

Eradicating Poverty Through Social Development: A Practical Guide for Lawyers



Editors: Norman Clark and Neil Gold



the global voice of
the legal profession®

Poverty and Social Development Committee

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July 2021



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Preface

This is an extremely important book. It is called a guide, and it is one; and so, it will be helpful. It is also, at a meta level, a *cri de coeur*, a rallying call. The IBA Poverty and Social Development Committee passionately believes that lawyers in their many public and practice roles can individually, collectively, and through their professional associations and governing bodies lead the movement to reset the effort aimed at the eradication of poverty, in accordance with UN Sustainable Development Goal 1,¹ which has been badly disrupted by the Covid-19 pandemic. This book arrives at a time when we are predictably and appropriately focused on ourselves and our dear ones. It also marks the need to shift our attention, for our own and others' sakes, to action through law, which will result in both the expansion of and the fairer sharing of opportunities, legal rights and wealth with those whose disadvantages have disabled them.

This Guide is composed of seven initial contributions. It is our intention to add chapters or update existing ones periodically, at least annually. We are therefore introducing *Eradicating poverty through social development: a practical guide for lawyers* as an important eBook. We welcome contributions that demonstrate, as do those we have collected here, the myriad ways in which lawyers can assist the private and public sectors to encourage progress in the eradication of poverty while promoting fairness and equity for all.

The book does not argue that lawyers must be charitable in order to contribute to SDG1, although for some activities both a bona fide charitable intention and a professional commitment will be necessary. In Chapter 1 Clark and Pombo argue that lawyers can both 'do good and do well'. This is important because to do good one need not forego payment. In their discussion of social entrepreneurship, they make clear that supporting it entails paid professional services for diverse profit motivated businesses which have social purposes, such as micro-finance or agricultural cooperatives. Not only is such a legal practice profitable, it also contributes to the elimination of poverty while meeting regulatory aspirations for professional public (pro bono) service as well as new lawyer aspirations for law practices that make a social difference.

Horrigan and Evans make a powerful plea for strong and concerted action in the elimination of poverty as a professional obligation and as a core element of the vitality and stability of the rule of law: poverty undermines justice and equality for all, especially in a world of unequally-distributed resources. In Chapter 2 they eloquently, persuasively and importantly argue that law schools, among the many components of the global legal profession, can and should do more to battle the inequality and marginalisation that persists through the perpetuation of poverty. Law schools cannot only participate directly, and in participation with branches of the legal profession in the diminution of poverty, but they can also prepare their graduates to engage in this good work for their careers: moral

1 UN SDG 1, see <https://sdgs.un.org/goals>.

development and the establishment of commitments to the service of others are among the central concerns of higher learning.

Just as law schools might become formidable contributors to the elimination of poverty through their programmatic and co-curricular activities, so too may their faculty members engage in pro bono legal services aimed at protecting the interests of the poor and at advancing their interests. Pro bono legal services are a mainstay of lawyers' efforts to ameliorate the condition of the poor. In Chapter 3 Fatemah Albader urges legal professions and law schools to ensure that law teachers play their part in activities without fee. There are both curricular and co-curricular options as well as their research mandate, which would permit these activities to do double duty, enabling law teachers both to teach and/or research while providing service. In addition, law teachers could contribute to pro bono work, in many important ways, through their external public service and private practice connections.

The tendency to consider climate change as a threat to the future fails to take account of the current and real, devastating effects of climate change on the poor, who are least able of all citizens to provide themselves shelter in safe and secure areas. The poor do not have recourse to shelter capable of withstanding, for example, cyclones (typhoons or hurricanes), rising tides and flood waters, wild bush fires or desertification, to name but a few sources of disaster associated with climate change. In Chapter 4 Mansinghka and Garg show how, in the absence of serious and wide-ranging government action, climate change litigation is a critical and important strategy for lawyers whose clients seek to mitigate and ultimately eliminate poverty. If nations and regions do not take regulatory action, litigation may be a keyway of redressing and preventing harm while it highlights facts, which some recalcitrant governments refuse to recognise. Surely, climate change litigation is an important remunerative way that lawyers may support efforts to improve both current and future conditions and ultimately enable the poor to be safe from the threats and vagaries of the negative climatic effects of human activity, including industrial processes.

Lawyers tend to see their work through the lens of their personal and firm's practices. Many corporate commercial lawyers see few opportunities to engage in public-spirited work. At times, in order to find ways of making a meaningful contribution to the mitigation and elimination of poverty such practitioners may wish to have recourse to their associations. Importantly, such is the case for Argentine practitioners of the Buenos Aires Bar Association who found gratifying and uplifting opportunities to provide assistance through its *Comisión de Pro Bono* (Pro Bono Committee). In Chapter 5 we have the benefit of 11 lawyers' personal descriptions of and thoughts on their pro bono experiences, which were enabled by their bar association and its Committee. As one of them, Francisco Roggero, related the following reflection on his experience:²

'Helping is our duty. Pro bono is our duty. It is a moral imperative. As lawyers, we have a tool we have to put at the service of the community. Once we do it, and once we work in a useful project where you can see that you are really helping people, then you feel that being a lawyer is really worth it.' (emphasis added)

² Chapter 5, Roggero, p 148

In Chapter 6 Samper and Salazar have taken their home country of Colombia as a case in point to examine recourse to justice and the alleviation of poverty through law. They examine the various types of claims and the avenues available under Colombian public and private law for the disadvantaged to seek to rectify their circumstances. Following a detailed analysis, they come to the conclusion that while the legal system offers several very attractive and potentially fruitful avenues of recourse, those without means are denied access to such justice and are therefore unable to pursue their state-provided remedies. It would seem odd to a non-lawyer (but not to a lawyer) that there are constitutional, human, social, economic, political and personal *legal* rights which are unenforceable because there is no accessible means through which they can be accessed. But even more basic is the requirement that to take action by any means requires knowledge that such options and means are available for recourse. These are universal truths, not limited to Colombia, by any means, but established through detailing its circumstances and clear policies enunciated in laws. Recognising that knowledge opens up pathways to empowerment, the authors press readers to pursue pro bono activities, and chief among them, robust, accessible and fundamentally important programmes of legal education. Perhaps such opportunities might also be pursued by bar associations and law schools, separately or in concert, recalling chapters 2 and 5 of this book.

Tulubensky, Galperina and Naumov argue by example in Chapter 7 that lawyers and their clients (in this case in-house clients), who are engaged in major mining development projects, can gainfully and helpfully contribute to both corporate and community interests through the manner in which they structure and conduct projects. Rather than driving the marginal and the poor into poverty or deeper poverty, they seek to improve their circumstances by looking at outcomes that benefit both the developer and the community, and especially its disadvantaged members. They note that their corporate client gains good relationships, building trust and enabling project development and completion, with relatively fewer challenges in a community where it and its members are better off than when the mining development started. It is important to note that 'an environmentally safe along with social and corporate governance (ESG)' policy eases moving projects forward, benefits the community and its citizens, and builds the potential for a longstanding, mutually fruitful relationship. ESG-based legal and business practices are 'win-win'.

Our book aims to demonstrate that lawyers can 'do good and do well', that it is in their personal and professional interest to make societies fairer and more equal, and that there are many metrics by which to conclude that one has done well. The book seeks to demonstrate many ways in which lawyers can practically practice in areas that alleviate and support the elimination of poverty. This is important: lawyers may be variously motivated to contribute to the mitigation and elimination of poverty, whether it is through, for example, earning their living, contributing to another's wellbeing, making a long-overdue change, bringing the great intelligence and passion of lawyers' commitment to justice to righting a wrong, making certain that citizens know their rights, options and means to assert them, or ensuring one's legal system's efficacy. There are many ways to increase resources and increase benefits for all. While it may too often feel so to many, the law and life's pursuits do not necessarily result

in one person's gain being equivalent to another person's loss. In each of the examples offered in this book's important e chapters, the authors demonstrate that there are many practical, professionally and personally worthwhile reasons to take action to support the eradication of poverty and the many social ills attendant upon it.

This is an important book. It is important for many reasons. The book charts ways for every legal practitioner to make a difference in the movement to diminish and eliminate poverty. We are bold enough to ask every lawyer to make a commitment to work towards the elimination of poverty, to see it as their duty to pursue the law's highest aspiration, justice. Without equity and fairness there is no ultimate justice. We urge you to become a justice practitioner. This is our *cri de coeur* – and we mean it with all our hearts.

Norman Clark

Neil Gold

Co-Editors

Acknowledgements

This book is a project of the IBA Poverty and Social Development Committee, an entity of the Section on Public and Professional Interest. It would not have been possible without the support of the SPPI and its Chair Sarah Hutchinson, whose foresight and commitment to justice made both the book and the Committee's existence possible.

As with so many things there is a background to this volume. *Poverty, Justice and the Rule of Law* (2013) – the Report of the Second Phase of the [IBA Presidential Task Force on the Global Financial Crisis](#) was always intended to be the first work by the IBA to address the elimination of poverty. A Working Group was established when the Task Force's mandate ended. Peter D Maynard, who led the Task Force remained as leader of the Working Group. The working group subsequently became a sub-committee of the IBA Legal and Access to Justice Committee under the leadership of a Co-Editor of this book, Norman Clark. In its inception the Poverty and Social Development Committee also had the leadership and support of Carmen Pombo Morales, former Co-Chair of the Rule of Law Forum and Vice-Chair of the sub-committee. Through the efforts of Maynard, Clark and Pombo, and the support of Sarah Hutchison, the IBA was persuaded to accord the sub-committee committee status. Neil Gold, beginning with Maynard, a long-time participant in the work of the IBA in this area and a Co-Editor this book, served as its first Chair and then a Co-Chair, together with Alvaro Castellanos Howell. Rebecca Ruler, Section on Public and Professional Interest Bar and Issues Commission Administrator encouraged the Committee's activities.

Of course, as always, it is the authors, whose names appear in the Table of Contents, who deserve to be most gratefully recognised: simply, without them, there would be no second book. To a person they have taken to heart the mandate to share with colleagues how they might engage in like activities to make a fundamental difference for so many impoverished and disenabled persons in every country and corner of the world. There is no monopoly on poverty; even the world's richest countries suffer great numbers of severely poor individuals. This is fundamentally unjust, per se. No one is entitled to be poor, or rich for that matter.

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Building a social entrepreneurship practice in a law firm

Norman K Clark
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Synopsis

Since 2015, there has been a substantial increase in the number of law firms which are considering ways of expanding their traditional practice areas and specialties into a new area: social entrepreneurship. This will become increasingly important in global economic development between now and 2030. By being an early entrant into this new practice space, even relatively small law firms can establish substantial market positions which could produce solid returns on their investment over the next 15 years.

A social entrepreneurship practice is not a traditional pro bono legal service. Instead, it is a fee-generating practice area that can produce a solid foundation for cross-marketing of mid-value and even some high-value legal services to clients in the social entrepreneurship sector. This distinguishes a social entrepreneurship practice from other charitable or pro bono programmes that a law firm might operate. It is the nature of the clients that it serves, rather than a law firm's services, which is the defining characteristic.

In short, a law firm can both do good and do well.

This chapter presents an analytical process by which a law firm can determine whether there is a persuasive business case to launch a formal social entrepreneurship practice and, if the business case appears to be sound, the factors that will probably be most important to its long-term success.

What is the business case for a social entrepreneurship practice?

A social entrepreneurship practice could be a dramatic innovation for traditional law firms, with characteristics that can be subtly different – and in some instances, not so subtly different – from the assumptions that have governed a law firm's strategies and operations. At the same time, the business case for a social entrepreneurship practice rests on familiar intellectual foundations and infrastructure, but the factors that drive a successful social entrepreneurship practice can be subtly different from the experiences and assumptions that have governed the delivery of legal services by traditional law firms.

When first confronted with the concept of a social entrepreneurship practice, some law firms might confuse it with activities that the firm already conducts, such as charitable funding, corporate social responsibility and pro bono services. Although there are conceptual and operational connections between a social entrepreneurship practice and these other

traditional initiatives, a social entrepreneurship practice in a law firm is defined by several important characteristics that, to some extent, describe almost any other practice group or area of specialisation. By definition, a social entrepreneurship practice in a law firm:

- is a revenue-producing activity;
- often includes both profit-generating and ‘low bono’¹ services;
- is an organised formal practice group or practice team;
- is multidisciplinary, drawing from a wide range of practice specialties (eg, tax, employment law, administrative law, corporate/commercial and investment funds, as does any other client-sector practice group); and
- is somewhat different from a ‘mere’ entrepreneurship or start up practice.

Additionally, a social entrepreneurship practice group might include organised teams focusing on one or more subsectors of social entrepreneurs, such as micro finance or agricultural cooperatives. Social entrepreneurship practices can often be incubators for legal innovation, new approaches for access to justice and law reform.

A social entrepreneurship practice can be a powerful expression of the professional values of the firm, supporting sustainability and positive social impact in its practice. This can lead to a differentiating competitive advantage. While many law firms talk about support for community development and charitable causes, a social entrepreneurship practice goes beyond the marketing slogans and demonstrates it.²

Doing well by doing good

Social entrepreneurs are businesspeople, not charities. Even with fees that might be less than what other clients pay, a well-managed social entrepreneurship practice can deliver: reasonable levels of sustainable profitability; a platform for the business development of an ongoing client relationship with a social entrepreneur into other more profitable matters; and professional development opportunities for associates, especially in the application of existing substantive law to the frequently new and different issues encountered by many social entrepreneurs.

A social entrepreneurship practice also can produce clear long-term benefits. All of them can be converted into measurable direct and indirect contributions to a law firm’s bottom line. For example, a credible, structured social entrepreneurship can be newsworthy and can help a small law firm differentiate itself from its better-known competitors. Because of the complex and frequently new, needs of social entrepreneurs, a social entrepreneurship practice can give a firm valuable experience in assembling multidisciplinary legal services into a package that precisely meets the needs and promotes the objectives of any client.

1 A ‘low bono’ service is one that is delivered at a sub-standard profit margin or at cost, as distinguished from pro bono services, to which no fee is charged and the firm contributes the value of the fee-earner time and other operating costs incurred in the delivery of the pro bono service.

2 See Norman Clark and Carmen Pombo, ‘Social Entrepreneurship: A Strategic Growth Area for Law Firms in the 2020s’ (January 2020) *Modern Legal Practice* 30.

Unlike traditional pro bono services,³ the investment in a social entrepreneurship practice can produce a positive return, measured by the fees paid by social entrepreneurs themselves and the additional related business that a robust social entrepreneurship practice can stimulate for other practice areas.

A new tactic in the competition to retain legal talent

One of these positive returns can be the retention of talented, energetic younger lawyers. The authors have observed that as the younger generation is becoming more socially active, they are making a wide variety of choices, including career choices, based on an organisation's contribution to important social issues. Focus groups of law firm associates with two to six years' post-qualification experience have confirmed that salary is a relatively minor consideration in the decision to remain at one's current law firm, provided, of course, that the compensation is reasonably competitive.⁴ Working in and, whenever possible, having significant responsibilities for a social entrepreneurship practice can be immensely satisfying, both professionally and personally. This, in turn, supports high employee morale and leads to high productivity and good business results. Having a significant role in a practice area that visibly supports the eradication of poverty, social development in disadvantaged communities or similar activities can reinforce that even the newest lawyer in a firm can do very important work with long-term benefits to clients and the community.

A social entrepreneurship practice can provide an opportunity for all lawyers, but particularly younger ones, to perform a meaningful role in the development of social entrepreneurship in many developing markets where the regulations have not yet been drafted. It is an opportunity for the entire firm to be more active in thought leadership and law reform for the entire legal profession, contributing to social change that can also be a catalyst for economic development (and, consequently, more fee-paying work for lawyers). The emergence of social entrepreneurship as part of the regular service specialties of legal practice also compels an examination by law school faculties of the extent to which they can incorporate these issues into their curricula, as well as a consideration by providers of continuing legal education programmes of how to help practising lawyers move into this new

3 This is not intended to suggest or imply that a social entrepreneurship practice should replace pro bono services, which are appropriately considered to be an ethical obligation of the legal profession.

4 Since 2002, Walker Clark has conducted focus groups with more than 1,300 associates from law firms in Europe and the Americas. When asked to identify the most important factors in their decisions to remain at their current law firms, three responses have been cited as the most important reasons, consistently and without exception among the participating law firms (although not always in the same order):

- expertise – the opportunity to develop one's legal knowledge;
- mentoring – the opportunity to work with a partner who is considered an expert in their field; and
- client contact – the opportunity to have significant contact with clients with respect to important matters.

Salary is more important as a disincentive than as a decisive factor. Barring overwhelming personal considerations unrelated to one's employment in a law firm, a salary that is perceived as being 'competitive', ie, at least in the third quintile of salaries paid in that job market for lawyers with similar qualifications, it will be, at most, a 'tie-breaker' between opportunities that are perceived as delivering the level of satisfaction with respect to the key three factors, above. However, if the salary should drop below the third quintile, even a high degree of satisfaction with three key factors, above, will not usually be enough to retain an otherwise highly qualified associate.

areas of practice. Law firms have a vital interest, therefore, in advocating for and supporting by the contribution of their intellectual capital and practical experiences, not only the acquisition of legal knowledge in this area in law schools and continuing legal education, but also practical clinical experience in delivering the services that social entrepreneurs require.

The innovation imperative

The needs and expectations of clients in all business sectors are changing, not only for legal services but also with respect to the interface between public policy and the public, both individuals and corporations. Furthermore, such changes appear across societies with different governmental systems and legal structures, from democratic ones to authoritarian ones. Like any other client group, social entrepreneurs have been affected and in some instances, perhaps more intensely than more traditional business organisations.

This has had profound implications for the legal services sector and, at the same time, can affect whether a traditional law firm is capable of making the strategic, operational and cultural changes necessary to move into the world of its potential clients who are social entrepreneurs. Whereas in the past, a lawyer might cautiously just stick to the ‘black letter law’, organisations now frequently require more than ‘good, sound legal advice’. Basic legal advice is just table stakes: the cost of admission to the competition for high-value legal work. To stand out in today’s rapidly changing legal services market, a fully holistic approach to legal advice has become an effective way to show differentiating competitive advantages that deliver important benefits to the client.

Whether a law firm realises it or not, considerations of social impact have become an important part of understanding a client’s business objectives, as well as the new winds blowing through a client’s business risk environment. Reputations can be quickly broken through an unfavourable news report on a social issue. The trend of regulatory or national authorities requiring firms and companies to consider the social impacts of their operations has driven the legal profession to become familiar with these new, somewhat non-traditional issues.⁵ These trends are colliding and integrating to create perfect storm for those lawyers who want to cling onto the old methods of ‘If it isn’t law, I don’t advise!’⁶

Real legal challenges have arisen in this field: using legal skills to help to create vehicles through which social entrepreneurship can be delivered, such as the legal viability of social impact bonds, venture philanthropic operations and creative new legal structures. Law firms that have demonstrated their ability to design and manage change are already well equipped

⁵ Directive 2014/95/EU of the European Parliament and of the Council as regards to disclosure of non-financial and diversity information requires Member States to transpose its requirements into national law. This directive requires transparency of the social and environmental information provided by undertakings in all sectors. All Member States have implemented national law provisions.

⁶ See Ben W Heineman, Jr, William F Lee and David B Wilkins, *Lawyers as Professionals and Citizens: Key Roles and Responsibilities in the 21st Century* (Harv Law Sch Ctr on the Legal Profession 2014); and David B Wilkins and María J Esteban Ferrer, ‘Taking the “Alternative”, out of Alternative Legal Service Providers: Remapping the Corporate Legal Ecosystem in the Age of Integrated Solutions’ in Michele Destefano and Guenther Dobrauz-Saldapenna (eds), *New Suits: Appetite for Disruption in the Legal World* (Stämpfli Verlag, 2019).,.

to meet these challenges. By contrast, law firms which have difficulty identifying the need for change and implementing innovative responses to it, are unlikely to succeed and, in some cases, for reasons unrelated to the social entrepreneurship opportunity, to survive.

