public Interest, Professionalism, and Pro Bono Publico' (2008) 46 Osgoode Hall Law Journal 131, 140.
[17] Deborah L Rhode, *Access to Justice* (OUP 2004) 147.

earning law firms in 2008,[18] is undeniably a "significant contribution to access to justice".[19] However, as approximately 80% of the "legal needs" belonging to US's impoverished continue to go unsatisfied,[20] society's lack of access to justice persists as a severe issue.[21]

This essay explores the quantitative and qualitative reasons as to why corporate law firm pro bono programmes fail to meet society's access to justice needs, and argues that they must be better designed. Further, this essay argues that those pro bono programmes must also receive better evaluation, for otherwise pro bono research will continue to be restricted to "normative" issues,[22] hindering the discovery and address of their weaknesses, and indirectly compromising society's access to justice.

Limitation of society's access to justice due to quantitative reasons

Although corporate law firms are providing greater amounts of pro bono, overall, pro bono has not seem to have increased.[23] This is because its purported growth actually stems from stronger reporting regiments and greater statistical inclusiveness.[24] Additionally, the bulk of lawyers continue to abstain from pro bono,[25] and its availability is disproportionately small in comparison to the amount of existing law firms.[26] Thus, the true quantity of pro bono provided by corporate law firms is very limited, restricting society's access to justice. Such is unsurprising because, although pro bono programmes bear great weight upon the decision of lawyers to undertake pro bono, they do little to encourage it.[27]. Firstly, they fail to address pro bono's conflict with incorporation,[28] permitting economic prosperity to be favoured over kindness, giving, and even "justice",[29] and allowing the "professionalism" of lawyers to be diluted.[30] Additionally, incorporation emphasises a commercial mindset that influences firms to extract maximum value from lawyers, leaving them with little time for all else, much less pro bono.[31] Such a sentiment was shared by 40% of lawyers.[32]

Secondly, also because of incorporation, corporate law firm pro bono programmes allow their clients to limit and dictate the scope of pro bono cases,[33] and will abide by their directions unquestioningly.[34] Even when unrestricted by clients, lawyers of corporate law firms often constrain themselves to cases that benefits,[35] or at the very least, that will not hinder their clients.[36] Avoiding these "positional conflicts" has excluded certain areas of the law from pro bono,[37] and it is especially severe amongst cases pertaining to "employment and labour" law.[38]

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[18] Leslie C Levin, 'Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms (2009) 37 Hofstra L Rev 699, 699.
[19] Low Commission (n 4) 101.
[20] Justus (n 7) 365.
[21] Deborah L Rhode and Scott L Cummings, 'Access to Justice, Looking Back, Thinking Ahead' (2017) 30 Geo J Legal Ethics 485, 486.
[22] Boutcher (n 8) 545.
[23] Cummings and Sandefur (n 12) 100.
[24] Boutcher (n 8) 551.
[25] Rhode, 'Pro Bono in Principle and in Practice' (n 15) 413.
[26] Rhode and Cummings (n 21) 486.
[27] Boutcher (n 8) 545; Scott L Cummings, 'The Politics of Pro Bono' (2004) 52 UCLA L Rev 1, 99.
[28] Andrew Boon and Robert Abbey, 'Moral Agendas? Pro Bono Publico in Large Law Firms in the United Kingdom' (1997) 60 MLR 630, 636-637.
[29] ibid 637. See also Cummings and Rhode (n 14) 2429.
[30] ibid. See also Boutcher (n 8) 549; Cummings (n 27) 99.
[31] Cummings (n 27) 136.
[32] Monica Taylor, 'What does pro bono publico mean to lawyers? A report on the findings of the Pro Bono Values Project' (UQ Pro Bono Centre 2016) 30.
[33] Cummings (n 27) 99.
[34] ibid 122.
[35] ibid 123, 130.
[36] Levin (n 18) 700.
[37] Bartlett and Taylor (n 13) 276; Cummings (n 27) 121.
[38] Cummings and Rhode (n 14) 2393. See also Cummings and Sandefur (n 12) 101.