Becoming part of the client's future

The social entrepreneurship sector is here to stay and continues to grow. Nairobi, Santiago, Hong Kong and Berlin are hot spots for social entrepreneurs, but so are other parts of the world, such as Indonesia, Australia, Northern Europe, Canada and Singapore.⁷ Moreover, social entrepreneurs frequently operate in countries or regions that most traditional law firms have shunned. Although most businesses still exist to make money, the ones which will survive their ever-changing and increasingly competitive markets are those that are becoming socially aware and are prioritising long-term sustainability over the next fiscal quarter's profits. Law firms have much to learn from them. Consequently, bar associations and other regulatory bodies in the legal profession must be willing to understand the market evolutions that are happening – often without reference to canons and codes of professional ethics – and become more receptive in permitting innovative business structures for delivering legal services.

Some of the most powerful changes that have, to some extent, opened the door for social entrepreneurs are not the results of legislation or regulations. One such example is the increasing demand for socially responsible investments, for example, from pension funds investing more strategically in social impact projects and businesses. This is a driving force behind major changes in business operations. The funders set the rules, making social impact highly relevant to the raising of capital. Billions of dollars are under management in social investment funds around the world. Access to capital for socially aware enterprises is becoming more and more available as customers increasingly choose to buy from these organisations. Another example is how insurers are becoming focused on a new range of risks related to socially impactful initiatives and operations, including human rights risks and business responses to abuses. Finally, consumers tend increasingly to choose responsible and/or sustainable products.

Evaluating the opportunity for a social entrepreneurship practice

As with almost every possible practice specialty or client-sector focus, a social entrepreneurship practice might not be a solid business proposition for many firms. The phrase 'solid business proposition' is important because, notwithstanding the sincere desire of most lawyers to make a positive contribution to the communities they serve, a social entrepreneurship practice is a business venture, not charity work.

⁷ *The best place to be a social entrepreneur*, Thompson Reuters Foundation Poll (2019) <http://poll2019.trust.org> accessed 4 January 2020.

Step one: understand the market for legal services for social entrepreneurs

The first and most important point is that your market for legal services to social entrepreneurship probably will be much broader than what you have traditionally considered to be your firm's sphere of competition. It probably will include individuals and organisations that you previously would never have considered as fitting your firm's ideal client profile. In this respect, coordination with a foundation, university or other institution that is active in social development is essential. Without such a source of market intelligence, you probably will never perceive most of the opportunities.

Although social entrepreneurship is not a new activity and many law firms claim to offer services that are related to corporate social responsibility or social development, social entrepreneurs still are under served by the current legal market. Their needs frequently are too sophisticated to be within the reasonable scope of traditional pro bono programmes. Some law firms, have defined social entrepreneurship practice groups or industry focus teams,⁸ while others try to meet client needs through traditional practice management structures, including pro bono, which often can be inefficient and are obviously not-for-profit for the firm.

Social entrepreneurs are not looking for free legal services, but they are attracted to law firms that, like themselves, are willing to divert at least a reasonable portion of their revenue into long-term social development.

Because social entrepreneurship enterprises often are local or regional in their current geographic scope, the decision to create a structured, ongoing social entrepreneurship practice should be based on thorough research and a practical understanding of the needs of social entrepreneurs in the legal markets in which a law firm already competes.

This can be a particularly attractive and high-yield professional development activity for associates in your firm. It gets them out into the market and talking to prospective clients in the social entrepreneurship sector, which is usually well-networked and can lead to other conventional client origination opportunities. It also allows them to develop practice area and industry sector expertise that is highly relevant to your firm's overall business development objectives.

WHO ARE THE SOCIAL ENTREPRENEURS?

As with all trends or new developments, 'social entrepreneurship' is a label, a convenient way to encapsulate a broader and more complex concept. It has also become a common topic of discussion in academic circles, although there is still room for further research and impact studies. Perhaps the strongest indicator that an innovation is gaining traction outside academia is when it starts to appear on the lips of politicians and begins to form part of the strategy of prominent organisations, as has happened in the cases of Ashoka,⁹ the Schwab

⁸ Appendix II at the end of this book lists links to examples of law firms' websites with social entrepreneurship or closely related practices. As this is by no means a complete list, it will be periodically updated.

⁹ Ashoka, see www.ashoka.org/en accessed 4 January 2021.

Foundation for Social Entrepreneurship¹⁰ and the Skoll Foundation.¹¹

It has long been observed and accepted that even entrepreneurs who are driven by a strong social ethic focus first on building a successful commercial organisation to advance their larger goals. Only once they had achieved commercial success do they turn their minds to philanthropy, whether through the vehicle of their enterprise or privately. For example, the great American industrialist Andrew Carnegie, who accumulated one of the largest fortunes in the US at the time, died in 1919, with only \$100,000 in his estate, having given more than \$76bn (more than \$350bn in today's money) to charitable, educational and other philanthropic causes.¹²

The increasing awareness of young entrepreneurs about social issues and their increasing drive to be active in social issues have combined to fuel a new trend. This has been assisted by the development of new business models, new corporate vehicles and, occasionally, by government policies, such as tax incentives. There also are more opportunities for entrepreneurs not to focus purely on a private profit model, but also to combine business and social goals to create what we describe as 'social enterprises'.¹³ It is now possible to combine a social cause with the complementary aim of generating profit for shareholders. This is also supported, in increasing numbers, by impact investing and a conscious consumer base consisting of individuals and companies who are making ethical buying decisions.

The term 'social enterprise' therefore has many possible definitions and variations. Some of these different definitions arise out of the enabling legislation in the various countries around the world. However, the European Commission's Social Business Initiative is probably one of the most widely referenced and convenient definitions of a social enterprise, based in the context of three areas: entrepreneurial, social and governance.

The starting point for defining social entrepreneurship is that it is not charity. A short and perhaps incomplete, definition is that it is an attempt to use successful business strategies and techniques to find solutions to social problems that are economically sustainable. It is very important to emphasise that social entrepreneurship is not just philanthropy or charity. In the context of the legal profession, it is not traditional pro bono work.

In addition to not-for-profit organisations and foundations, social entrepreneurship also embraces profit-making enterprises that either divert a significant portion of their revenue to social development, such as education, health care, human rights and the eradication of poverty, or whose business objectives include the solution of a social or environmental problem.

Social entrepreneurs therefore represent a new way of conducting business with a clear double focus.

10 Schwab Foundation www.schwabfound.org accessed 4 January 2021.

11 Skoll Foundation <https://skoll.org> accessed 4 January 2021.

12 'Andrew Carnegie', Wikipedia, (2020) https://en.wikipedia.org/wiki/Andrew_Carnegie accessed 4 January 2021. See also 'Andrew Carnegie: Pioneer. Visionary. Innovator', Carnegie Corporation of New York, (2020) www.carnegie.org/interactives/foundersstory/#!/#giving-legacy accessed 4 January 2021

13 Roger L Martin and Sally Osberg, 'Social Entrepreneurship: The Case for Definition' (Spring 2007) Stanford Social Innovation Review, https://ssir.org/articles/entry/social_entrepreneurship_the_case_for_definition accessed 4 January 2021.

The first focal point is to use business structures and operations to generate a positive social impact. Too frequently business interests and their lawyers have been perceived, often correctly, as inert obstacles to social development or, in worst-case scenarios, as forces that actively support and perpetuate the economic or social repression of disadvantaged people and communities or damage the environment.

The second aim is to help people to move themselves and their communities out of poverty by helping them establish and operate sustainable businesses. In this way, social entrepreneurs benefit society by developing innovative products or service solutions that can be applied directly to social or environmental problems and can promote sustainable social and economic development. Environmental entrepreneurs are often included within the broader social entrepreneur term. Climate change and climate justice impact society directly and therefore generate social issues which need solving.

Social entrepreneurs therefore require a special blend of sophisticated legal services and support, delivered as cost-effectively as possible. Innovation is often key to the success of the social entrepreneur and therefore for the practice of lawyers advising them, often requires the delivery of legal services in non-conventional ways, with outside-of-the-box solutions and schemes that can help the sector to expand.

Like all kinds of entrepreneurs, social entrepreneurs also look to their legal advisers to build lasting legal empowerment. The efforts of the legal profession can be a significant force for improving the political, economic and social environments for businesses and individuals who previously had been largely excluded from access to legal services, either because they did not need them or could not afford them. Furthermore, some social enterprises, especially relatively new ones, tend to operate on tight budgets, with usually only a small in-house legal department or none at all.

On a larger scale, social entrepreneurship will be a critical component of efforts to achieve the United Nations Sustainable Development Goals (SDGs) by 2030.¹⁴ In an era in which some major governments are abandoning any significant direct role in long-range social development, even in their own countries, social entrepreneurship will be one of the most important factors in improving economic opportunity and living standards worldwide, conditions in which the legal profession and clients who are not social entrepreneurs also can thrive.

The business structure and operating models for social entrepreneurial enterprise can take a variety of forms, using both not-for-profit and for-profit structures. The common characteristic is the diversion of some or all of the net income of the enterprise to support social development. There are several profiles of social entrepreneurs, depending on where they operate and the objectives they have. The most frequent are regular entrepreneurs who undertake their business with a precise social or environmental purpose. However, also many non-governmental organisations (NGOs) and other non-profit entities have developed

14 The 17 SDGs adopted by the UN General Assembly in 2016 are a blueprint to achieving a better and more sustainable future for all people by 2030. They are outlined in Appendix I. See also UN 'About the Sustainable Development Goals', www.un.org/sustainabledevelopment/sustainable-development-goals accessed 4 January 2021.

social entrepreneurial activities to diversify their fund-raising methods to contribute to their economical sustainability, while also pursuing their mission. These are for-profit activities within non-profit entities. In addition, big corporations are increasingly focusing on social business. Often with a for-profit or venture approach, or both, multinationals are now creating business specifically orientated towards solving environmental or social problems. Finally, there are social mini-enterprises, which number in the thousands worldwide, run by disadvantaged persons or for their benefit. They create sustainable profitable small business projects, having the highly beneficial multiplying effect of improving their living standards.

Researching examples in the legal sector to find interesting social entrepreneurial endeavours is never an easy task. There are interesting legal enterprises; some are even specialising in advice to social entrepreneurs. There are many lawyers providing legal assistance to vulnerable groups or providing legal advice to support the promotion of social change by non-profit organisations. However, the mere provision of legal advice for social purposes, without using new corporate vehicles or some other new structural approach, is not really social entrepreneurship in the legal profession as such. In other words, many clearinghouses, foundations and other not-for-profit organisations have social and environmental purposes: however, they do not seek a profit nor are they run in a business-like way or organised in an entrepreneurial sense. Although many of these entities provide, or facilitate the provision of, legal advice in an innovative way, since they are not for profit, we cannot include them in this group.

It may be that, to some extent, law firm structures are limited to what is permissible under the ownership rules of a specific jurisdiction. In any event, a model to reinvest legal advice profits back into the firm, or into some beneficial social purpose connected with the firm, or some other type of innovative business model along those lines, is a structure that we have not found. As with any business, the legal profession's involvement in social entrepreneurship is critical to success. Unlike most traditional businesses, however, social entrepreneurs especially need and value legal expertise to empower social entrepreneurs and social investors to achieve their goals, which often cut across traditional practice-area boundaries in most law firms. This also frequently requires the unique creativity that lawyers can bring to define new legal frameworks to meet the challenges that social entrepreneurs face in legal and regulatory environments, which often do not contemplate these new forms of business.

With that caveat, here are some inspiring examples.

La Bolsa Social

La Bolsa Social was the first equity crowdfunding platform authorised by the Spanish securities regulator. La Bolsa Social promotes the participative financing of investors and companies with a positive social and environmental impact. They promote ethical finance by boosting the financing of companies with growth potential that will have a positive impact on society and the environment. La Bolsa Social was established to connect social impact investors and

enterprises to promote the achievement of the UN SDGs. Since its establishment in 2014, they have attracted more than 1,000 investors, raising up to €5m, which funded 24 social impact companies.¹⁵

Innuba

Innuba provides consultancy, development and other advisory services to social innovation projects for companies and individuals, including the creation of new business units within companies. Innuba donates 30 per cent of its revenues to the Uno Entre Cien Mil Foundation for children's leukaemia research. Innuba was conceived as a strategic social innovation partner to help and guide companies to design and create new products or services that matter to everyone. Leroy Merlin, Coca-Cola, Viceroy and Accenture are among its clients. In 2018, it launched the platform I think, therefore I act for Yoigo (a telephone operator), a service to connect users with social entrepreneurs in order to obtain funds and collaboration for their projects. This campaign was a massive success and enabled Innuba to consolidate its team of 14 staff members and dozens of collaborators.¹⁶

Workit Health

Workit Health is working to reinvent substance abuse and addiction treatment. It seeks to curate effective, accessible and affordable solutions for people struggling with addiction. Through both virtual and in-person mental health support programmes, the team continues to tackle the nearly \$35bn addiction recovery market and put the focus back on accessibility for those who need it most. Workit Health's virtual substance abuse treatment programmes provide holistic, evidence-based care to patients through trained clinicians, technology and unwavering commitment to continuity of care. Its evidence-based programme offers online and offline treatment for all three addiction stages: prevention, treatment and detox. With the spike in telehealth needs during Covid 19, Workit Health has also seen overwhelming growth. The company recently reported a 400 per cent growth in revenue since 2019 and announced a \$12m Series B round of financing, bringing the company's total funding to \$20m since its inception in 2015.¹⁷

M-Pesa

M-Pesa is a mobile money service in Kenya which is critical to understanding social intrapreneurship's value because it proves the power of this internal approach. Two middle managers from Vodafone and Safaricom launched the mobile payment product from within their established companies in 2007. You can withdraw, send money and pay from M-Pesa, through a phone device, with no need to carry physical money. M-Pesa has grown to over 30 million customers, many of whom previously did not have bank accounts, in ten countries.¹⁸

15 La Bolsa Social <https://bolsasocial.com> accessed 8 February 2021.

16 INNUBA, Innovación Social Trascendente <https://innuba.com> accessed 8 February 2021.

17 Workit Health, www.workithealth.com accessed 8 February 2021.

18 M-Pesa, www.vodafone.com/what-we-do/services/m-pesa accessed 8 February 2021.

TOMS

Blake Mycoskie is the founder and chief shoe giver of TOMS and the person behind the idea of One for One®, a business model that helps a person in need with every product purchased. This simple idea has grown into a global movement. TOMS Shoes has provided over 86 million pairs of shoes to children since 2006; TOMS Eyewear has restored sight to over 600,000 people since 2011; and TOMS Roasting Company has helped provide over 600,000 weeks' supply of safe water since launching in 2014. In 2015, TOMS Bag Collection was founded with the mission to help provide training for skilled birth attendants and distribute birth kits containing items that help a woman safely deliver her baby. As of 2016, TOMS has supported safe birth services for over 25,000 mothers.¹⁹

Grameen Bank

Against the advice of banks and government, Muhammad Yunus carried on giving out 'micro-loans' and in 1983 formed the Grameen Bank, meaning 'village bank', which was founded on principles of trust and solidarity. By 2015, Grameen had 2,568 branches in Bangladesh, with 21,751 staff serving 8.81 million borrowers in 81,392 villages. On any working day Grameen collects an average of \$1.5m in weekly instalments. Of the borrowers, 97 per cent are women and over 97 per cent of the loans are paid back, a recovery rate higher than any other banking system. Grameen methods are applied in projects in 58 countries, including the US, Canada, France, the Netherlands and Norway.²⁰

Diaspo4Africa

This an Ivory Coast based funding platform which provides innovative companies and entrepreneurs with investment and funding from abroad. Diaspo4Africa's vision is to connect African diaspora investors with local companies and start-ups looking for funding, contributing to the development of African economies and diversification of African enterprises. More than 1,500 entrepreneurs in 11 African countries have been funded.²¹

All of these are impressive enterprises that have made impressive – and, many cases, life-saving – contributions. Despite their vision, values, strategies and results, they are businesses, not charities. Like any other business, they need legal services, guidance and support and they expect to pay reasonable fees for them.

THE RESPONSE OF THE LEGAL SERVICES SECTOR

In many respects, the legal needs of social enterprises are the same as those of any other growing business. Social entrepreneurs sometimes suggest that their social businesses are venturing into legal and regulatory issues that are somewhat new to them and which are likely to expand in scope and complexity.

These are generalisations, of course, about an emerging expanding and richly textured

sphere of economic activity. However, they point to a promising specialty market for law firms, in which, as in other areas of legal services, an early entrant with an intensely client-focused and well-managed practice could establish a significant and durable competitive advantage. This creates a market opening for small and medium-sized firms with well-balanced transactional experience. Such firms have the opportunity to assemble the legal expertise and skills they need to be highly effective and profitable practice groups or teams focusing on social entrepreneurs. In this field, size is not necessarily an advantage; small and medium-sized firms may have the flexibility for first mover advantage.

The most common issues where legal assistance is required, specific to social entrepreneurs, relate to:

- defining their legal structure;
- tax;
- fundraising and access to capital, including impact investment and venture philanthropy;
- reporting impact, governance and compliance; and
- social security and employment.

They also need legal advice on other topics that any entrepreneur would require, such as:

- alternative dispute resolution;
- commercial and business law; and
- intellectual property and data protection.

Such firms increasingly require a fully holistic approach from the legal profession, whereby legal advice can enable and even promote, the merging of two now complementary worlds: the world of the commerce and that of the social entrepreneur.

Remember that this is not traditional pro bono work. Although some legal support to social development, either directly or through social entrepreneurs, might continue to be contributed 'low-bono' (ie, using low-margin fees set only slightly above cost), the best emerging opportunity is for sophisticated legal advice for which a social entrepreneur expects to pay a reasonable fee and which can be profitable, even at somewhat lower rates, for a well-managed law firm. Generally, the pro bono work would be in connection with the development or promotion of law reform or legal initiatives that would benefit the whole social entrepreneurial sector, including the design of new legal vehicles or structures.

In this context, different types of legal practices have emerged, such as the growth of the 'B-Corp' standard for companies that have a predominantly social purpose. A B-Corporation certification is issued to non-profit private organisations by B Lab, a global non-profit organisation with offices in the US, Europe, Canada, Australia, New Zealand and through a partnership in Latin America with Sistema B. To be granted and to maintain certification, companies must receive a minimum score on an online assessment for 'social and environmental performance', satisfy the requirement that the company integrate B Lab commitments to stakeholders into company governing documents and pay an annual fee ranging from \$500 to \$50,000, depending on annual sales. Companies must re-certify every

three years to retain their B Corporation status.²²

As of July 2020, there are over 3,400 certified B Corporations across 150 industries in 71 countries.²³

A private organisation issues certificates under its own standards to give the ‘B-Corp’ or ‘Sistema B’ status. Because of the expansion of this trend, a generation of ‘B Lawyers’ has emerged, specialising in the specific social aspects of these corporations. For the avoidance of doubt, while a ‘B-Corp’ company has a predominantly social purpose, the certification has no specific legal authority or standing. ‘B-Corp’ certification (‘Sistema B’ in many Latin American countries) is a mark of approval issued by a private organisation that issues certificates under its own standards. However, as discussed elsewhere, such corporations can have legal status in their respective jurisdictions as social entrepreneur-type companies and are known by different names around the world.

International organisations and networks are generating relevant documents that support the incorporation of sustainability into lawyering. For instance, in 2019 the UN Global Compact produced the ‘Guide for General Counsel on Corporate Sustainability Version 2.0’,²⁴ which includes issues such as: Corporate Sustainability and Business Integrity; Human Rights and Supply Chain Due Diligence; Corporate Sustainability and Grievance Mechanisms; and Challenges to Corporate Sustainability – Managing a Crisis.

In addition, the International Bar Association (IBA) has produced guides for business lawyers and practical handbooks on M&A and corporate restructuring, as well as commercial transactions. These resources bring together a diverse collection of educational resources relating to the roles and responsibilities of legal practitioners with respect to business and human rights, including background contexts and explanations, case scenarios, discussion exercises, frequently asked questions (FAQs), sample checklists and further reading and resources.²⁵

Finally, ESELA,²⁶ the legal network for social impact, is an interesting initiative in this field. It is an international network of lawyers, advisers, academics and entrepreneurs aiming to reshape legal systems and practice for good. In practice, this includes impact investing, social entrepreneurship, business and human rights, the response of business to the climate emergency, ‘profit with purpose’ and related disciplines. Therefore, a new generation of lawyers is specialising in the new way of doing business, which often is the same method used by social entrepreneurs. As has always been true in the legal profession, lawyers can learn from their clients.

22 See B Corporation (certification), Wikipedia [https://en.wikipedia.org/wiki/B_Corporation_\(certification\)](https://en.wikipedia.org/wiki/B_Corporation_(certification)) (2020). For further information about the certification process, see also <https://bcorporation.net/about-b-lab> accessed 26 March 2021

23 See <https://bcorporation.net> accessed 4 January 2021. These include well-known companies such as Ben & Jerry’s, Cascade Engineering, Danone North America, Eileen Fisher and Patagonia Works.

24 ‘UN Global Compact produces guides to help General Counsel drive the corporate sustainability agenda’, *UN Global Compact News*, (7 November 2019) www.unglobalcompact.org/news/4497-11-07-2019 accessed 4 January 2021.

25 IBA *Handbook for Lawyers on Business and Human Rights* www.ibanet.org/Handbook-for-lawyers/Contents.aspx 2019 accessed 4 January 2021.

26 ‘About ESELA: the legal network for social impact’, *ESELA* (2020) <https://esela.eu/about-esela> accessed 4 January 2021.

In the past, some members of the legal profession believe that, unless ‘black letter law’ didn’t cover the matter, it was not relevant to the provision of legal advice and attempting to advise on these ‘unknown’ areas might be risky to the extent of bordering on malpractice. As explained elsewhere in this chapter, that view is clearly becoming outdated and increasingly rare. However, there have been some significant developments in ‘black letter law’ which is compelling the legal sector to develop new applications of legal expertise and take a more holistic approach to legal advice, such as is suggested here. In some countries, the law has recognised this trend and created new legal structures for the purpose of social entrepreneurship. Some examples include the UK, France, Italy, Colombia, South Korea and some states in the US. In India, for instance, the law requires companies with over a certain level of revenue to devote a percentage of profits to social causes. Other countries have also followed this model.²⁷

THE CHALLENGE OF FINDING SPECIALISED LEGAL SERVICES FOR SOCIAL ENTREPRENEURS

Notwithstanding the conceptual and intellectual framework for legal services for social entrepreneurs, as described above, law firms have been slow to respond. Today, very few law firms have a designed, focused social entrepreneurship practice. The structures that law firms use to deliver legal services to social entrepreneurs vary significantly and they usually are defined by the nature of the services (ie, fee producing, pro bono or low-margin) and the general industry characteristics of the social entrepreneur client. For example, a social entrepreneur who provides micro lending facilities to small businesses and individuals in poor communities would be more likely to be directed to the banking and finance practice group of a traditional law firm than to a practice team built for and focused specifically on social entrepreneurship.

Law firms that do appear to have functioning social entrepreneurship practices often describe them in several different ways, such as social responsibility or sustainability practices, or by similar titles. Some practice areas appear to be much more targeted in areas such as sustainable or impact investment. How law firms tend to organise their practice structures also reflect, we believe, two similar, but nonetheless distinct, conceptualisations of a social entrepreneurship practice. Some firms throw social entrepreneurship into a more general category of social responsibility. Others target specific business activities that might include social entrepreneurs, such as sustainable investment and education.

A significant number of law firms now have social entrepreneurship legal services, ranging from big multinational law firms to medium-sized, law firms and boutique law firms.²⁸ It is a new area of practice, but it is not generalised nor present in most of the jurisdictions of the world. The fact that the practice is expanding proves that there is a demand for these services and that there is a business case for it.

The example in France is quite remarkable, where many boutique firms specialise in

27 ‘Legal forms of social enterprises’, *SEFORIS Cross-Country Report* 2016 (2016) 20-22 https://issuu.com/kwinbxi/docs/cross-country_report_6 accessed 4 January 2021.

28 See Appendix II.

social entrepreneurship, impact investing and non-charitable foundations law. There is a context explanation for this, such as pro bono not being well developed there. Also, as mentioned above, France has a specific legal structure for social enterprises (ie, ‘hard law’ in a civil law country). Other regions of the world do not have special legal requirements for social enterprises and are governed by normal entrepreneurship rules. But there is an expanding wave of legislative initiatives across the globe, reflecting a quiet corporate law evolution, which is generating legal market opportunities.²⁹

This suggests that, for larger law firms, social entrepreneurship is something of a sideline, if it is even perceived at all to be a viable practice specialty or client sector. For example, a survey in conducted in 2014 by the University of Birmingham (UK), of the 100 largest English law firms found that 88 of the 100 firms advertised a corporate social responsibility practice, but only 21 of these 88 firms explained why they believed that it was an important activity for them as a firm. On some firms’ websites, the corporate responsibility or social responsibility practice was very difficult to find.³⁰ The authors’ survey of a sample of medium-sized and large US law firms in 2020, undertaken as part of the research for this chapter, produced similar conclusions.

None of this is surprising because, for most large law firms, social entrepreneurship and social responsibility produce little revenue compared to other practice areas and client sectors. Without diminishing the sincerity and good will driving these efforts, they often are little more than marketing campaigns or a contribution to their corporate social responsibility activities.³¹

This creates, we believe, a substantial opportunity for smaller law firms to gain a significant share of the social entrepreneurship market with a sharply focused client-centred practice team have the capabilities and the will to carry out two actions. These are: to persuasively demonstrate a deep practical understanding of the business objectives of social entrepreneurs and their legal implications, specific to their respective types of business activities in support of social development; and marshal the wide-ranging experience and intellectual capital of their entire firm to deliver precisely tailored services to this client sector.

So, one of the first tasks for a law firm considering anything more than a token involvement in legal services to social entrepreneurs should be a candid assessment of whether it can achieve these two actions credibly and consistently.

29 See *Briefer on Cutting Edge Trends in Social Enterprise Regulation*, European Center for Not for Profit Law <https://ecnlp.org/sites/default/files/files/Briefer-on-social-enterprise-regulation.pdf> accessed 26 March 2021.

30 Stephen Vaughan, Linden Thomas and Alistair Young, ‘Symbolism Over Substance? Large Law Firms and Corporate Social Responsibility’, (2015) 18 *Legal Ethics* 138 (University of Birmingham 2015) www.tandfonline.com/doi/full/10.1080/1460728x.2015.1119530?journalCode=rlet20 accessed 4 January 2021.

31 This observation is not intended to discount the marketing and business development value of a social entrepreneurship practice, which is noted later in this chapter. For the purposes of this chapter, we are not focusing on corporate social responsibility practices in law firms, but rather on the legal advice provided to clients on social responsibility matters, in the context and organisational structure of which some law firms include legal services for social entrepreneurs.

THE FACILITATING ROLE OF FOUNDATIONS

Foundations and similar institutions with connections to the legal services sector perform a critically important role in the identification and coordination of legal support to social entrepreneurship projects. Legal foundations raise awareness as experts in the field, both in legal and social impact matters. They also can act as clearinghouses, serving as a contact provider to the law firms. With their ‘learning while doing’ methods, legal clinics have also been very active in supporting social entrepreneurs,

Some clearinghouses, legal clinics and legal foundations coordinate and support the provision of legal services to social entrepreneurs and social development initiatives. They often act as a first legal contact and then revert to law firms for further support, mainly pro bono.

There are many aspects that these not-for-profit entities consider – for which they need to spend time and effort – that are vital to the cycle of growth of social entrepreneurship. We have cited the UN SDGs as directly linked to this topic and it is obvious that charities often channel support to and are directly connected with, the beneficiaries of the SDGs.

Law reform is also a key interest for this sector, especially when it is necessary to promote new legislation or adapt existing regulations to support social entrepreneurship. We have mentioned, above, several examples of hot spots for social entrepreneurship around the globe. Most of these opportunities arise in jurisdictions where there are new legal initiatives either for entrepreneurs generally or specifically for social entrepreneurs. Many legal foundations have worked pro bono in the conceptualisation and design of and the advocacy for, these legislative initiatives. Research, legislation and advocacy each have been specifically necessary in the fields of impact investment, venture philanthropy and new financing vehicles or legal incentives for social investors.

Foundations perform a major role in the engaging the legal profession in support of legal and regulatory environments that support and sustain social enterprises. Probably the most obvious role is that of lawyers, both individually and collectively, in advancing the rule of law. The rule of law links directly and forcefully to social and economic prosperity and lawyers are surely best positioned to advocate for the rule of law, not only in legislative and regulatory fora, but also through their day-to-day legal advice and support to social entrepreneurs.

There also is an important role for lawyers in tearing down the traditional legal obstacles to the growth of social enterprises. In this context, foundations assist in the identification of clients (pro bono who might ultimately become regular fee-paying ones if they can escalate their businesses successfully), acting mainly as clearinghouses. They identify the clients and filter the requests for legal assistance, orientated towards social impact.³²

Foundations have been very creative in collaborating with law schools in bringing legal aspects of social entrepreneurship to their curricula. As a new market area, new legal needs

³² The *Estándares Pro bono México* is a good example of how pro bono advice is given to social entrepreneurs in Mexico and to what extent, <https://estandaresprobono.mx> accessed 26 March 2021.

have arisen and new legal research has become necessary. Law students can now learn about them at university and law faculties have emerged as leaders in advancing the awareness, expertise and skills of legal practitioners.

Many foundations have carried out significant work in the field and it would be impossible to name them all. Two examples of pioneering and inspirational pro bono entities for social entrepreneurs are the Lex Mundi Pro Bono Foundation and TrustLaw.

The Lex Mundi Pro Bono Foundation states: ‘Our mission is clear: social entrepreneurs will be more successful at tackling the worlds’ biggest challenges if they have access to quality pro bono legal advice from lawyers in the Lex Mundi global network.’³³

TrustLaw, the Thompson Reuters Foundation’s global pro bono legal programme, ‘connects high-impact NGOs and social enterprises working to create social and environmental change with the best law firms and corporate legal teams to provide them with free legal assistance. We produce ground-breaking legal research and offer innovative training courses worldwide.’³⁴

The key point to remember about pro bono work is that even if legal support to social entrepreneurs is initially delivered pro bono, those serves are, in effect, an investment by the service provider, which, in the case of a law firm, can develop into a paying client relationship as the social enterprise begins to succeed. Moreover, the quality of those legal services delivered, often pro bono, at the beginning of the life of the social enterprise will have a clear, demonstrable impact on that success.

Another prominent example and a useful case study for the purposes of this chapter, is the Fernando Pombo Foundation (the ‘Foundation’), based in Madrid, Spain.³⁵ This is an organisation of lawyers which seeks social change through legal innovation with the motto: ‘Changing the world is a lawyer’s business too’. The Foundation, dedicated to the most vulnerable people, understands the need to support and give legal advice to social entrepreneurs. This includes several areas of activity.

The Foundation provides pro bono legal support to social entrepreneurship projects. This is targeted strategic pro bono legal advice at key moments in the entrepreneurial development and is different from blanket free services for all the social entrepreneur’s legal needs. The Foundation focuses on innovative social entrepreneurship projects such as: La Bolsa Social,³⁶ which innovated the first equity crowdfunding platform to be authorised by the Spanish securities regulator; and Innuba,³⁷ a strategic social innovation partner that helps and guides companies to design and create new products or services that transcend societal differences and matter to everyone.

³³ Lex Mundi Pro Bono Foundation www.lexmundiprobono.org/lexmundiprobono/default.asp accessed 4 January 2021.

³⁴ TrustLaw, the Thomson Reuters Foundation’s global pro bono legal programme www.trust.org/trustlaw accessed 4 January 2021.

³⁵ Fernando Pombo Foundation see www.fundacionpombo.org accessed 4 January 2021. One of the authors, Carmen Pombo, is the founder and Chief Executive Officer of the Fernando Pombo Foundation.

³⁶ La Bolsa Social www.bolsasocial.com accessed 4 January 2021. At the time of writing this chapter, La Bolsa Social had more than 6,900 investors.

³⁷ Innuba, <https://innuba.com> accessed 4 January 2021.

The Foundation also produces analysis and research of innovative legal methods and tools for the sustainability of NGOs and social entrepreneurs, especially in the development of social impact bonds. This cutting-edge concept, a new model for sustainable businesses, is already being studied by future lawyers in their clinical legal education experiences and is supported by well-reputed experience lawyers, often on a pro bono basis. Other models are directly related to venture philanthropy and impact investors.

These initiatives and efforts raise awareness among lawyers in the national and international arenas, specifically in forums on social entrepreneurship, social investment and legal innovation. They connect the experience and specific expertise of lawyers with pro bono activities to enable the development of new models of sustainable social entrepreneurship activities. These activities also provide opportunities for clearinghouses and law firms to promote the rule of law by building appropriate legal ecosystems for social entrepreneurship with international and multinational goals.

Such collaboration among foundations, law schools and law firms is vital for the development of social enterprises. No single component of the legal services sector can do it alone.

Step two: inventory the expertise already in your law firm

Most medium-sized law firms, as well as many small ones, already have the breadth of legal knowledge necessary to serve a full range of legal issues. Taxation, regulatory law and investment funds expertise and are especially important and alternative dispute resolution services could be an additional competitive advantage.³⁸

The hard issue, however, is whether your firm has the practical business insights required to support a credible claim that you can be trusted, reliable advisers to social enterprises, many of which are start ups led by highly motivated, but relatively inexperienced, younger entrepreneurs. Good technical legal work will not be enough; conventional reputation in the market, as evidence by good rankings in law firm directories, might be helpful but usually not decisive for this group of potential clients. Sharply focused, relevant experience is usually more persuasive. Even if your firm has never had a social entrepreneur as a client, experience with start up businesses could be a convertible competitive asset.

As a practical matter, frequent experience in assembling multidisciplinary teams to deliver highly integrated expertise in relatively new business situations is essential. Law firms that operate most of the time in rigidly practice-defined or partner-owned silos might find that, although they might have abundant relevant legal expertise, they cannot put it together to meet the needs and service expectations of a social entrepreneur.

The most efficient way to inventory your firm's existing expertise and experience is to start with some potential clients. Contact social entrepreneurs and ask them about the issues on which law firms have delivered advice and services that they found to be the most

38 For more information on the most common issues where legal assistance is needed, see the section about *the response by the legal services sector* section earlier in this chapter.

valuable and influential in achieving their goals. You do not have to guess at this; the answers are already available from your firm's potential clients.

The best way to test your firm's expertise against the needs of your potential social entrepreneur clients is to invest in the time necessary to list specific experience and knowledge that your firm can demonstrate in detail. Although it is always dangerous to generalise about any group of clients or potential clients, most social entrepreneurs are not easily persuaded by marketing slogans or vague assurances. Most of them operate on very tight financial tolerances and erroneous legal advice or poor service can have a larger relative impact on members of this client sector than on most others. Your law firm will probably only get one chance to get it right.

The other reason why this inventory is so important is that legal issues presented by social entrepreneurs often carry a greater urgency, in terms of the need for legal advice that is promptly delivered, responsive to the specific needs and expectations of the client and correct the first time. Social entrepreneurs and often all kinds of entrepreneurs, run on low budgets and are single person or tightly team-run ventures, hence the frequent urgency of their legal demands. Because many of these matters also require a multidisciplinary, holistic approach, a law firm will usually only have the luxury of being able to assemble an efficient team of multidisciplinary experts after the need arises.

Step three: understand the factors that drive the profitability of a social entrepreneurship practice

The profitability of any practice area or line of service in a law firm is principally the result of the interaction of six factors, which can be described as the six classic drivers of law firm profitability.³⁹ These drivers are pricing, productivity, realisation, cost management, staff compensation and leverage.

PRICING

Over the past decade in particular, law firms worldwide have faced strong price resistance even from client sectors and services which had previously been relatively price insensitive. Predatory pricing⁴⁰ by non-traditional competitors, such as foreign law firms, entering a traditional legal market have added to this downward price pressure. Even new clients now expect discounts that were formerly reserved for the firm's best clients.

PRODUCTIVITY

How much billable work can each fee earner produce in a standard unit of time, typically

³⁹ See generally, Norman K Clark and Lisa M Walker Johnson, *Sustainable Profitability in a Disrupted Legal Market*, (Globe Law and Business 2019).

⁴⁰ Predatory pricing is the practice of offering relatively sophisticated legal work, such as in M&A or anti-trust matters, at prices that are far below the prevailing range of fee quotations in the market, in the hope of winning market share from better-known, established competitors. *Ibid*, at 14. See also *ibid*, at 21-32.

the hour? As advanced technology enables lawyers to produce high-quality, accurate legal work faster, the greater work capacity of most law firm associates will eventually outstrip the demand for their services. An associate will soon be able to produce three or four times the amount of work in a day than that was once possible. As the demand for legal services is unlikely to keep pace with improvements in law practice technology, many law firms will find they have too many associates. This has implications for the staffing of a social entrepreneurship practice, in that some law firms might already have excess work capacity among their associates, which could be applied to a social entrepreneurship practice without any increase in the largest component of a firm's operating costs, which is associate and staff compensation.⁴¹

REALISATION

Of all the billable work that your fee-earners do, how much of it results in a collected fee? Realisation rates are among the most powerful diagnostic indicators that law firms have. A significant, unexplained change in a realisation rate usually can be traced back to a weakness in the how the work is performed, almost always linked to a defect – or, in some law firms, complete non-existence – in the firm's quality assurance procedures. In some firms, preventable rework, especially in document drafting and production, can account for as much as 70 per cent of the write-offs or write-downs of billed work.⁴² In large law firms and practice groups whose legal work is relatively price-insensitive, poor quality assurance can cut deeply into profitability; in price-sensitive practice groups, such as many social entrepreneurship practices, it can destroy it.⁴³

COST MANAGEMENT

The traditional preference of most law firm partners, who sometimes seem to feel the pain of every penny of operating costs being extracted from their pockets, tended to support better profitability in the past: produce the highest-priced legal service as the lowest possible cost. Occasionally, risk-adverse partners would turn down good opportunities, but the firm remained on solid financial ground. Today, however, law firms that are reluctant to make the frequently substantial financial investments in better technology, communications and professional development risk disqualifying themselves of opportunities to protect and sustain future profitability. By saving costs now, they will almost certainly suffer greater opportunity costs later.⁴⁴

⁴¹ See n 40 above, at 15-16 and 33-47.

⁴² This figure is based on observations and research by Walker Clark concerning realisation rates in the practice groups of small and medium-sized law firms during 2002-2019.

⁴³ Clark and Walker Johnson, see n 40 above, at 47-56.

⁴⁴ *Ibid*, at 57-68.