Additionally, and also relating to conflict of interest, corporate law firms often prioritises profit-making work over pro bono.[39] That biasness reduces available resources,[40] and coupled with the demands of law firms, often compels lawyers to forgo pro bono.[41] This problem is especially acute in pro bono work requiring long hours,[42] such as the frequent "individual case work", which can seldom be completed to acceptable standards.[43] Thirdly, despite the greater need for pro bono in areas typically beyond the competency of corporate lawyers, such as "family… housing… and criminal" law,[44] brought about by their exclusion from legal aid, pro bono programmes of corporate law firms do little to bridge that proficiency gap.[45] Furthermore, pro bono is consistently used to train junior lawyers.[46] Thus, corporate lawyers prefer to avoid pro bono, less they be perceived as being incompetent and requiring training in their speciality.[47] This reduction in the quantity of pro bono inhibits society's access to justice.

On top of the lack of encouragement, which hampers the quantity of pro bono conducted by lawyers, corporate law firm pro bono programmes also regularly overestimate the quantity of pro bono. Those overstatements exist because pro bono is often defined extremely broadly,[48] and it is problematic because they create false impressions of access to justice that downplay their inadequacies.[49] Up to 75% of all legal work classified as pro bono is provided to financially capable acquaintances or relatives, and many pro bono programmes even classify legal work that is "uncompensated or undercompensated" as pro bono.[50] Worse still, 35% of lawyers did not differentiate pro bono from generic charity,[51] believing that it includes "community projects",[52] "legal aid" and even "hospital visiting".[53] Even if the correct definition of pro bono is adopted, because of the current practice by pro bono programmes to direct pro bono at wealthy institutions,[54] with some dedicating 90% of all their time to them,[55] its provision is unfairly skewed away from those that require it the most.[56] This severely compromises society's access to justice, and thus, pro bono programmes must be better designed.

Limitation of society's access to justice due to qualitative reasons

Top tier law firms providing pro bono have predicted a stagnation to its growth.[57] Thus, to achieve greater access to justice, pro bono programmes must not insist on seeking growth, but must instead strive to provide higher quality pro bono. Such is especially important since 60% of the institutions dealing with public causes complained about the pro bono they received

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[39] Cummings (n 27) 117.
[40] Rhode, 'Pro Bono in Principle and in Practice' (n 15) 450.
[41] Taylor (n 32) 30.
[42] Bartlett and Taylor (n 13) 262.
[43] ibid 275-276.
[44] Helena Whalen-Bridge, 'Challenges to Pro Bono Work in the Corporate Context: Means Testing and the Non-Profit Applicant' (2010) 13 Legal Ethics 65, 67.
[45] Low Commission (n 4) 101; Rhode, 'Pro Bono in Principle and in Practice' (n 15) 448.
[46] Deborah L Rhode, 'Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line' (2009) 77 Fordham L Rev 1435, 1442; Cummings and Rhode (n 14) 2361, 2386.
[47] The Law Society of England & Wales, 'Pro Bono Manual: A practical guide and resource kit for solicitors' (The Law Society 2016) 17.
[48] Rhode, 'Pro Bono in Principle and in Practice' (n 15) 429.
[49] ibid.
[50] ibid. See also Levin (n 18) 701.
[51] Bartlett and Taylor (n 13) 266; Steven Vaughan, Linden Thomas and Alastair Young, 'Symbolism over substance? Large law firms and corporate social responsibility' (2015) 18 Legal Ethics 138, 152.
[52] ibid 140.
[53] Boon and Abbey (n 28) 644.
[54] Cummings (n 27) 123. Although it has been argued that the provision of free legal services to wealthy institutions is not even within the meaning of pro bono, see Deborah L Rhode, 'Pro Bono in Principal and in Practice' (2005) 26 Hamline J on Pub L & Policy 315, 318.
[55] Low Commission (n 4) Annex 17 'Pro Bono', 1.
[56] Whalen-Bridge (n 44) 68; Rhode and Cummings (n 21) 493.
[57] Low Commission (n 4) 101.

from non-public lawyers, corporate lawyers included.[58] Quality is often compromised because pro bono programmes fail to adequately provide the necessities for pro bono. Firstly, because pro bono programmes do not provide a sufficient variety of pro bono work, they are unable to accommodate the mismatch between the expertise of corporate lawyers and the requirements of pro bono.[59] That lack of proficiency by pro bono lawyers extends to misunderstanding the profiles and demands of those requiring pro bono,[60] and it creates a sense of apathy amongst lawyers undertaking pro bono.[61] Even if corporate lawyers have those expertise, they usually lack practical knowledge, and are unable to devise the "strategies and tactics" required for the successful conduct of pro bono.[62] Thus, society's access to justice is limited.