STAFF COMPENSATION

Staffing is one of the most financially significant decisions when considering a new practice area or practice group. How many people will the new group need? What are the expectations for their productivity? Overstaffing a new practice area – ‘If we build it, they will come’ – usually results in poor profitability, or none at all, with disappointing results that persuade the owners of a law firm to cut their losses and abandon the project. Understaffing it can result in serious quality assurance and client service problems.⁴⁵

LEVERAGE

Traditional concepts of staffing leverage, with their pyramid-shaped assumptions about the most profitable ratio of associates to partners, are becoming increasingly irrelevant, especially in highly specialised practice areas. As technology enables associates to perform many of their traditional functions, such as research and drafting, many times faster and with exponentially greater accuracy and analytical quality, a staffing ratio of four associates to one partner, for example, instead of being reasonably profitable as has been the assumption in the past, could become quite unprofitable.⁴⁶

With the usual caveats about the risks of generalising an entire client sector based on what appear to be its dominance traits, social entrepreneurs can be quite price-sensitive, even with respect to services that would be relatively price-insensitive in traditional commercial legal services. This makes pricing, productivity and leverage important considerations in the evaluation of the potential profitability of a new social entrepreneurship practice group. Social entrepreneurs also tend to have a very low tolerance for poor service quality, which can drive realisation rates below minimum profitability levels. Whether paying on an hourly basis or by fixed fee, almost no clients today – whether social entrepreneurs or others – are willing to pay extra to fix a law firm’s mistakes.

Consider also how a law firm’s marketing and sponsorship structures and practices can be an overlay to the six profitability drivers listed above. Sometimes the possibility for a law firm to participate in a matter as a sponsoring partner, rather than a fee-earning service provider can be worth considering, especially when the operation could generate significant visibility for the firm. Very often, providing pro bono tend to be low-profile activities, or hardly ever used in a law firm’s marketing communications. However, their potential long-term return on investment should not be overlooked.

Therefore, it is essential that any consideration of a social entrepreneurship practice should include a realistic – even somewhat sceptical – evaluation of the profitability of your firm’s internal processes for preparing and delivering legal services to clients. Inefficiencies and error that already exist in your firm usually will produce a disproportionate negative impact on profitability because the profitability tolerances, especially with respect to pricing, will be tighter than in many of the firm’s other practice areas and lines of service. The

⁴⁵ *Ibid.*, at 69–76.

⁴⁶ *Ibid.*, at 77–82.

most serious threats to operational profitability, in most law firms, lurk in inadequate or non-existent quality assurance policies and procedures. They show up in the otherwise unnecessary losses that a firm suffers by having to correct mistakes that should have been avoided in the first place. This is even a greater threat to a social entrepreneurship practice.

If your firm already has difficulty in making a profit from its low-margin services, you should not expect that your social entrepreneurship practice will be any different. A law firm cannot lose one dollar per billable hour and hope to make a profit from volume.

Finally, a key matter for firms venturing into this practice is to be very clear internally and externally of what can be considered pro bono, what should be 'low bono' and under which circumstances the client should become a fee-paying client. Major injection of funds from business angels, flotation, benefits over a certain amount and so on, are milestones that law firms can use as indicators of opportunities to change the fee ranges.⁴⁷

Step four: write a conservative client-sector business plan

As with any business plan, reasonable goals and reliable performance measurements are essential. The importance of these two features is even greater when starting a new practice group, especially one that is defined by a business sector that is as diverse as social entrepreneurship. This diversity reinforces the critical importance of thoroughly researching and understanding the social enterprises that would be the most promising candidates for your firm's services, as discussed in Step one, above.

A matching of the client-focused research that you did in Step one with the inventory, in Step two, of your firm's existing capabilities, lead to clear and specific descriptions of the identity, responsibilities and expected contribution of the members of your social entrepreneurship practice. This will allow your firm to focus the most relevant expertise and service delivery capabilities on your potential clients, but will also facilitate the flexibility needed to respond to their unanticipated needs and expectations, as well as future changes in the social entrepreneurship sector. This level of planning takes time, but many of the most important needs of your prospective clients in this sector are too complicated for you to try to improvise only after they arise.

Adopt the same mind set as your prospective clients in the social entrepreneurship sector. The guiding principle behind your financial performance expectations should be to develop a sustainable practice, not just to take advantage of a fad. This is farming, not big-game hunting.

Two areas demand special, well-informed consideration in the business plan. First, how can your firm leverage your technological capabilities, particularly in knowledge management and client communications, to improve productivity and reduce operating costs? This will

⁴⁷ It is worth mentioning that many social entrepreneurs never actually reach these milestones. Although there is a significant opportunity for pro bono and 'low bono' fees to evolve eventually into more profitable fee arrangements, the probability of such a result is substantially lower than with a new client who first instructs a firm in a relatively simple matter for a modest fee, but also already has more substantial legal work available, depending on the client's satisfaction with the firm's performance in the first matters.

be an essential part of your firm's availability to sustain a satisfactory level of profitability. Second, consider how you will support the ongoing development of knowledge and understanding within your firm about social entrepreneurship and, to the extent that they are relevant in your market, the SDGs. So much of the long-term return on the investment in a social entrepreneurship practice comes from cross-selling your firm's services. Unless at least all the partners in the firm – and ideally all the other lawyers, as well – can speak reasonably intelligently about social entrepreneurship, your firm could inadvertently lose some significant opportunities.

The business plan should also define the potential ethical issues that might arise from support to social entrepreneurship, such as *de facto* commercial or philosophical conflicts that do not rise to the level of *de jure* conflicts of interest. To put it bluntly, which, if any, of your firm's current clients might object to your firm indirectly supporting, through your legal services to social entrepreneurs, the achievement of social or economic goals that they might oppose for political reasons?

The business plan also should identify and prescribe a set of simple, reliable performance measurements by which to monitor the progress of the practice group towards the achievement of its business goals, as well as to identify emerging performance or profitability issues before they can deteriorate into a crisis. Five measurements, each of which is well within the capabilities of even the smallest, least sophisticated law firm, are especially useful:

- realisation rate of all the 'billable'⁴⁸ work that we perform, how much of it directly results in a paid fee?
- fully loaded cost⁴⁹ per lawyer billable hour
How much does it cost our firm to produce one hour of legal work?
- fee yield per lawyer hour
What is the average paid fee per lawyer hour worked?⁵⁰
- profits per lawyer hour⁵¹
This is a simple calculation – fee income minus fully loaded cost divided by total hours worked – but it usually is reliable enough for monitoring a practice group's progress in delivering its business plan.
- lawyer utilisation rate
What percentage of the total hours worked by lawyers in the practice group are 'billable' hours?

48 For purposes of the measurement of financial performance of a practice group, the term 'billable hour' refers to work by lawyers that could be billed directly to the client if the client were paying an hourly fee.

49 For purposes of this measurement, the term fully loaded cost includes all operating costs of the firm, including staff and non-partner compensation, but excluding capitalised expenditures and costs funded by external sources.

50 This includes all hours that a lawyer works at or for the practice group, not only billable hours. We recommend tracking all hours, because a significant portion of the time of the members of a new practice group will be involved in practice-building activities, such as research and business development.

51 This includes all hours that a lawyer works at or for the practice group, not only billable hours, for the same reason stated in n 51, above.

Step five: develop the practice group marketing plan

This step often is a ‘showstopper’ for many small and medium-sized law firms. ‘We don’t even have a marketing plan for our firm’, they exclaim.

The absence of a well-informed, well thought-out marketing plan at the firm level will greatly impede the efforts to establish a productive new practice group, especially in a diverse and dynamic sector such as social entrepreneurship. The unpleasant truth is that, without a marketing plan, the members of the new practice group probably will be wasting their time, as opportunity costs arising from other initiatives that do not get done surpass the disappointing results from the new practice.

Nevertheless, even without strategic guidance built into a structured firm-wide marketing plan, the design and execution of a practice group marketing plan will not be impossible. To have a reasonable chance of success, the marketing plan for a social entrepreneurship practice group should at least answer these questions clearly:

- How will you make your social entrepreneurship practice visible to social entrepreneurs, especially those with for-profit enterprises? Visibility will be the key.
- How will you differentiate your firm’s social entrepreneurship practice from firms that do not have such a specialty or even from those who have only ordinary start up or entrepreneurship practices?

Sector-specific or regulatory specific expertise that is plainly relevant to social enterprises could make a difference in establishing a clear competitive advantage for your practice group.

- What clear advantages can your firm deliver better than other firms the claim to serve social entrepreneurs? How, specifically, do you demonstrate these advantages in the services that you deliver to them?

This is the difference between a genuine competitive advantage and a marketing slogan.

- Are there opportunities to encourage your existing clients to move into social entrepreneurship activities?
- How can your social entrepreneurship practice create better visibility for your firm among industry sectors and prospective clients that are not engaged in social development initiatives and enterprises?

Of course, these issues could apply to almost any industry-sector practice group. As a practical matter, however, some law firms have observed that the development of a successful marketing plan for a social entrepreneurship practice requires much more in-depth, intensive conversations with clients and potential clients in the sector.

While it might be relatively easy to establish visibility in the still relatively small social entrepreneurship legal market, establishing credibility is an entirely different matter. Traditional law firms, with experience primarily only with traditional commercial clients, often have difficulty establishing credibility among social entrepreneurs.

Questions for the future

There are no short cuts in the five steps outlined above. Each one builds on previous ones. Each step is also a potential exit point from the consideration of a social entrepreneurship practice. If you cannot produce clear responses – not just educated guesses – to the intellectual challenges at any step, that usually is a strong sign that it is not worth going forward to the next one.

If you make it up the five steps, however, you will be able to make a well-informed decision about whether this promising new opportunity is right for your firm. Nonetheless, there are several difficult and broader questions that the legal profession and the social entrepreneurship sector will need to resolve. They serve as a useful intellectual checklist as you review your law firm's social entrepreneurship business case and business plan and consider whether it is not only viable now, but sustainable in the future:

- Does your firm have a common definition and working understanding of the term 'social entrepreneurship' as it applies to your firm's current and potential client base and legal market? When considering a potential client sector as broad and diverse as social entrepreneurs, it is easy to be distracted from your primary focus.
- Is law reform necessary to promote social entrepreneurship? This could mean, for example, that the focus of your firm's pro bono activities might require expansion to include advocacy and lobbying for statutory, tax and regulatory changes.
- What is the best role for a foundation, such as Fundación Fernando Pombo, in promoting and coordinating the active engagement of the legal profession with social entrepreneurs?
- How should your social entrepreneurship practice group support and contribute to innovations in legal education, such as the introduction of social entrepreneurship law in the curricula of law schools, legal clinic programmes in law schools and in continuing professional education programmes?
- What are the ethical risks of a social entrepreneurship practice? As of the writing of this chapter, the ethical implications and risks of a social entrepreneurship practice, as well as the direct participation of law firms in social enterprises of their own, have not been thoroughly examined. As noted above, some of these risks might arise from perceived conflicts with the business interests of the law firm's other clients.
- How can the legal profession enlist the active participation of social entrepreneurs, in the promotion of human rights and the rule of law?
- What will be the most cost-effective way to integrate traditional pro bono services and 'low bono' services into new legal models of sustainable entrepreneurship activities to alleviate poverty?
- Can the legal profession really innovate and embrace social entrepreneurship? Can the legal profession (and the governing associations or regulatory authorities as applicable) facilitate legal social entrepreneurs, beyond merely giving conventional legal advice to social enterprises?

Perhaps this chapter has raised more questions than it has answered. Social entrepreneurship is a rapidly emerging, dynamic sector of local and national economies, with global impacts that will almost certainly continue to manifest themselves. There are currently no clear answers to some of these issues; they will emerge as social entrepreneurship becomes a more prominent part of the legal services sector and in the communities that we and our social entrepreneur clients serve together.

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The role of law schools and clinical programmes in ending poverty

Professor Bryan Horrigan and Emeritus Professor Adrian Evans

Synopsis

The rule of law is compromised by the toleration of poverty, in an era when the world has the resources, expertise and capability to end poverty and its damaging effect on justice and equality for all. Lawyers, including current and future lawyers in law schools, who value access to justice under the rule of law have individual and collective responsibilities to do something about poverty through law and justice. Law schools and other branches of the global legal profession¹ can and should, do more in that mutual enterprise than most of them currently do.

To gain mass acceptance for those three fundamental propositions and make a difference on poverty, the role of law schools in combatting poverty needs a conceptual framework justifying that role and an operational plan of action that implements it. Accordingly, this chapter covers both conceptual and practical dimensions of the relationship between poverty and the rule of law and how that relationship manifests itself in the ways in which law schools conduct legal education, scholarship and external engagement with the profession and the world at large.

What lawyers do or fail to do about poverty must be assessed and practised within prevailing systems and standards of governance, regulation and professional (including social) responsibility.² These standards are not sacrosanct. Instead, they are subject to scrutiny and criticism if they obstruct action on poverty or even institutionalise oppression of poor people under cover of the rule of law.³ Individual law schools and the community of legal academics as a whole⁴ can act alone or together with other branches of the legal profession in alleviating the conditions of poor people, who in practice are denied full equality and access to justice in multiple ways. How law schools and the legal profession as a whole respond to poverty is itself responsive to broader disruptions to legal thinking, practice and responsibility in the era of the Fourth Industrial Revolution,⁵ reinforced by transformational approaches to successive global crises such as the climate emergency and pandemics such as Covid-19.

As a collective constituency capable of creating meaningful change about poverty, injustice and inequality, law school communities comprise legal academics, law students as future leaders of the profession(s), alumni, current and retired judges and lawyers and partner organisations. They can be powerful communities for exposing and redressing gaps and inequities in law-making, the administration of justice and broader access to justice for poor, vulnerable and disadvantaged communities. The challenge for law schools and their communities is to embed understanding and action about poverty and associated inequalities and injustices in the DNA

of legal education, scholarship and engagement, particularly through clinical legal education (CLE) and community legal centres (CLCs).

This chapter outlines and illustrates various ways in which law schools and their clinical programmes can take action on poverty and empower poor clients and communities in law schools' research, education and engagement with their various constituencies and communities. We are determined that our discussion produces a concrete focus on the highly necessary reorientation of law schools, sufficient to prioritise within legal and justice education the urgent need to end poverty, inequality and injustice. Throughout this chapter, we therefore focus on a comprehensive suite of practical steps for action by law schools and others in the legal profession in helping poor, vulnerable and marginalised people achieve basic human rights and equal access to justice under the rule of law.

Overview

Poverty, injustice, inequality and law

The world is very different now. For man holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life.⁶

President John F Kennedy

Poverty is both a cause and a consequence of inadequate levels of access to justice [...] Moreover, poverty as a barrier to access to justice is exacerbated by other structural and social obstacles generally connected to poverty status, such as reduced access to literacy and information, limited political say, stigmatisation and discrimination.⁷

Julinda Beqiraj and Lawrence McNamara,
International Access to Justice: Barriers and Solutions

The tolerance by wealthy countries and peoples of poverty anywhere in the world in the 21st century is a cause for global and national shame, 'an affront to human dignity',⁸ a barrier to equality and justice, a denial of universal human rights and a deficiency that impedes full realisation of the rule of law worldwide. No less an authority for lawyers than the International Bar Association (IBA) – the self-described 'global voice of the legal profession' – acknowledged through its Human Rights Institute (IBAHRI) more than a decade ago that: 'each case of poverty is [...] accompanied by violations of fundamental rights and is an affront to human dignity', as well as 'a persistent danger to global peace, security and economic equity within and among nations'.⁹

Even on human rights grounds alone, lawyers who value and work towards the universalisation of human rights are necessarily bound to value and work towards the end of poverty within and across all nations and communities.¹⁰ 'Poverty itself is a violation of

¹⁰ There have been calls for lawyers to swear or affirm a 'Hippocratic Oath' before they are admitted to legal practice, in the interests of 'doing no harm' to the community or their clients, but to date there is no formally positive requirement for a lawyer to address poverty, as a condition of admission. See Adrian Evans, 'Admission by Hippocratic Oath', IBA (28 September 2009) www.ibanet.org/Article/NewDetail.aspx?ArticleUid=127b51ae-36fe-44b6-9cf6-e9e4f4044e2b accessed 4 January 2021; Kim Economides, '2002: An Odyssey' (2003) 34 'Victoria University of Wellington Law Review' 1.

numerous basic human rights' according to Mary Robinson, former President of Ireland, United Nations High Commissioner on Human Rights and UN Special Envoy on Climate Change.

At the same time, poverty cannot be treated in one-dimensional terms, as just another aspect of human rights or even defined by a designated level of income. Many contingencies affect the societal preconditions that shape the systemic distribution of capabilities, resources and opportunities that, in turn, affect the employment, income and enabling of individuals and communities.¹¹ In the words of Professor Amartya Sen on poverty and justice: 'the relationship between resources and poverty is both variable and deeply contingent on the characteristics of the respective people and the environment in which they live – both natural and social'.¹² Action by lawyers on poverty risks failure if it is not designed, coordinated and pursued with sensitivity to the true complexity of poverty and associated inequality and injustice and also to the humanity, dignity and empowerment of people in poverty.

The IBA has publicly espoused values and stated positions that stand alone and also come together as an overarching platform for action by the global legal profession in ending poverty. According to the IBA, poverty is implicated not only in human rights, equality and peace and security, but also in legal aid, access to justice, standards of legal professional conduct, climate change and law and business and human rights.¹³ For example, the IBA recognises that while access to justice is 'a universal right' and 'essential to [...] the Rule of Law', the deplorable global reality remains that 'access to the courts and effective legal representation and advice are not afforded to all who need them, especially *the poor, underprivileged and marginalised*'.¹⁴

In our view, the IBA can and should build up its public stand on poverty's implication in various essential domains of law and justice, by explicitly endorsing the individual and collective responsibility of its members to contribute meaningfully to the end of poverty, inequality and injustice (*Practical step 1*). For example, the IBA could recommend that courts, law societies and bar associations support measures such as the equivalent for newly admitted lawyers of the Hippocratic Oath taken by members of the medical profession, incorporating an ethic of not only doing no harm, but also committing to improve equality and access to justice under the rule of law of the poorest and otherwise most vulnerable members of the communities affected by their practice as lawyers. Such an oath would reinforce conventional lawyerly commitment to pro bono work, improve professional and community respect for lawyers as key actors in ending poverty and associated inequality and

11 Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009) 253–7.

12 *Ibid* 254. According to Sen (at 255–6), the four sources of variation in those contingencies are: 'personal heterogeneities' (eg, disability and ill-health); 'diversities in the physical environment' (eg, climatic variations and industrial pollution); 'variations in social climate' (eg, public health, peace and levels of crime); and 'differences in relational perspectives' (eg, resources and opportunities to participate in the social life of a community).

13 Eg. IBA *Pro Bono Declaration* (Declaration, 16 October 2008); see n 8 above; IBA Council, *IBA Business and Human Rights Guidance for Bar Associations* (8 October 2015); IBA Council, *IBA Practical Guide on Business and Human Rights for Business Lawyers* (28 May 2016); IBA Climate Crisis Statement (5 May 2020).

14 IBA Council, *International Principles on Conduct for the Legal Profession* (25 May 2019) 16; IBA *Pro Bono Declaration* (16 October 2008) 3e [emphasis author's own].

injustice and enhance aspirations for lawyers to become more committed and involved in that collective enterprise.

In recent years, the IBA has highlighted the importance of lawyers acting to address poverty. This public position has been adopted by various entities of the IBA in areas as diverse as human rights, business and climate change.¹⁵ The IBA has also promoted this position through the establishment of various committees which directly seek to address poverty.¹⁶ Consequently, the IBA could and, in our view, should consider such additional practical steps as:

- The IBA should require lawyers to declare an admission oath to address poverty and associated inequalities and injustices in order to become a member of the IBA.
- The IBA should fund a research project to define the appropriate accountability mechanisms of law schools' (and other branches of the legal profession) systemic impacts on alleviating poverty.
- The IBA should expressly include a commitment to alleviating poverty, inequality and injustice as part of its mission statement.
- The IBA should include in its practical guidelines to lawyers the impact that certain areas of law have in exacerbating global poverty. This could be achieved in a similar way to the IBA's approach to recognising the impact that particular areas of law may have on human rights (which are *Practical steps 2 to 5* below).