Secondly, pro bono programmes also lack seriousness, favouring lower calibre pro bono work,[63] to be conducted by less experienced lawyers as practice,[64] or as a pass time.[65] That lack of seriousness is exacerbated by pro bono programmes treatment of pro bono as a means to gain acknowledgement through "high profile results", instead of increasing access to justice.[66] Such waters down the importance of pro bono, reducing the chances it yields positive results.[67] Additionally, superiors often neglect the overseeing of pro bono work,[68] and when they do, it tends to be lacklustre in comparison to profit-generating jobs.[69] These factors, together with an absence of accountability,[70] impedes pro bono programmes from generating quality pro bono, constricting society's access to justice.

Thirdly, corporate law firm pro bono programmes have very limited resources. Cummings and Rhode found from their surveys that 70% of those programmes lacked stable financing, and those that had, were inadequately funded.[71] Worse still, pro bono programmes do not utilise their already minimal resources efficiently.[72] They frequently allocate work to lawyers without the necessary knowledge, despite the availability of lawyers with the expertise, squandering "time and money".[73] These deficiencies are intensified during economic downturns,[74] as law firms redirect their already meagre pro bono resources.

In addition to their unsatisfactory provision of resources, pro bono programmes also fail to prevent incorporation from diminishing pro bono's quality in the same fashion its quantity is impaired. Pro bono programmes, influenced by incorporation, do not introduce nor promote pro bono's underlying rationale.[75] Instead, they allow the financial targets of firms to coerce

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[58] Deborah L Rhode, 'Public Interest Law: The Movement at Midlife' (2008) 60 Stan L Rev 2027, 2068.
[59] Rhode, 'Rethinking the Public in Lawyers' Public Service' (n 46) 1443; Latham & Watkins LLP (n 13) 194.
[60] Rhode, 'Rethinking the Public in Lawyers' Public Service' (n 46) 1444; Deborah A Schmedemann, 'Pro Bono Publico as a Conscience Good' (2008) William Mitchell L Rev 977, 1007; Latham & Watkins LLP (n 13) 194.
[61] Rhode 'Rethinking the Public in Lawyers' Public Service' (n 46) 1444.
[62] Jon Robins (ed), 'Pro bono: good enough? The uneasy relationship between volunteer legal activity and access to justice' (Wilmington plc 2010) 66. These factors also affect the quantity of pro bono, see Cummings and Rhode (n 14) 2393.
[63] Levin (n 18) 700.
[64] Rhode, 'Rethinking the Public in Lawyers' Public Service' (n 46) 1442.
[65] Bartlett and Taylor (n 13) 273; Boutcher (n 8) 547.
[66] Bartlett and Taylor (n 13) 275.
[67] Justus (n 7) 373.
[68] Rhode 'Rethinking the Public in Lawyers' Public Service' (n 46) 1442. However, it has been argued that the lack of supervision is not specific to pro bono, see Cummings and Rhode (n 14) 2379.
[69] Cummings (n 27) 136.
[70] Rhode 'Rethinking the Public in Lawyers' Public Service' (n 46) 1446.
[71] Cummings and Rhode (n 14) 2390.
[72] Rhode, 'Rethinking the Public in Lawyers' Public Service' (n 46) 1445.
[73] Cummings and Rhode (n 14) 2429.
[74] ibid 2390. Deflation in the economy also reduces the quantity of pro bono, see Cummings and Rhode (n 14) 2415.
[75] Scott L Cummings and Deborah L Rhode 'Public Interest Litigation: Insights from Theory and Practice' (2009) Fordham Urban Law Journal 603, 623.

even the most altruistic lawyers into focusing their attention upon paid work.[76] Given the constraints faced by corporate lawyers, it seems reasonable for pro bono programmes to employ a selective strategy towards the undertaking of pro bono work. Unfortunately, "cherry-picking" neglects less attractive work,[77] and overall does more harm than good towards society's access to justice. Thus, pro bono programmes must be better designed for not only do they fail at providing quality pro bono, their attempts to do so has only backfired.