Professor Jeffrey Sachs, former Special Adviser to UN Secretary-General Kofi Annan and globally recognised economic expert and scholar on poverty, concludes that 'the key to ending extreme poverty is to enable the poorest of the poor to get their foot on the ladder of development', adding '[t]he extreme poor lack six major kinds of capital', comprising '[h]uman capital', '[b]usiness capital', '[i]nfrastructure', '[n]atural capital', '[p]ublic institutional capital' and '[k]nowledge capital'.¹⁷ He includes within the notion of 'public institutional capital' a number of elements all of which relate to aspects of law and justice – namely, 'the commercial law, judicial systems, government services and policing that underpin the peaceful and prosperous division of labor'.¹⁸ Law schools and their various

15 For IBA statements relating to poverty, see *IBA Poverty, Justice and the Rule of Law* (Peter Maynard and Neil Gold, eds) (2013); see n 7 above, pt 3.1; IBA Access to Justice and Legal Aid Committee and the World Bank, *A Tool for Justice: The Cost Benefit Analysis of Legal Aid* (September 2019) ch 1; IBA *Rule of Law Forum, Poverty and the rule of law* (13 November 2019); IBA, *IBA Pro Bono Declaration*, n 13 above. In the context of climate change, see IBA, *Climate Crisis Statement*, n 13 above.

16 The IBA has demonstrated its commitment to tackling poverty by creating the Poverty and Social Development Committee which seeks to engage the legal profession in actions that will directly contribute to the attainment of UN SDG No 1: The Eradication of Poverty. See IBA, 'About the Committee', *Poverty and Social Development Committee* www.ibanet.org/PPID/Constituent/Poverty-Social-Dev/Default.aspx accessed 4 January 2021; the IBA has also committed to recognising the link between the commercial world and poverty through the creation of the IBAHRI Task Force on Illicit Financial Flows, Poverty and Human Rights. See IBAHRI *Task Force on Illicit Financial Flows, Poverty and Human Rights, Tax Abuses, Poverty and Human Rights* (IBA, 2013).

17 Jeffrey Sachs, *The End of Poverty: How We Can make it Happen in Our Lifetime* (Penguin Books 2005) 245.

18 *Ibid.*, 244.

constituencies form part of society's poverty-fighting 'capital', commonly located and working with poor communities.

From any perspective, the link between law and poverty is or should be a matter of core concern to everyone in the legal profession. The IBA's own public statements and standards make it an imperative. Accordingly, the link between law and poverty is a suitable (some would say essential) focus for study and action by law schools and their internal and external constituencies.

The IBA has an established practice of not only recognising law schools and their academics as one of the branches of the legal profession, but also including them in the development and content of various standard-setting exercises. For example, the most authoritative IBA statement referring to law schools, especially in a poverty-related context, is the *IBA Pro Bono Declaration*,¹⁹ which reads:²⁰

‘The IBA is committed to actively encouraging lawyers, judges, law firms, bar associations, law schools, governmental and non-governmental organisations to participate in pro bono legal service and invites them to use and contribute content to the information developed by the IBA in this field.’

Accordingly, the IBA can and should solidify the connection between these concerns by explicitly recommending that such a poverty-sensitive focus and priority for legal and justice education and training is incorporated in requirements for the accreditation of law schools, admission of lawyers to legal practice and ongoing entitlement to continue working as a lawyer in all areas of the legal profession (*Practical step 6*).

¹⁹ *IBA Pro Bono Declaration*, n 13 above.

²⁰ *Ibid*, 5 [emphasis author's own]. For a comparative view and practical suggestions on how to cultivate a 'pro bono ethos' amongst future lawyers by law schools and those who regulate them, see, eg, John Corker, 'The Importance of Inculcating the "Pro Bono Ethos" in Law Students and the Opportunities to Do It Better' (2020) 30(1) Legal Education Review 1.

Practical steps

1. The IBA can and should build on its public stand on poverty's implication in various essential domains of law and justice, by explicitly endorsing the individual and collective responsibility of its members to contribute meaningfully to the end of poverty, inequality and injustice.
2. The IBA should require lawyers to declare an admission oath to address poverty and associated inequalities and injustices in order to become a member of the IBA.
3. The IBA should fund a research project to define the appropriate accountability mechanisms of law schools' (and other branches of the legal profession) systemic impacts on alleviating poverty.
4. The IBA should expressly include a commitment to alleviating poverty, inequality and injustice as part of its mission statement.
5. The IBA should include in its practical guidelines to lawyers the impact that certain areas of law have in exacerbating global poverty. This could be achieved in a similar way to the IBA's approach to recognising the impact that particular areas of law may have on human rights.
6. The IBA can and should solidify the connection between these concerns by explicitly recommending that such a poverty-sensitive focus and priority for legal and justice education and training is incorporated in requirements for the accreditation of law schools, admission of lawyers to legal practice and ongoing entitlement to continue working as a lawyer in all areas of the legal profession.

The role of law schools in combatting poverty, injustice and inequality

The nations and peoples of the world collectively have the resources, expertise and capability to end poverty.²¹ However, they are yet to come together effectively to achieve that end. Some countries and their populations (including lawyers) have the wealth but not yet the political and legal will to do so.²² *All* lawyers in *all* branches of the legal profession – including current and future lawyers in law schools who value human rights, social justice and the rule of law – have individual and collective responsibilities to do something about poverty through legal and other means. We all can *and* should do more on this front, alone and together.

In particular, law schools across the globe must do more than most of them currently do to address poverty and associated factors directly in their core mission of research, education and engagement with the legal profession and the outside world (*Practical step 7*). Their success or failure in doing so from now depends in part on the combined contributing effect of a series of critical and inter-related factors. Critically, those factors include: their own missions and resources; the priority and means of combatting poverty accepted by

lawyers and other potential collaborators in their locations; professional and politico-legal institutional mechanisms in each jurisdiction that reinforce or alternatively hold back the ambition of ending poverty; and national and geopolitical architecture within which such poverty-combatting initiatives operate.

In particular, study and action on poverty must be sensitive to a multiplicity of politico-legal, socio-ethical and eco-environmental forces and structures within society that can either help or hinder the war on poverty, ranging from the ‘problematisation’ and identification of poverty to the ideological, institutional and sectoral realities to which any poverty-alleviating actions by law schools and other lawyers must be sensitive.²³ The legal profession’s unique societal role and expertise worldwide on law, justice and equality requires it to meet the united call to arms from the IBA itself to join forces in ending poverty, injustice and inequality.

Lawyers are not just members of the legal profession and participants in legal and justice systems. Rather, lawyers occupy those roles within broader ecosystems in which they operate. Similarly, law schools and their constituencies form part of multiple coexisting systems within geopolitics, societal sectors and the legal profession. Consequently, any involvement by law schools in addressing poverty in their core academic work of scholarship, education, professional engagement and community-building must ideally be integrated (and not fragmented), embedded (and not marginal) and systems-sensitive (and not ad hoc or isolated).

The dynamics and structures operating in such systems are not value-neutral. They favour prevailing political, legal and economic actors (including institutions) and interests who might be threatened by what it will take to end poverty and associated inequality and injustice. Existing distributions of political power, economic prosperity and individual and family wealth that survive through tolerance of endemic poverty and its incidents will not easily yield. At the same time, diverse and complex forms of societal ordering provide an array of mechanisms that can help or hinder anyone engaged in the enterprise of trying to navigate and end poverty at home or abroad.

So, the possibilities and aspirations for law schools in focusing on poverty must be understood and implemented against their broader systemic backgrounds, to achieve success. As outlined later in this chapter, the choices made by law students about worthy areas of legal study and career uses of their law degree and by legal academics about the orientation and scope of what they research and teach, are each choices that are subject to broader ideologies and other forces within particular societies, public and university sectors, professional services industries and law school environments.

This chapter’s structure, aims and practical tools

This chapter is divided into three parts:

- The first part outlines a conceptual roadmap for navigating the landscape on law

²³ On the ‘problematisation’ of poverty (ie, making poverty problematic), see Arturo Doty, ‘The problematization of poverty: The tale of three worlds and development’ in Arturo Escobar (ed), *Encountering Development: The making and unmaking of the third world* (Princeton University Press 2012) 21.

and poverty and the location of law schools in that landscape. It also outlines key geopolitical (including UN), scholarly and professional (including IBA) entry points into the international architecture for discussing, practising and exercising advocacy about law and poverty with which law schools and their constituencies must engage.

- The second part provides a suggested framework for holistically examining the role and opportunities for law schools and their constituencies in studying and committing to actions that meaningfully do something about poverty and associated inequality and injustice. It also outlines a series of practical recommendations and steps to inform action by law schools and their constituencies aimed at helping poor, vulnerable and disadvantaged people and communities within their orbit of influence.
- The final part offers a more focused reflection on CLE and justice education more broadly and the crossroads at which law schools find themselves in meeting their responsibilities towards students and the community constituencies serviced and supported through legal clinics.

Appendix III also lists the practical steps discussed and illustrated throughout this chapter, for ease of reference in taking up the challenges this chapter presents.²⁴

In writing this chapter and making these recommendations, we do not try to cover all of the terrain on the multi disciplinary scholarly landscape on law and poverty. Nor do we attempt to describe any kind of ‘best practice’ combination of actions in combatting poverty that law schools and their various constituencies might universally adopt. Much is path-dependent on the particular political, legal and societal cultures of the developed and developing nations and communities in which individual law schools are located. What we hope to offer is a simple (but hopefully not simplistic) focus on the rationale and role of law schools in combating poverty and an illustrative menu of practical means to choose from in pursuing that end. In particular, we hope to elevate the triangulation between the legal profession, law schools and associated CLCs and clinics as a major force in helping and working with poor, vulnerable and marginalised individuals and communities.

In doing so, however, we also hope to inspire law schools and their staff to rethink and re-orientate their approach to the inter-relationship of poverty, inequality and injustice, centring that inter-relationship and what it demands of lawyers at the core of the research, education and professional and community engagement of lawyers. Essentially, law schools globally now face a provisional and suspect social utility. All need to reinvent a sense of mission that embraces justice and the alleviation of poverty; and each needs to adopt its own programme to achieve such redefinition, based we suggest on these practical steps. To do nothing is to deny the cultural and moral stewardship of legal education and its obligation to the most profound of national and international goals.

Practical step

7. Law schools across the globe must do more than most of them currently do to address poverty and associated factors directly in their core mission of research, education and engagement with the legal profession and the outside world.

Part 1

A roadmap on law and poverty

Global mega-trends

One reason for reducing inequalities within a domestic society is to relieve the suffering and hardships of the poor [...] A second reason for narrowing the gap between rich and poor within a domestic society is that such a gap often leads to some citizens being stigmatised and treated as inferiors and that is unjust [...] A third reason for considering the inequalities among peoples concerns the important role of fairness in the political processes of the basic structure of the Society of Peoples.²⁵

John Rawls,
The Law of Peoples

Gaps in global, national and local systems of law and justice affect poverty in multiple and dramatic ways. Such gaps maintain or increase levels of poverty in various ways, result in more poor people having legal problems, inhibit meaningful access to justice for the poor in vindicating their rights, marginalise the voices and interests of poor people in making and applying laws affecting them and otherwise reinforce structural inequalities and socio-economic barriers to the empowerment of poor people.²⁶ All of these causes and effects are the concern of all branches of the legal profession everywhere, including the legal academy and its constituencies and communities.

The actions that law schools and lawyers in general take on poverty are ingrained within broader international and societal systems. In taking a systemic approach to this topic, a contrast can be drawn between what might be called old and new ways of thinking about matters such as sovereignty, democracy, governance, regulation and responsibility, at least from a legal perspective. Understanding and differentiating the old from the new provides an insight into lawyerly mind sets which shape and sometimes hinder effective analysis, advocacy and action on poverty. The result is hopefully a richer appreciation of both lawyerly responsibility in society *and* what is involved in ‘thinking like a lawyer’ for various work-situated roles in legal practice. All of this is – or should be – an essential focus of study and training in law schools.

The transition between old and new ways of thinking can be viewed and grasped through the prism of a series of global mega-trends. One mega-trend that shapes attitudes and actions

on poverty-ending strategies from state and non-state actors alike is the continuing battle for supremacy between Western and non-Western systems of thought and political organisation in successfully elevating mass populations and communities out of long-term poverty. To that extent, the West – including the Western legal profession and Western legal education – cannot be complacent about its contribution to alleviating poverty.

In this Asian century, with democracy facing huge challenges to its legitimacy from populism, institutional mistrust, social unrest and instability, long-term systemic inequality and injustice and entrenched crime and corruption, the emerging economic and military dominance of Greater China is supporting effective effort in alleviating poverty for many. In the process, the rise of China and other non-Western countries as global focal points of political and economic power is challenging Western assumptions about the inherent superiority of its systems and institutions in delivering widespread socio-economic prosperity along with political freedom and an independent rule of law. Consequently, there is an external dynamic to the need for conventional political legal processes in broadly Western societies to sharpen their focus on eliminating poverty among their peoples.

Another relevant mega-trend concerns changes in thinking and practice about societal organisation and norms. Considered from a Western perspective, the 20th century witnessed the high-water mark of the old view of *sovereignty* based on territoriality, *democracy* conceived and exercised predominantly through the formal mechanisms of majoritarian rule, *governance* focused solely or mainly on the functions and activities of government, *regulation* principally through the official institutions of law-making and adjudication and *responsibility* understood chiefly in terms of what is enforceable by state power and sanction under law.

What underlies each of those lenses is a notion of the nation-state and its formal architecture as the exclusive source and agent of authority and power in ordering society through political processes (including law-making), the legal system (including the administration of court-centred justice) and official enforcement of compliance with the law. At their extreme, those lenses can collectively produce a form of tunnel vision, resulting in an overly government-centric account of societal (and indeed global) governance and an overly law-centric account of the regulation of institutional, organisational and individual behaviour. Together, such accounts further risk propelling us towards a flawed and impoverished account of responsibility, under which it is not real or worth accepting unless it has the backing of the force of law.

What does this mean for lawyers? One important consequence of the old view is a mass tendency, even within the global legal profession, to view notions of responsibility overwhelmingly through the prism of what the state does (eg, make and enforce laws), with the ancillary outcome of privileging enforceable legal responsibility (eg, through legal compliance and sanctions) as the dominant notion of responsibility for lawyers and their clients. The world of the old view is a world in which socio-ethical lawyerly responsibilities, corporate social responsibility (CSR), (including CSR for the legal profession and its various branches) and other products of anything other than ‘hard law’ (and even then, mainly

'hard law' of relevance for BigLaw and its BigBusiness clientele) lie at the margins of what really matters in legal education and practice alike.

To date, law schools are central to the pervasiveness of the old view of law and lawyering because of their critical roles in the intellectual and character formation of law students and therefore in the creation of more technocratic and rule-focused than empathetic and justice-sensitive future practitioners and other professionals. They are anything but immune from such ideological fault lines in their own battles over pedagogy, scholarship and the evolving role of law schools in society.

The 21st century is witnessing at least the permeation of the old view by an evolving understanding of the new view of sovereignty beyond territoriality, democracy beyond majoritarianism, governance beyond government, regulation beyond law and responsibility beyond enforcement.²⁷ A connecting thread through those features in the new view concerns the reassertion of the primacy of 'the people' in various guises. For example, notions of sovereignty can extend beyond territorial sovereignty and become grounded in alternative bases for sovereignty, such that '[u]nder the republican ideal of the sovereignty of the people, national sovereignty and parliamentary sovereignty are best conceived as subordinate sovereignties'.²⁸ Those advances in theory-building about sovereignty reinforce a growing willingness under international law to accept that, in moral philosopher Professor Peter Singer's words: '[t]he limits of the state's ability and willingness to protect its people are also the limits of its sovereignty'.²⁹

Similarly, ideas of participatory governance and democracy envisage mechanisms by which the formal architecture of democratic government gives 'the people' meaningful voices in their own political and legal systems, beyond the formalities respectively of periodic visits to the voting booth and the jury room, even more so in the age of technology-enabled mass global constituencies. Opportunities now exist for multi-stakeholder coalitions to engage in standard-shaping of law and policy and also public 'watchdog' monitoring of governments and businesses alike, amplified through news and social media, as well as network-building that can include lawyers from various branches of the legal profession, including law schools and their constituencies.

Systemic consideratio

The various branches of the legal profession have been at the forefront of progressive worldwide developments aimed at redressing inequality, injustice and poverty, working within and across systems of government, the legal system and the administration of justice.³⁰

27 For a broader discussion of this point, see Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar Publishing 2010) 49–69.

28 John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2000) 605.

29 Peter Singer, *One World: The Ethics of Globalisation* (Text Publishing 2002) 164.

30 Some organisations which have been at the forefront of such progressive worldwide developments include The *Global Alliance for Justice Education* (GAJE) (see 'Welcome to Gaje', Global Alliance for Justice Education <https://gaje.org> accessed 4 January 2021, the *Ford Foundation* and the *Soros Foundation* (see Richard J Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2004) 22 Penn State International Law Review 421).

Transnational illustrations of that point include IBA standard-setting and the involvement of IBA members in work on UN conventions and norms, the Sustainable Development Goals (SDGs) and initiatives of similar scale. Advocacy and action by lawyers on poverty importantly includes, but is not confined to, their collective contribution to undertaking pro bono legal work and sensitising policy development, law-making and law reform to the realities of poverty, inequality and injustice. Publicly funded legal aid schemes provide legal advice and assistance for people in poverty who need access to justice but who cannot afford a lawyer and the resourcing of CLCs and clinics supports an access to justice ecosystem in many local communities.³¹

The exorbitant cost of going to court to defend or enforce legal rights is joined by disruptions to conventional ways of administering justice through technology and mass pandemics, creating an impetus for online dispute resolution. Court-centred justice can overcome traditional hurdles of cost and non-coordination for poor and marginalised groups in protecting and enforcing basic legal rights, through the combined effect of class actions, litigation funding, strategic litigation in the public interest and court-facilitated pro bono schemes.³² Subject to the provision of assistance in users' electronic literacy, online courts can improve access to quicker and cheaper justice for a larger number of people from a larger number of places.³³ Law schools must study, support and participate in such enterprises.

Considered from a systemic perspective, law schools use a number of guises within a series of coexistent systems. Law is simultaneously a social construct, a public good, an academic discipline, a body of knowledge, a profession and a business. Most law schools are constituent parts of universities within tertiary (post-secondary) sectors of education,³⁴ members of broader peer associations and also academic and professional networks and subject to politico-legal regulation and standard-setting of various kinds, while also playing their part in communities, economies and societies. In addition, law schools constitute a critically important branch of the legal profession, interacting in various ways with its other branches.

In an age of 'fake news', scepticism about truth-seeking, mistrust of institutions, partisan public intellectualism and shallow social media debate, law schools and their constituencies also have a role to play as independent brokers and participants in the mechanisms of participatory governance, deliberative democracy and public reason. Law school academics, students and alumni partner with other organisations in multi-stakeholder coalitions of influence in public debate and advocacy, as well as standard-setting and partnering

31 At the same time, law firms and individual lawyers can do much more than many currently do in leading and implementing activities flowing from such transnational and local initiatives.

32 On three 'waves' in the reform of access to justice in western democracies, relating here to legal aid, class actions and alternative dispute resolution, see Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report' in M Cappelletti and B Garth (eds) *Access to Justice: A World Survey* (Sijthoff and Noordhoff 1978-1979) vol 1, 3, 21.

33 Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 10.

34 Much of what we say in this chapter about law schools and CLE is equally applicable to publicly and privately funded law schools alike, although we take publicly funded law schools as the prevailing norm, while conceding that the funding and functionalities of all law schools are now more complex than what a crude state/public-private distinction conveys.

initiatives with other branches of the legal profession, together with institutions and actors from government, industry and civil society. In short, law schools have huge and largely untapped potential to address poverty, inequality and injustice under evolving notions of governance, operating within the architecture of contemporary governance, regulation and responsibility.

Law schools can no longer rely on uncritical community goodwill to ensure their relevance to social wellbeing. Their roles are not just important, but fundamental to justice and equality, despite the fact wider society rarely sees this. And if this is true, then law schools must re-combine to seek a collective authority in their own justice mission and do so in a way that encourages all law schools to accede to and be measured against this ambition. Therefore, law schools must embrace new ways of thinking about their place in contemporary governance, regulation and responsibility and take active steps to embed them in the design, operations and evaluation of law schools by the various audiences who regulate or need them (*Practical step 8*).

Practical step

8. Law schools must embrace new ways of thinking about their place in contemporary governance, regulation and responsibility and take active steps to embed them in the design, operations and evaluation of law schools by the various audiences who regulate or need them.

Democracy's evolution and poverty

*Democracy reflects the emergence of a universal expectation that those who seek a validation of their empowerment – the governors – should govern with the consent of the governed. Democracy has invariably been addressed as a national issue [but] (d)emocratic claims too are being internationalised. If participatory democracy is relevant to the national levels of government then why should it not also apply at the international level, where so many decisions which affect people's lives are now being taken?*³⁵

Philippe Sands QC, *Lawless World: Making and Breaking Global Rules*

The working of democratic institutions, like that of all other institutions, depends on the activities of human agents in utilising opportunities for reasonable realisation [...] (I) f democracy is seen in terms of public reasoning, then the practice of global democracy need not be put in indefinite cold storage [...] Active public agitation, news commentary and open discussions are among the ways in which global democracy can be pursued, even without waiting for the global state. The challenge today is the strengthening of this

³⁵ Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin Books, 2006) 18.

*already functioning participatory process, on which the pursuit of global justice will to a great extent depend. It is not a negligible cause.*³⁶

Amartya Sen, *The Idea of Justice*

At its broadest and simplest, democracy is government of, by *and* for the people.³⁷ The relevant popular constituency and the correlative jurisdiction might be global, national or regional. In each case, democratic architecture and institutions are part of the formal machinery of democracy and sometimes seen as exhausting its content and dynamics.

However, democracy's manifestations and potential evolution are not limited to the formalities of constitutional government, electoral voting and law-making by elected legislative majorities. Some scholars argue that respect for majoritarian democracy in turn rests on majoritarian democracy's respect for underlying democratic preconditions for a society.³⁸ A 'thin' version of this form of democratic accountability occurs under judicial review of the legality of executive government decision-making and even the validity of duly enacted legislation in some jurisdictions, which turns upon the judicial branch of democratic government holding the other two branches to account under constitutional constraints. A 'thick' version of it might envisage broader ways in which state and non-state entities and individuals might hold the wielders of political, corporate and financial power accountable to the people and communities who are subject to the uses (and abuses) of such power.

Similarly, some scholars argue that democracy is itself evolving in the late 20th century and beyond to include respect and accountability within and between branches of democratic government for universal human rights,³⁹ even to the point where the proliferation of national bills and charters of rights protecting universally agreed human rights represents a growing transnational commitment and expectation by societies of people that protection of such rights inheres and extends beyond individual countries and their democratically elected majorities.⁴⁰

Another group of scholars highlight the forms of public deliberation, argument and contestability of views and values that are part of the workings of modern democracy.⁴¹ Yet others point to the need for openness and accountability of democratic institutions to the people and the emergence of a 'monitory' form of democracy, through mechanisms that are not limited to voting for elected politicians and even judges at periodic elections, with coalitions of non-state actors participating in their own democratic governance and holding the organs of democratic government publicly accountable in some way.⁴²

In short, this brief sample of scholarship at least offers a common glimpse of a view

³⁶ See n 11 above, 354, 409-410.

³⁷ President Abraham Lincoln, 'Gettysburg Address' (Speech, Gettysburg, 19 November 1863).

³⁸ Eg, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 17-8.

³⁹ Eg, Anthony Mason, 'Future Directions in Australian Law' in *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE* (Geoffrey Lindell, ed) (Federation Press 2007) 11, 26.

⁴⁰ Eg, Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Yale University Press, 2012) 198.

⁴¹ Eg, Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004).

⁴² John Keane, *The Life and Death of Democracy* (W W Norton 2009).

of society in which both state and non-state institutions and actors are engaged in participatory governance, deliberative democracy and public reason and standard-setting, with interlocking forms of accountability. In an age of globalisation, democratisation and digitalisation and therefore mass interconnected communities, law schools risk irrelevance if they do not combine with state and non-state parties in forming multiple networks of monitoring, accountability and standard-setting for the use and limits on abuse of official and corporate power. Law schools do so, for example, through their academics, students, alumni and partner organisations: making submissions to public inquiries to improve laws for the better; contributing to public advocacy and thought leadership on matters of fundamental inequality, injustice and corruption; undertaking various forms of research with the aim of enhancing public and political understanding and otherwise improving the conditions of people's lives under law; and also working directly to assist those without wealth or other advantages through legal clinics and pro bono work.⁴³

Law schools therefore have various roles to play in the new ecosystem for democratic governance within and across countries, many of which can support the global project and legal professional responsibility of 'making poverty history'.⁴⁴ In these countries that lack democracy, there are other mechanisms of networking, monitoring, standard-setting and influence, both within and beyond their national borders, which can be developed to similar effect. A strong connecting thread therefore exists between: the rule of law, lawyerly fidelity to it and contemporary democracy, on one hand (in the sense that a robust rule of law provides necessary social integrity for all other systems to function); and options for CLCs and clinics associated with law schools to improve the opportunities for poor and otherwise socio-economically disadvantaged people to influence the laws that govern them and to otherwise achieve better access to justice, on the other.

Furthermore, '[i]f equal access to justice under the rule of law involved action and advocacy to ensure that the non-value-neutral impact of leasing, taxation and other laws upon poor, vulnerable and disadvantaged people is addressed, for example, then enabling non-government parties to represent and give a voice to such people in policy-making, law-making and law reform processes is just as valid an object of clinical work, law school endeavours and multi-dimensional contemporary democracy as any other', as the co-author of this chapter, Professor Horrigan, has written in highlighting these connections in another context.⁴⁵ Nor are these concerns only for legal theorists, public lawyers and clinicians within law schools. Research, teaching and advocacy by private lawyers about the poverty-exacerbating suppositions and effects of property law, taxation law, investment law, financial services law and business and corporate law are all part of this mix too. In that sense, all legal academics have poverty-sensitive opportunities and responsibilities regardless of their

43 For a broader discussion of the role of law schools and legal clinics in the contemporary democratic ecosystem, see Bryan Horrigan, 'Designing and Implementing an Enhanced Clinical Program in the Age of Disruption – Part Two: Clinical Activities' (2020) 27 *International Journal of Clinical Legal Education* 204.

44 Nelson Mandela, 'Make Poverty History' (Speech, London, 3 February 2005).

45 Horrigan, n 43 above, 223–224.

field(s) of expertise and their choices (and non-choices) play into broader justice education, legal knowledge and democratic governance.

21st century regulation and poverty

*(S)elf-regulatory organisations frequently become more influential than states in the epistemic communities that frame debates over regulatory design [...] The recursive quality of global regulation means that there are many possible entry points of entry to influence the direction of change [...] It does not follow that actors are destined to irrelevance unless they are cogs in either a powerful state or a powerful corporation. There can be strength in a large set of comparatively weak ties to powerful motors that drive other powerful motors in a recursive system ... If an interest group has large corporations in its coalition [then] enough strength to transform the world can follow from the weak link.*⁴⁶

John Braithwaite and Peter Drahos, *Global Business Regulation*

Societal and democratic governance aside, what does a contemporary view of regulation (including law) hold for law schools in approaching responses to poverty, inequality and injustice? A contemporary view of regulation includes but also goes beyond simply nation-states (and their regional institutions) as sources of law-making and enforcement and lawfulness and legal compliance as exclusive measures of relevant responsibility in society. It takes account of the multiple state and non-state parties and other drivers of human and organisational behaviour that combine to order and influence values, norms and resulting behaviour by governments, private sector organisations, civil society actors and individuals. In such a meta-regulatory system, ‘law interacts with other forms of normative ordering’, resulting in ‘various layers of regulation each doing their own regulating’, while at the same time ‘each layer regulates the regulation of each other in various combinations of horizontal and vertical influence’.⁴⁷

‘Hard laws’ and ‘soft laws’

In the discipline of law, for example, the idea of law and responsibility under it is traditionally viewed mainly in terms of what legislatures enact, executive agencies administer, official regulators enforce and courts adjudicate. Conceived in that primarily state-centric and court-focused way, ‘law’ is about ‘hard law’ and the only responsibility that really matters to lawyers and their clients is their enforceable legal responsibility under ‘hard law’. ‘Soft law’, on the other hand, includes standards, customs and norms which lack the official legal force and origin of executed regulatory instruments such as primary or subordinate legislation, but which are nevertheless legal in character and can influence behaviour and decision-making as much as ‘hard law’. Examples from public law include statements of government

⁴⁶ Braithwaite and Drahos, n 28 above, 481–482.

⁴⁷ Christine Parker et al, ‘Introduction’ in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 1, 6.

policy, regulatory guidelines and rulings, official codes of conduct and practice and major public recommendatory reports and findings.⁴⁸

‘Soft law’ also extends beyond the domain of the public sector, to embrace, for example, industry practices and codes, contractual and non-contractual measures, professional body and special interest group standard-setting and public statements of position from industry stakeholder coalitions. Combined with a richer and more complicated account of the reality of law and regulation, the rise of ‘soft law’ in international and national legal systems means that lawyers now regularly advise their clients on how ‘hard law’, ‘soft law’ and other forms of relevant regulation relate to their legal responsibilities and liabilities.

What law firm, for example, could meaningfully advise a multinational corporate client on its legal position in doing business in each of its countries of operation without considering a wide range of legal and regulatory drivers? These drivers include:

- international economic regulation (eg, free trade agreements and rules of international commercial arbitration);
- avenues and standards to navigate in various forms of commercial dispute resolution;⁴⁹
- applicable national and regional laws (eg, corporate and employment law);
- relevant ‘soft laws’ (eg, the UN’s Guiding Principles on Business and Human Rights (UNGPs));
- Organisation for Economic Co-operation and Development (OECD) standards, and so on); and
- matters affecting corporate reputation and governance (eg, a company’s social responsibility and standing, its engagement with shareholding and non-shareholding constituencies and its consideration of investors’ concerns about environmental, social and governance (ESG) considerations in its decision-making and disclosure).

Mere compliance with ‘hard law’ as a matter of necessity is no longer a complete account of how successful multinational business enterprises and their legal advisers holistically approach legal, regulatory and societal responsibilities as part of the recipe for business success in society.

Accordingly, a broader view of regulation transcending ‘hard law’ encompasses the ways in which various standards and other societal norms influence and order behaviour by individuals, organisations and institutions, from a variety of sources that are not exclusively legal or state-based in origin. In terms of legal dimensions of regulation, the existence, importance and reinforcing interaction of ‘hard law’ and ‘soft law’ in the national and international legal orders has knock-on effects for the range of relevant sources of law for client-focused legal services work, as well as the correlative dimensions of individual, organisational and institutional responsibility in national and international legal orders.

⁴⁸ On these notions and illustrations of ‘soft law’, see Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016) 13-21.

⁴⁹ Eg, Centre for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration* (12 December 2019).

The question that this opening snapshot of contemporary regulatory theory poses for all branches of the legal profession in addressing global poverty is what they can do alone and together on a sufficient scale to create meaningful change, using the various regulatory dimensions and levers available to them. One legal academic can write a pivotal text on law and poverty and a law school can prioritise and resource a student legal clinic or social entrepreneurship programme to help communities in need; whereas an association of law schools working with other branches of the legal profession and indeed other state and non-state parties can achieve much in coalitions of standard-setting and collective action to alleviate poverty. Global frameworks within which the research, education and engagement of law schools on such fronts can usefully occur include various IBA standards (including those dealing with ethics and combatting corruption)⁵⁰ and the UN's SDGs, Principles for Responsible Investment (PRI) and UNGPs.

The UNGPs provide a clear global example of the influence and reach of a 'soft law' standard that is relevant to poverty, given the clear relationship between business, human rights and the protection and empowerment of poor people and communities. It is reinforced by its adoption in other multilateral standards (eg, OECD and International Finance Corporation (IFC) standards and the SDGs), as well as its developing normative influence on 'hard law' standards. The UNGPs are described in IBA standards for lawyers on business and human rights in the following terms:⁵¹

'In 2011, following six years of multi-stakeholder consultations, research and pilot projects, the UN Human Rights Council unanimously endorsed the UNGPs [...] The UNGPs do not have the force of law and are not legally binding. But they have enjoyed wide global uptake and are regarded as the global authoritative standard on business and human rights. They are increasingly reflected in public policy, in law and regulation, in commercial agreements, in international standards that influence business behaviour, in the advocacy of civil society organisations and in the policies and processes of companies worldwide.'

The cumulative reinforcing effect of the UNGPs, SDGs, various IBA standards and the commitment of most (if not all) law schools to social justice under the rule of law has a potential that is yet to be realised in generating poverty-ending coalitions, strategies and measures across the various branches of the global legal profession. In the 21st century, the landscape of the 'war on poverty' continues to evolve.

Law schools taking individual and collective action on poverty

The impact of the market on the higher education sector has been remarkably similar all over the world as neoliberalism has become the dominant political philosophy and nation

⁵⁰ Eg. see 'Anti-Corruption Strategy for the Legal Profession', *Anti-Corruption Strategy for the Legal Profession* www.anticorruptionstrategy.org accessed 4 January 2021.

⁵¹ IBA Council, *IBA Practical Guide on Business and Human Rights for Business Lawyers*, n 13 above, 13.

*states move to commodify heretofore public goods [...] (N)ot only is the legal academy being radically altered as a result of contraction in the funding of universities from the public purse, but the cartography of legal knowledge itself is changing. The ultimate impact on the legal profession and democratic institutions is likely to be profound as social, critical and contextual knowledge is sloughed off in favour of the technocratic and the instrumental – knowledge most highly valued by the market.*⁵²

Professor Margaret Thornton, *Privatising the Public University: The Case of Law*

The multiplicity of possible dimensions and entry points for legal analysis, advocacy and action on poverty can themselves be barriers to progress in this field of work, because of the absence of a single dominating standpoint, narrative and solution. The topic can be approached from a range of legal perspectives, including theories of law and justice, ‘social contract’ analysis, universal human rights, economic and sustainable development, intergenerational equity, democratic participation, socio-ethical and professional responsibility, substantive areas of law, access to justice and CLE. The range and density of scholarly analysis is itself something to be navigated in identifying, justifying and implementing remedial solutions for poverty through law and justice.

The roles and actions of law schools in alleviating poverty are also affected at a broader level by the relationship between the state and markets and by how their host universities and professional audiences perceive and respond to law schools in view of that relationship and its effects and constraints on them. Some commentators characterise the prevailing relationship between nation-states and markets in terms of a neoliberal agenda, at least in societies subscribing to democratic capitalism. A neoliberal agenda is characterised by factors such as economic liberalism, market capitalism and privatisation of public assets and services, resulting in free trade, deregulated markets and contraction of the welfare state, all as part of broader market-driven influences on government activity, including socio-economic policy priorities and resource allocation.

The shrinking state

Under such a view, an alignment occurs between the interests of free and deregulated markets, a shrinking state in service to those markets and BigBusiness – the major client constituency for BigLaw. Such an alignment also results in particular expectations from BigLaw and other sector employers of law graduates about the preferred types of knowledge, skills and work-related experiences that law graduates need from their university education. In the absence of careful filtering and balancing against other public interests engaged in legal and justice education, these expectations can steer law schools more towards preparing students for the transactional and advice-based needs of commercial law firms and their business clients than

52 Margaret Thornton, *Privatising the Public University: The Case of Law* (1st edn, Routledge 2012) xii–xiii.

towards achieving access to justice for impoverished peoples, especially where success in that endeavour might threaten existing balances of power, money and influence.

Reflecting through the lens of neoliberalism on the systemic pressures and drivers of law school strategies, operations and resourcing does not automatically mean accepting all of the characterisations or even all of the criticisms surrounding neoliberalism generally and its application to universities and law schools in particular. Nevertheless, universities and law schools that are unduly subservient to market interests, corresponding governmental priorities and orientations of law school stakeholder audiences catering to those interests have already fallen prey, because, more often than not, they have not been careful of the unfiltered impact of those forces.

In staying true to their own moral compasses, law schools must navigate neoliberalism's gravitational force towards 'marketisation' of their missions and operations, 'credentialisation' of their academic reputation (or 'brand') and course offerings, corporatism of their strategy and structures, privatisation of the benefits of their legal education and managerialism of their governance and decision-making. At worst, the result is a legal academy where individual academic autonomy, freedom and collegiality and the quality and range of localised professorial control and decision-rights conventionally associated with such academic qualities, are mediated and disrupted beyond recognition by such forces.⁵³

In turn, the collective impact of such marketisation, credentialism, corporatism, privatisation and managerialism arguably increases the likelihood of the instrumental commodification and commercialisation of academic legal research and education, limiting the priorities and opportunities for intended audiences and beneficiaries in broader society. Additional risk arguably arises in consequence for pursuit of the ideals of law and justice, public goods in law-making and the administration of justice and both truth-seeking scholarship and inculcation of an ethic of professional and public service.⁵⁴ Justice education (ie, 'education in the social responsibility of the law and the legal profession')⁵⁵ struggles to survive let alone thrive in such an environment, where the law's 'progressive potential'⁵⁶ for an aspirational race to the top in creating a just and civil society is impeded and suffocated by a subservient race to the foot of neoliberal ideology and market idolatry.⁵⁷

Whatever position anyone might take in supporting or opposing such ideological characterisations, it is undeniable that a series of convergent and very visible global crises in

53 At the same time, university and law school management face institutional choices that still need to be made with good intent under prevailing institutional circumstances, even accepting neoliberal critiques of what produces those circumstances and conditions the decisions made under them. Of course, not every value, choice, or decision of a university or law school manager necessarily fits an overarching neoliberal narrative.

54 For an empirical and critical account of neoliberalism's pervasive influence upon universities and law schools in major common law systems, which informs this analysis, see n 52 above. For another recent perspective on global, market and other forces affecting Western and non-Western law schools, see Carel Stolker, *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge University Press 2014).

55 Adrian Evans, 'Normative Attractions to Law and their Recipe for Accountability and Self-assessment in Justice Education' in Frank S Bloch (ed) *The Global Clinical Movement: Educating Lawyers for Social Justice*, (Oxford University Press 2011) 353, 353.

56 *Ibid.*

57 Justice education and its orientations and benefits are discussed further in the final part of this chapter.

the first two decades of the 21st century are challenging key ideas and practices surrounding the nature and role of governments, markets and lawyers in service to both. The last 20 years bear witness to the threats posed by the interdependencies and instabilities of the international financial system (eg, the 2008 Global Financial Crisis (GFC)), ongoing mass socio-economic inequality, an ascending climate emergency, sectoral and region-wide corruption and global pandemics (eg, Covid-19), all of which combine to greater adverse effect in widening the gap between wealthy and poor communities.