Limitation of society's access to justice due to poor evaluation

In addition to the quantitative and qualitative inadequacies of corporate law firm pro bono programmes, society's access to justice is also compromised because those programmes are seldom evaluated.[78] That review cannot occur because its precondition, monitoring,[79] is often neglected,[80] and thus, there is a void of analysable data.[81] Even when law firms do collect data, it is frequently unhelpful because it is of an incorrect type,[82] or unreliable because its collection is casual and lacks a universal standard.[83] Such hinders society's access to justice in multiple ways, albeit indirectly. Firstly, the lack of evaluation prevents pro bono programmes from understanding their defects, and thus, it remains largely unknown whether their funds are allocated efficiently, and whether they fulfil their intended objectives.[84] Such allows law firms to maintain their false believe that any assistance is better than none, and excuses them for ignoring the flaws of pro bono programmes.[85] Thus, society's access to justice is limited.

Secondly, an absence of evaluation impedes law firms from discovering alternative methods that will enable society to achieve greater access to justice. For example, it has been suggested that the financial contributions of lawyers may sometimes advance society's access to justice more so than their direct undertaking of pro bono.[86] Unfortunately, because pro bono programmes are not subjected to any substantive evaluation, that claim cannot be properly explored, and no real evidence exist to support it.[87] Thus, it can be observed from this example that a proper mechanism for evaluation can assist society to realise greater access to justice. Despite the potential for evaluation to improve society's access to justice, law firms remain apprehensive to their uptake because their costs may outweigh the advantages they bring.[88] Nevertheless, law firms should bear that risk because evaluation provides much value.[89]

Increasing access to justice by better designing and evaluating pro bono programmes

The quantitative and qualitative limitations of corporate law firm pro bono programmes, together with their inadequate evaluation, restricts society's access to justice. Thus, they must be better designed, and moving forward, it must be considered how that can be achieved. However, the current lack of action by corporate law firms is not catastrophic because corporate law firm pro bono programmes are merely one type of pro bono amongst many alternatives, such as law schools or charities, and pro bono is only one of the various means society can achieve greater access to justice, the others including education or direct charity.

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[76] Cummings and Sandefur (n 12) 102.
[77] Rhode, 'Rethinking the Public in Lawyers' Public Service' (n 46) 1445. See also Lenore Carpenter, 'We're Not Running a Charity Here: Rethinking Public Interest Lawyers' Relationships with Bottom-Line-Driven Pro Bono Programs' (2011) 29 Buffalo Public Interest Law Journal 37, 57-76.
[78] Cummings and Sandefur (n 12) 102-103.
[79] The Law Society of England & Wales (n 47) 63-64.
[80] Cummings and Rhode (n 14) 2395.
[81] Rhode, 'Pro Bono in Principal and in Practice' (n 54) 326.
[82] Maguire (n 7) 1195; Deborah, 'Rethinking the Public in Lawyers' Public Service' (n 46) 1442.
[83] Cummings and Rhode (n 14) 2406.
[84] The Law Society of England & Wales (n 47) 64.
[85] Rhode and Cummings (n 21) 494.
[86] Maguire (n 7) 1179.
[87] Cummings and Sandefur (n 12) 91.
[88] The Law Society of England & Wales (n 47) 63-64.
[89] ibid 64.

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GRADEMARK REPORT

FINAL GRADE

76/100

GENERAL COMMENTS

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GRADING FORM: LAWS ESSAY FEEDBACK FORM

BENEDICT TAN

FIRST MARKER FEEDBACK

This is an excellent paper that shows an in depth understanding of the literature on CSR and pro bono. It sets out both quantitative and qualitative reasons justifying CSR programmes. The analysis shows strong critical insight with some original commentary around the limitations inherent in poor evaluation of programmes. The integration of empirical evidence alongside other materials is apt and well explored in the context of the paper as a whole. Arguments are succinct and well articulated. Some excellent independent research has been conducted.

FIRST MARKER MARK

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SECOND MARKER FEEDBACK

Great opening, jamming in a wide range of relevant sources and setting the scene nicely. Neatly sets out key shortcomings of current pro bono provision as well as slightly bizarre definitions/measurement. Not explicit, but assume much of the debate is referring to the UK? Highlights issues around expertise /serious/resourcing very well. Hard to fault - very well written, coherent argument, well researched. Excellent essay

SECOND MARKER MARK

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FURTHER COMMENTS

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