In that sense, measures aimed at ending poverty must take also account of its intersections with the structural and systemic features of intergenerational inequity, socio-economic inequality, non-access to justice, climate deterioration, institutional corruption and recurring pandemics. Law is often not the only disciplinary lens through which to view these topics and the interactions between them. Lawyers in all branches of the profession must coordinate and join forces with others in society to achieve success in these domains.

Market forces can, of course, also be used for the public good, notwithstanding the undeniable reality that market and societal values are not completely the same. For example, governments and the financial community can use the emerging market for social bonds to achieve some public goods, tying dividends on bonds to indicators aligned with demonstrable socio-economic improvements in poor communities.^{58, 59} Law schools can create social entrepreneurship clinics, working together with social enterprises, business advisers, philanthropic bodies and poor communities to develop sustainable businesses that address community needs (*Practical step 9*).

Practical step

9. Law schools can create social entrepreneurship clinics, working together with social enterprises, business advisers, philanthropic bodies and poor communities to develop sustainable businesses that address community needs.

Recasting lawyerly responsibility to combat poverty under the rule of law

(T)he relentless focus on short-term economic success has adversely affected the culture and institutional integrity of firms; the training, mentoring and development of young lawyers; the ability of firms and their lawyers to service the poor and underprivileged; and the ability of firms and their lawyers to devote time to the profession and the broader needs of society. We urge a rebalancing of the sometimes competing goals of ‘economic’ and ‘professional’ success.⁵⁹

⁵⁸ Mathilde Pellizzari and Jean-Michel Lecuyer, *The Social Bond Market: Towards a New Asset Class?* (Report, 2018).

⁵⁹ Ben W Heineman Jr, William F Lee and David B Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century* (Essay, Harvard Law School Center on the Legal Profession, 25 November 2014)

Ben W Heineman Jr, William F Lee and David B Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*

The biggest obstacle to mass global action against poverty by lawyers from all strands of the profession is our individual and collective failure to accept responsibility for that outcome as a necessary and not simply voluntary aspect of lawyerly fidelity to the profession and society under the rule of law. Yet, the IBA has explicitly accepted and publicly espoused the fundamental proposition that the special privilege, status and expertise of lawyers to society on matters of law and justice produces a correlative ‘duty and opportunity to provide pro bono legal service’, which crucially ‘helps to fulfil the unmet legal needs of the poor, underprivileged and marginalised’.⁶⁰ To that extent, the ‘global voice of the legal profession’ (as the IBA rightly presents itself) unequivocally accepts the connection between poverty, the rule of law and resulting lawyerly responsibility, with implications for member bar associations, law societies, law firms and individual lawyers in how that responsibility is promoted and practised.

The co-author of this chapter, Professor Horrigan has argued elsewhere⁶¹ that lawyerly fidelity to the rule of law produces a correlative lawyerly responsibility to do something to end poverty, as individual lawyers and collectively through law firms and other branches of the legal profession as a whole. The steps in that argument can be summarised as follows. Meaningful access to justice is part of most (if not all) accounts of the rule of law. Lawyers profess fidelity to the rule of law. Society affords lawyers special privileges and roles beyond ordinary citizenship in upholding the rule of law through legal systems and the administration of justice, with correlative expectations – accepted by the legal profession – that lawyers will use their special expertise and opportunities to achieve justice and remedy injustice for all people, regardless of their capabilities, wealth and standing in society.

Publicly funded legal aid, community legal services and pro bono legal assistance are all manifestations of a lawyerly commitment to the rule of law that helps poor people and other vulnerable groups in legal need. They demonstrate a clear and integral connection between society, law and poverty that requires coordinated actions of lawyers across all branches of the profession. In many communities, such activities reach a critical mass and scale that amounts to a major contribution to the common good.

‘Thin’ and ‘thick’ accounts

Nevertheless, such manifestations do not exhaust what is possible in helping poor and disadvantaged communities as part of a lawyerly commitment to the rule of law. In our view, the lawyerly responsibility to contribute in some way to the end of poverty changes nature and scope in the transition from ‘thin’ to ‘thick’ accounts of access to justice under the rule of law. A ‘thin’ account of access to justice focuses on what people need when they have legal troubles and face investigation, prosecution, or litigation. Individually, lawyers fulfil

⁶⁰ IBA, *IBA Pro Bono Declaration*, n 13 above, 3i–j.

⁶¹ Horrigan, n 43 above.

this form of access to justice characteristically by accepting legal aid work for lower than usual fees,⁶² volunteering at CLCs and doing pro bono work. Many law schools assist in that form of access to justice through CLE programmes and services, operating in conjunction with CLCs, pro bono lawyers and others engaged in public interest litigation.

A ‘thick’ account of access to justice encompasses all of the ways in which people need a voice and consideration in the regulation and use of political and corporate power over them and the laws that enable it.⁶³ Wealthy and poor constituencies rarely have equal voices in influencing the content, application and reform of laws. No legal instrument or proceeding is completely value-neutral as between different interests and allocations of resources. To that extent, the need for access to justice for everyone is not confined to a guaranteed minimum level of access to legal advice and assistance, triggered whenever someone is in trouble with the law or needs to pursue legal avenues to protect their rights or remedy their situation.

Individually, lawyers fulfil this ‘thick’ account of access to justice by contributing their expertise to submissions by advocacy groups to law-making and law reform inquiries, funding (including through foundations set up by law firms) necessary research and community initiatives to address gaps and faults in the justice system and otherwise participating in professional and public advocacy that is specifically aimed at exposing and fixing entrenched disadvantage, inequality and injustice. Law schools have individual and partnering roles to play in such initiatives too, through contributions by legal academics and students (including legal clinics) to the public goods of law-making and law reform in submissions to legislative committees and official inquiries that highlight the law’s impact on poor and disadvantaged people.

Globally, the disproportionate impact on poor people and others most in need of the law’s protection of inequitable allocation and use of power and resources is manifested in everything from the global climate emergency and mass pandemics such as Covid-19, to the systemic inequality and structural injustice that is exposed by mass movements, such as the anti-modern slavery and universal human rights movements. Even contemporary attempts to modify capitalism under banners such as ‘stakeholder capitalism’⁶⁴ and ‘compassionate capitalism’⁶⁵ reflect a similar concern with the use and abuse of corporate and financial power in ways that adversely affect business-related constituencies, such as victims of human

62 Just as an individual lawyer might support the pro bono part of their work through their other fee-generating work, so too whole organisations might support and cross-subsidise their pro bono efforts through other fee-paying and income-producing efforts. In this sense, both the lawyers engaged in pro bono work at a law firm and the lawyers working in practice areas whose client-based work generates the fees to support a pro bono practice group are equally engaged in both delivering on their firm’s public pro bono commitments and meeting (at least in part) their individual and collective lawyerly obligation to access to justice under the rule of law.

63 This account of a ‘thick’ view of access to justice accommodates both public and corporate power. For a discussion to similar effect of access to justice’s ‘broad’ and ‘narrow’ meanings, see, eg, John Corker, ‘The Importance of Inculcating the “Pro Bono Ethos” in Law Students and the Opportunities to Do It Better’ (2020) 30(1) *Legal Education Review* 1, 5.

64 Gavin Kelly, Dominic Kelly and Andrew Gamble, *Stakeholder Capitalism* (Palgrave Macmillan 1997); R Edward Freeman, Kirsten Martin and Bidhan Parmar, ‘Stakeholder Capitalism’ (2007) 74 *JOURNAL OF BUSINESS ETHICS* 303.

65 Rich DeVos, *Compassionate Capitalism: PEOPLE HELPING PEOPLE HELP THEMSELVES* (Plume 1994).

rights abuses and modern slavery violations in a company's supply and distribution chain, as well as poor local communities and groups who are victims of both lawful and unlawful corporate actions to their detriment. To summarise, a balanced approach to education, research and engagement by law schools must encompass a broader horizon of poverty-sensitive concerns, as part of meeting a law school's university mission, membership of the legal profession and socio-ethical responsibility (*Practical step 10*).

Practical step

10. A balanced approach to education, research and engagement by law schools must encompass a broader horizon of poverty-sensitive concerns, as part of meeting a law school's university mission, membership of the legal profession and socio-ethical responsibility.

Part 2

Prioritising relief from poverty in law school roles, missions and actions

Ten areas of endeavour for law schools on poverty, inequality and injustice

*We are committed to ending poverty in all its forms and dimensions, including by eradicating extreme poverty by 2030 [...] Our journey will involve Governments as well as parliaments, the United Nations system and other international institutions, local authorities, indigenous peoples, civil society, business and the private sector, the scientific and academic community – and all people.*⁶⁶

United Nations General Assembly, 70th Session, September 2015

As suggested earlier, law schools exist and operate in the intersections between law as an academic discipline, university entity, profession, business, public good and force for change. At first glance, law schools therefore seem well-placed to pursue education, research and professional and community engagement in many ways that prioritise poverty-sensitive study and work because of their and its close mutual connection to socio-economic equality, access to justice and the rule of law.

In their strategic planning and everyday operational realities, however, many law schools commonly confront and navigate various elements that detract from poverty-ending study and work. Those elements include the pressures of neoliberal governmental agendas, the host university's budget and workforce constraints, employer expectations of law graduate attributes, BigLaw's strong (albeit declining) hold on the legal services sector,⁶⁷ state-directed

⁶⁶ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th session, Agenda Items 15 and 116, UN Doc A/RES/70/1 (25 September 2015) 7[24], 12[52].

⁶⁷ Eg Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (2nd edn, Oxford University Press 2017) 60-5; Emma Ryan, 'BigLaw v NewLaw Debate Heats Up', (19 January 2017) *Lawyers Weekly* www.lawyersweekly.com.au/

research funding priorities and grant schemes, professional and accrediting requirements, law school rankings and – for law schools associated with legal clinics and community centre services – inadequate publicly funded legal aid. All of these pressures can easily marginalise and otherwise distract attention from and support for, poverty as a major focus of study and action in 21st century law school missions and priorities.

The co-author of this chapter, Emeritus Professor Evans has written in another context about the need, forms and measurement of justice education about law and the legal profession, in a way that illustrates the array of socio-ethical orientations and connections implicated in how law schools might act on poverty, as follows:⁶⁸

‘Not many legal education institutions (LEIs), including law schools and other providers of practical legal training, see themselves as having a responsibility to deliver justice education – that is, education in the social responsibility of the law and the legal profession [...] Lawyers and nongovernmental organisations (NGOs) working for justice and justice education, or even thinking about the possibility, are confronted with a bewildering array of interrelated complexities. These include, for example, the links between poverty and preventing terrorism, human rights and access to resources, taxation and wealth distribution, even legal ethics and the difficulties in withstanding global warming. And yet so little seems, at times, to be achieved by those of us who try to use the law as an instrument to achieve sustainable improvement in many of these fields [...] The answer, if there is one, must lie in a sense of optimism that there is purpose to a struggle to improve access to justice regardless of past setbacks, because such setbacks are never complete and gradual advances are achieved.’

In other words, there is a danger for society and its underpinning respect for law and lawyers if training future lawyers for work in commercial law firms or at the commercial bar for governmental or business clients is the sole or paramount educational focus for any law school, especially if it occurs within a politico-legal and socio-economic system that reinforces and prioritises the market-servicing aspects of law degrees, revenue-generating academic legal research and sponsorship opportunities with BigLaw and BigBusiness. The danger is that ideas and actions associated with the ‘good’ lawyer, progressive legal education, the social responsibility of lawyers and a deep commitment to the use of law to cure real inequality and injustice can easily find themselves ‘benched on the sidelines’. The fact that *some* law schools and commercial law firms do a tremendous amount of good in the community does not detract from the danger flagged here for *all*.

Furthermore, embedding these ideas and actions and what they mean for poverty-focused study and work within law schools extends beyond matters of formal education and future

newlaw/20409-newlaw-v-biglaw-debate-heats-up accessed 4 January 2021; Emma Ryan, ‘BigLaw “Rapidly” Losing Out to NewLaw Counterparts’, (19 February 2017) *Lawyers Weekly* [www.lawyersweekly.com.au/newLaw/20562-biglaw-rapidly-losing-out-to-newlaw-counterparts](http://www.lawyersweekly.com.au/newlaw/20562-biglaw-rapidly-losing-out-to-newlaw-counterparts) accessed 4 January 2021; Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press 2017) 66–71.

68 See n 55 above, 353.

professional outlook. As with the mainstreaming and integration of a business commitment to CSR, any law school's commitment to sensitising its constituencies to poverty on all of the levels that matter means mainstreaming that commitment as an integral and built-in feature of the organisation and not simply leaving it in the slipstream of individual academic discretion and interest as a marginal and add-on feature of law school potentiality. Making a focus on poverty and associated aspects of inequality and injustice part of the DNA of law schools requires a holistic and multi-pronged institutional approach.

The nine areas

Accordingly, for the purposes of comprehensive discussion about what is possible, the agenda and recommendations for action on poverty by law schools can usefully be grouped and analysed under the following nine categories of areas of endeavour:

1. societal standing and expectations;
2. jurisdictional regulation and accreditation;
3. professional admission and employment;
4. organisational partnering and collaboration;
5. institutional strategy and planning;
6. academic orientation and capability;
7. legal scholarship and advocacy;
8. legal engagement and impact; and
9. legal education and ethics.

Each of those categories warrants detailed individual examination. A tenth category of law school effort – legal clinics and placements – deserves separate discussion and is addressed in Part 3. As is apparent from the discussion that follows in this part and Part 3, these categories not only have an impact on one another, but also traverse the basic focus and work of education, research and academic, professional and community engagement by law schools.

Societal standing and expectations

Law and justice do not exist to provide jobs for members of any section of the legal profession, including academic lawyers.⁶⁹ They exist to serve civil societies under the rule of law. All such societies in all civilisations and eras profess real concern for their poor, marginalised and

⁶⁹ A sentiment and quote often attributed to legal futurologist, Richard Susskind. 'Law does not exist to provide a livelihood for lawyers any more than illness exists to provide a livelihood for doctors. Successful legal business may be a by-product of law [...] but it is not the purpose.' See Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press 2008).

disadvantaged members and groups. What does this mean for what society expects of the entire legal profession, including the legal academy? On the set of arguments presented in Part 1 of this chapter about the socio-ethical responsibility of lawyers on poverty, lawyerly fidelity to the rule of law generates a correlative lawyerly responsibility – both individual and collective – to do something about ending poverty and associated inequality and injustice. For law schools, that multi faceted responsibility translates into discrete actions in their core education, research and external outreach.

First, law schools can and should meet societal expectations that they educate and train the next generation of legal and professional leaders with orientations, knowledge and skills to do their part in ending poverty worldwide (*Practical step 11*). For example, a former justice of the High Court of Australia and current Co-Chair of the IBAHRI, Dr Michael Kirby, specifically included attention on poverty in the educational mission of Australian law schools in one of his ‘ten commandments’ for them in a 2015 speech (ie, ‘Address some particular subjects of poverty law’), commenting that ‘[i]f at no level in a law course there is any exposure amongst law students to the areas of law that typically affect their economically disadvantaged fellow citizens, it is unsurprising that there will be little or no knowledge, awareness or sympathy about the legal problems of people living in poverty’.⁷⁰ Law school subjects on law and poverty can be local, comparative or global.⁷¹

Second, societies which provide funding and other support for universities from a mix of public, private and not-for-profit sector sources have reasonable expectations that disciplines within universities will address significant national and global challenges in their research missions, as well as in their educational missions. Institutional resourcing of universities and their law schools from governments, industry and private foundations can prioritise poverty elimination as an area of academic focus and activities through measures such as government funding compacts with individual universities, research funding agency priorities for fundable research grant projects, social entrepreneurship initiatives and partnerships, sponsored multi disciplinary clinics and philanthropically supported research and outreach programmes (*Practical step 12*).⁷²

Third, the status and privileges afforded by society to the legal profession depend to a significant degree on lawyers accepting and acting on their resulting legal, professional and social responsibilities. International crises of confidence in lawyers’ integrity continue,

70 Justice Michael Kirby, ‘Unmet Legal Needs in Australia: Ten Commandments for Australian Law Schools’ (Speech, Australian Law Teachers’ Association Conference, 17 July 2015) 18.

71 Eg, Stanford University’s ‘Global Poverty and the Law’ subject: Stanford University, ‘Global Poverty and the Law’, *Stanford Law School Course Catalog* <https://law.stanford.edu/courses/global-poverty-and-the-law> accessed 4 January 2021.

72 As another example, the ‘Leave No-One Behind’ Initiative at Monash University in Australia began in 2018 as a social business and entrepreneurship programme of multi disciplinary student projects with real community impact and involving philanthropic partners and entrepreneurs, organised around the SDGs and funded by the Monash Sustainable Development Institute (MSDI) and the Faculties of Law, Arts, Business and Economics, Education and Art, Design and Architecture.

especially in the context of taxation,⁷³ in avoiding corruption and money laundering,⁷⁴ and in the avoidance of conflicts of interest.⁷⁵ There may be very little agency or esteem remaining to the profession in future decades if it loses sight of the imperative need to show equal and active commitment to doing justice and fighting injustice, above making money, serving elite interests and facilitating unjust privilege.

While ill-considered provocation of fellow lawyers is pointless, this is hardly the case any longer. In the wake of public examples of problematic lawyerly conduct across both hemispheres, from Australian royal commissions to American court challenges to presidential election results, it is probably high time for the global legal profession to address ethics enhancement proactively for individual lawyers, by recurring assessments of legal practitioners for their socio-ethical sophistication and integrity, reinforced in requirements for admission to practice and law school accreditation (*Practical step 13*). The IBA and its member bar associations and law societies can similarly encourage member law firms to move beyond a constrained focus on lawyerly work as work consisting of billable client work, business development and pro bono work and to view relationships with law schools in various avenues of poverty-ending work as part of a richer account of lawyerly work in fidelity to access to justice and the rule of law (*Practical step 14*).

Finally, expertise-based advocacy in support of empowering and achieving better access to justice for poor people is both part of academic external engagement and impact as well as an aspect of society's expectations of the legal profession as a whole, including law schools. In addition, on the set of arguments presented in Part 1 of this chapter about the evolution of 21st century democracy, universities and law schools play key roles addressing poverty as participants in deliberative, participatory and monitory democracy, within broader systems of 21st century governance, regulation and responsibility.

For example, law schools and individual legal academics can participate in multi-stakeholder coalitions that develop or monitor standards from within the global legal profession (eg, IBA statements and guides) as well as beyond it (eg, SDGs and UNGPs), focusing mass attention on lawyerly action or inaction in fulfilling such standards (*Practical step 15*). Individual academics can contribute public submissions highlighting poverty insights and solutions to inquiries and calls for public submissions from official inquiries, legislative committees and law reform agencies, as contributions to the public goods of policy-making, law-making and law reform, as well as manifestations of the legal academy's involvement in the kind of 21st century governance and democracy sketched in this chapter (*Practical step 16*).

73 See in particular, International Consortium of Investigative Journalists, *The Panama Papers: Exposing the Rogue Offshore Finance Industry* www.icij.org/investigations/panama-papers accessed 4 January 2021.

74 Involving former Australian monopoly wheat exporter AWB and its bribery of Saddam Hussein's Iraqi government. See 'How was AWB enmeshed in Iraq's oil-for-food scandal?', SBS News (Sydney, 13 October 2015) www.sbs.com.au/news/how-was-awb-enmeshed-in-iraq-s-oil-for-food-scandal accessed 4 January 2021.

75 In July 2020, the US Justice Department unilaterally withdrew charges against President Trump's former National Security Adviser, Michael Flynn, after he pleaded guilty. See Editorial Board, 'Don't Forget, He Pleaded Guilty', *New York Times* (New York, 9 May 2020) 30.

Practical steps

11. Law schools should have a core mission of educating and training the next generation of legal and professional leaders with orientations, knowledge and skills to do their part in ending poverty, injustice and inequality worldwide.
12. Institutional, government and philanthropic funding of law schools should be made conditional on prioritising poverty, injustice and inequality as core areas of academic focus.
13. The global legal profession should address ethics enhancement proactively for individual lawyers by recurring assessments of legal practitioners for their socio-ethical sophistication and integrity. This must be reinforced by requirements for admission to practice and law school accreditation.
14. The IBA and its member bar associations and law societies can encourage member law firms to move beyond a constrained focus on lawyerly work as work consisting of billable client work, business development and pro bono work and to view relationships with law schools in various avenues of poverty-ending work as part of a richer account of lawyerly work in fidelity to access to justice and the rule of law.
15. Law schools and individual legal academics should participate in multi-stakeholder coalitions that develop or monitor standards from within and beyond the global legal profession, focusing on lawyerly action or inaction in meeting such standards.
16. Individual academics ought to make public submissions and other contributions to the public goods of policy-making, law-making and law reform that highlight poverty insights and solutions.

Jurisdictional regulation and accreditation

Consistently with the broader multi-order view of regulation outlined in this chapter, the regulation and accreditation of law schools is now widely a matter for state authorities, professional accrediting and admitting bodies, standard-setting from national and global communities of law school peers and internal host university accreditation and regulation binding on individual law schools. A number of possibilities are open at each of and across those various levels of ordering, to reinforcing effect.

Governments can use sectoral policy settings, regulatory controls and even the funding arrangements of universities and their law schools to achieve outcomes that meaningfully contribute to the war on poverty. In the context of broader university dealings with government, such measures include institutional establishment and funding preconditions, public funding research priorities, social compacts with universities, legislated mandates for universities and government incentives for student equity and diversity (*Practical step 17*). At the level of individual law schools, a public agency or department of state might politically

and financially support a legal academic focus on poverty in various ways, for example, through contributing some funding to a relevant research centre or project that accords with publicly stated access to justice priorities, providing some publicly funded legal aid to a free legal clinic associated with a law school and reframing incentives for law firm eligibility for government tenders and panels based on pro bono measures to encourage poverty-ending collaborations with law schools and others (*Practical step 18*).

Standard-setting by associations of law schools on basic accrediting requirements for member law schools can incorporate expectations and measures about what law schools do to shape the social consciousness of students and academics as participants in local, national and global communities committed to values such as socio-economic equality, universal human rights, access to justice, ethical lawyering and the rule of law, all as part of a commitment to justice education (*Practical step 19*). Law schools and their national and international associations can also develop self-assessment criteria and other tools to assist in demonstrating successful orientation and delivery of justice education for accreditation and other purposes, including templates for assessing matters, for example, such as the adequacy of teaching of legal ethics and social responsibility, clinical and pro bono programmes, orientation and selection of academic staff and governance arrangements supportive of justice education (*Practical step 20*).⁷⁶

Such steps can help us to examine in depth how much difference a suite of clinics or an overall CLE programme can actually make to the lives and legal support of those in poverty, or at the very least to students' awareness of law's impact on poverty through clinical and non-CLE across the legal curriculum. Indeed, in the absence of specific endorsement and prioritisation of such values in other sources of regulation and funding for law schools, it is even more imperative for law school standard-setting and standard-evaluation exercises to undertake this role.

The laws and court rules of a jurisdiction can provide for rights of appearance for appropriately supervised law students to assist self-represented clients who cannot afford a lawyer and who also do not qualify for publicly funded legal aid (*Practical step 21*).⁷⁷ Where the interest on client funds held on trust by law firms for settlements and other purposes is officially quarantined and payable into a fund for public purposes, those purposes can be framed to include clinical and related support for people who cannot afford legal representation, through a combination of legal aid agencies, CLCs and associated law school clinics (*Practical step 22*).

An important caveat is needed on this last practical step. What might have been a socially useful and professionally justifiable practice in the pre-computing age faces ethical and technological challenge in a digital era, where computers can calculate and award micro amounts to law firm clients for their trust fund balances.

Practical steps

17. Governments must use sectoral policy settings, regulatory controls and funding arrangements with universities and law schools to achieve societal outcomes that meaningfully contribute to addressing poverty, injustice and inequality. These may include funding preconditions, public research priorities, social compacts with universities, legislated mandates for universities and government incentives for student equity and diversity.
18. A public agency or department of state might politically and financially support a legal academic focus on poverty in various ways, such as contributing funding to a relevant research centre or project that accords with publicly stated access to justice priorities, providing some publicly funded legal aid to a free legal clinic associated with a law school, or reframing incentives for law firm eligibility for government tenders and panels based on pro bono measures to encourage poverty-ending collaborations with law schools and others.
19. Associations of law schools must incorporate standards, expectations and measures relating to the social consciousness of students and academics and a commitment to values such as socio-economic equality, universal human rights, access to justice, ethical lawyering and the rule of law as a basic accreditation requirement for member law schools.
20. Law schools and their national and international associations need to develop self-assessment criteria and other tools to assist in demonstrating successful orientation and delivery of justice education for accreditation and other purposes. This must include templates for assessing matters, such as the adequacy of teaching of legal ethics and social responsibility, clinical and pro bono programmes, orientation and selection of academic staff and governance arrangements supportive of justice education.
21. The laws and court rules of a jurisdiction should provide for rights of appearance for appropriately supervised clinical students to assist self-represented clients who cannot afford a lawyer and who also do not qualify for publicly funded legal aid.
22. Where the interest on client funds held on trust by law firms for settlements and other purposes is officially quarantined and payable into a fund for public purposes with client consent, those purposes ought to be framed to include clinical and related support for people who cannot afford legal representation, through a combination of legal aid agencies, community legal centres and associated law school clinics.

Professional admission and employment

Next, admitting authorities can make demonstrated understanding and practical experience of pro bono legal service and other aspects of access to justice, lawyerly fidelity to the system of justice and rule of law mandatory or desirable preconditions for admission to practise as a lawyer. More particularly, those authorities can make a designated amount of poverty-related practical legal experience at university (eg, clinics, voluntary work or internships) or beyond (eg, practical legal training) an essential precondition for a law graduate being admitted to practise as a lawyer (*Practical step 23*).⁷⁸ Accrediting authorities can do the same with accreditation of law schools, within regulatory mandates set or amended accordingly (*Practical step 24*).⁷⁹

Beyond what admitting and accrediting authorities might do, an individual law school might impose a similar requirement as a matter of choice and competitive differentiation, making it compulsory for students to complete a designated amount of poverty-related study or work as a condition of graduating with their law degree (*Practical step 25*).⁸⁰ State or national associations of law schools might set their own accrediting requirements for what is necessary to be a law school and include a poverty-based focus in a variety of ways, including coverage of substantive areas of law, socio-ethical training of lawyers, clinical legal programmes, community outreach for law schools and demonstrated knowledge of lawyerly roles in poverty alleviation (*Practical step 26*).

For duly admitted lawyers, ongoing demonstrated understanding and experience after admission to legal practice in poverty-relevant law and work can be made a condition for individual lawyers of continuing to hold relevant accreditation as a legal practitioner, with individual law firms, law schools and bar associations and other professional bodies providing such continuing legal education and training (*Practical step 27*). Law firms can reinforce the work of law schools to instil a lifetime professional commitment by aspiring lawyers to access to justice and the rule of law, by making career advancement and progression to partnership at least partially dependent on a demonstrated commitment to ending poverty, inequality and injustice in the communities served by those law firms (*Practical step 28*).

National, regional and local law societies and bar associations can include familiarisation with international and national standards for lawyers relating to poverty, inequality and

78 Eg mandating designated amounts of pro bono legal service generally as a condition for admission to legal practice or more particularly in poverty-related work. Eg pursuant to Rule 520.16(a) of the *Rules of the Court of Appeals*, applicants who pass the bar examination in the State of New York must demonstrate they have performed 50 hours of qualifying pro bono service before applying for admission to practice. See *Court of Appeals: State of New York*, 'Part 520. Rules of the Court of Appeals for the Admission of Attorneys and Counsellors at Law', Court of Appeals: State of New York <http://www.nycourts.gov/ctapps/520rules10.htm#B16> accessed 4 January 2021.

79 Eg ABA *Standards of Procedure for Approval of Law Schools* 2016-2017 Standard 303(b) provides that 'a law school shall provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities'.

80 Eg Loyola University New Orleans School of Law's Law and Poverty requirement for its Juris Doctorate degree: see ABA, 'Loyola University New Orleans School of Law', ABA (6 August 2018) www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/directory/ld57 accessed 4 January 2021.

injustice – including relevant IBA standards – as much a part of their continuing professional development (CPD) programmes for their members as other areas of substantive law and practice (*Practical step 29*). The lifelong socialisation of future lawyers from ‘cradle to grave’ (ie, law school to retirement from the legal profession) therefore involves a series of intertwined and reinforcing measures in law school education and work-situated experiences, practical legal training, accreditation and admission requirements, legal career progression, CPD and leverage from governments and professional bodies, in the ways indicated and more.

Individual law firms might incorporate pro bono legal service generally or other poverty-alleviating community work in expectations or opportunities for their law graduates and other employees, through employment requirements, employee volunteering programmes, client-related secondments (including with legal clinics) and support for further education and training (*Practical step 30*). Law firms and other professional services firms might also include poverty-relevant education and training for both staff and clients as part of in-house CPD programmes, with tie-in benefits for meeting individual and organisational CPD requirements, firm-organised pro bono activities, partnering with client and community organisations and general lawyerly awareness-raising and social consciousness (*Practical step 31*).

Bar associations and law societies can waive fees for professional accreditation and membership for retired or part-time lawyers who only undertake pro bono legal work (*Practical step 32*).⁸¹ These special interest groups can also develop codes of conduct and other professional standards that reinforce poverty-alleviating employment initiatives (*Practical step 33*).⁸² Such initiatives can have recruitment, retention and reputational benefits for law firms, as well as financial benefits in jurisdictions where governments require law firms to undertake a designated amount of legal aid and pro bono work to be eligible to tender for and provide government legal services.⁸³ Indeed, governments can include eligibility

81 Eg, in Western Australia, the Legal Practice Board has agreed to make available a no-fee ‘volunteer or pro bono only’ condition for imposition on a local practicing certificate. This may incentivise lawyers to work in this area. See Legal Practice Board of Western Australia, ‘Availability of a “Volunteer or pro bono only” condition for imposition on practicing certificates’, *Legal Practice Board of Western Australia* www.lpbwa.org.au/Legal-Profession/Practising-in-Western-Australia/Volunteer-or-pro-bono-only-condition accessed 4 January 2021.

82 Eg, models for such requirements in terms of pro bono service generally also include lawyerly requirements to provide or facilitate access to justice for people who cannot afford a lawyer, as an aspect of lawyerly ‘honesty, integrity and fairness’ under the 2019 *IBA International Principles on Conduct for the Legal Profession*, n 14 above. Specifically in relation to poverty, see the commentary on the Law Society of Alberta Code of Conduct (‘As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means’) Law Society of Alberta, *Code of Conduct* (Code of Conduct, 20 February 2020) Chapter 4 Commentary 2.

83 Eg, ‘Victorian Government Legal Services Panel’, *Australian Pro Bono Centre* www.probonocentre.org.au/provide-pro-bono/government-tender-arrangements/victorian-government-legal-services-panel accessed 4 January 2021. As part of the tender process firms were required to commit a pro bono percentage of at least five per cent of the value of legal fees under the contract to pro bono work and could nominate up to 15 per cent. Furthermore, in 1995, the US-based Pro Bono Institute established the Law Firm Pro Bono Challenge® Initiative. This provided that law firms with 50 or more lawyers are eligible to become signatories to the challenge and nominate a minimum annual target of either: five per cent of the firm’s total billable hours or 100 hours per lawyer; or three per cent of the firm’s total billable hours or 60 hours per lawyer. See Pro Bono Institute, *Law Firm Pro Bono Challenge® Initiative*, <http://www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge> accessed 4 January 2021.

criteria to tender and serve on panels for delivery of governmental legal services that cover a spectrum from conventional pro bono and legal aid contributions to meaningful and innovative engagement in work that assists governments in alleviating poverty, inequality and injustice (*Practical step 34*).

Practical steps

23. Admitting authorities must make a designated amount of poverty-related practical legal experience at university (eg, clinics, voluntary work or internships) or beyond (eg, practical legal training) an essential precondition for a law graduate being admitted to practise as a lawyer.
24. Accreditation authorities must develop and implement regulatory mandates to make a designated amount of poverty-related practical legal experience at university (eg, clinics, voluntary work or internships) an essential precondition for law school accreditation.
25. An individual law school ought, as a matter of choice and competitive differentiation, make it compulsory for students to complete a designated amount of study or work related to poverty, injustice and inequality as a condition of graduating with their law degree.
26. State or national associations of law schools must set their own accrediting requirements to include a poverty-related focus. This can be achieved in a variety of ways, including: staff orientations and capabilities, coverage of substantive areas of law, socio-ethical training of lawyers, clinical legal programmes, community outreach for law schools and demonstrated knowledge of lawyerly roles in poverty alleviation.
27. For duly admitted lawyers, ongoing demonstrated understanding and experience after admission to legal practice in poverty-relevant law and work should be made a condition for individual lawyers of continuing to hold relevant accreditation as a legal practitioner, with individual law firms, law schools and bar associations and other professional bodies providing such continuing legal education and training.
28. Law firms can reinforce what law schools do to inculcate a lifetime professional commitment by aspiring lawyers to access to justice and the rule of law, by making career advancement and progression to partnership at least partially dependent on a demonstrated commitment to ending poverty, inequality and injustice in the communities served by those law firms.

29. National, regional and local law societies and bar associations must include familiarisation with international and national standards for lawyers relating to poverty, inequality and injustice – including relevant IBA standards – as a part of their CPD programmes for their members.
30. Individual law firms must incorporate pro bono legal service generally or other poverty-alleviating community work in expectations or opportunities for their law graduates and other employees. This might occur through employment requirements, employee volunteering programmes, client-related secondments (including with legal clinics) and support for further education and training.
31. Law firms and other professional services firms should also include poverty-relevant education and training for both staff and clients as part of in-house CPD programmes. This might also align with organisational benefits in meeting individual and organisational CPD requirements, firm-organised pro bono activities, partnering with client and community organisations and general lawyerly awareness-raising and social consciousness.
32. Bar associations and law societies must waive fees for professional accreditation and membership for retired or other lawyers who only or mainly undertake pro bono legal work.
33. Bar associations and law societies must develop codes of conduct and other professional standards that reinforce poverty-alleviating employment initiatives.
34. Governments must include eligibility criteria for law firms to tender and serve on panels for delivery of government legal services that promote lawyerly commitment to the public interests in addressing poverty, injustice and inequality. Those criteria can cover a spectrum from conventional pro bono and legal aid contributions to meaningful and innovative engagement in work that assists governments in alleviating poverty, inequality and injustice.

Organisational partnering and collaboration

Law schools can develop or join partnering, sponsorship, philanthropic and other collaborative arrangements to address poverty locally, nationally and globally, in the fulfilment of the educational, research and external engagement activities of the legal academy (*Practical step 35*). Multi-stakeholder initiatives aimed at improving access to justice can attract state support and include representatives from various branches of the legal profession, thereby encouraging and facilitating the involvement of law schools and their constituencies in such initiatives (*Practical step 36*).⁸⁴

The IBA already leads the way in recognising what various strands of the legal profession,

including law schools, can do together and at scale in core areas of poverty-sensitive legal work. For example, the 2008 *IBA Pro Bono Declaration* recognises the importance of ‘collaborations among bar associations, private and public interest law firms, *law schools*, foundations and other non-governmental organisations’ in providing pro bono legal services to improve access to justice, ‘especially [for] the poor, underprivileged and marginalised’.⁸⁵ A collaborative model that works in the community legal services context with which we are most familiar and which our law school has shared with interested academic and judicial delegations from other countries for their local communities, is as follows.

Local access to justice can and should embrace government-supported engagement between law schools, the legal profession and communities. A law school and its legal clinics can work hand in hand with the judiciary, legal profession, other CLCs and community bodies to provide free legal information, advice and representation locally, bolstered by relationships between those parties that facilitate student court appearances, professional supervision and volunteering of expertise (*Practical step 37*). Beyond court-focused legal and information services, other collaborations are possible between law schools and legal units across the public, private and NGO sectors, in the form of placements (including student internships, externships and voluntary work), clinics and partnered projects with a focus on providing support and services to people subjected to poverty, inequality and injustice (*Practical step 38*).

Standard-setting, monitoring and framework-building are important activities in holding government, business and professional advisers to account. The public goods of policy development, law-making and law reform to poverty-ending effect are influenced through public reason, advocacy and thought leadership – activities in which the legal academy and other branches of the legal profession have crucial networking, collaborative and influencing roles to play, alone or with others from multiple disciplinary and professional backgrounds beyond law (*Practical step 39*).

Many such collaborations have great potential to achieve success in addressing major challenges of poverty, inequality and injustice, through engagement with major international standards and cross-sectoral coalitions. Governments, businesses and those who advise them professionally all have roles to play, for example, in joining together to help the world achieve results under the SDGs in both developed and developing countries. Academics can become involved in research, consultancy and monitoring projects that flow from the innovative use of market mechanisms such as social bonds to achieve improvements in the conditions and opportunities for poor communities, aligned with goals and indicators under the SDGs (*Practical step 40*).⁸⁶

The significance of theory-building, framework-setting, multi-stakeholder coalitions and resulting policy and legal change in ending poverty are evident from even a cursory glance at some of the major SDGs on poverty, education, equality and justice and the potential

⁸⁵ IBA, *IBA Pro Bono Declaration*, n 13 above, 3 [emphasis author’s own].

⁸⁶ Pellizzari and Lecuyer, n 58 above; International Capital Markets Association, *The Social Bond Principles* (Report, June 2017); BMO Capital Markets, *Social and Sustainability Bonds Help Combat Effects of COVID-19* (Report, April 2020).

interactions between them, as follows:

‘Goal 1. End poverty in all its forms everywhere

By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day

By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions

...

1.b Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions

Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all

...

4.3 By 2030, ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university

...

4.b By 2020, substantially expand globally the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, for enrolment in higher education ...

Goal 5. Achieve gender equality and empower all women and girls

5.1 End all forms of discrimination against all women and girls everywhere

...

5.c Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels

...

Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

...

16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all

...

16.10 ... (P)rotect fundamental freedoms, in accordance with national

legislation and international agreements

At the individual level, legal academics and students might join and contribute to a range of collaborative initiatives with others in the legal profession and beyond to achieve better equality and justice for society's most impoverished and disadvantaged members (*Practical step 41*). They might become active members of IBA, a law society, bar association and associated young lawyer committees whose areas of interest and public submissions relate to poverty. They might undertake a placement or secondment with an NGO or other organisation focused on relieving poverty and disadvantage. They might collaborate with others inside and beyond universities in multiparty public submissions to public inquiries, law reform referrals, legislative reform consultations, policy-setting proposals and other standard-setting initiatives.

Practical steps

35. Law schools should develop or join partnering, sponsorship, philanthropic and other collaborative arrangements to address poverty locally, nationally and globally, in fulfilment of the educational, research and external engagement activities of the legal academy.
36. Multi-stakeholder initiatives aimed at improving access to justice can attract state support and include representatives from various branches of the legal profession, thereby encouraging and facilitating the involvement of law schools and their constituencies in such initiatives.
37. A law school and its legal clinics ought to work hand in hand with the judiciary, legal profession, other community legal centres and community bodies to provide free legal information, advice and representation locally, bolstered by relationships between those parties that facilitate student court appearances, professional supervision and volunteering of expertise.
38. Beyond court-focused legal and information services, law schools and legal units across the public, private and NGO sectors should collaborate in the form of placements (including student internships, externships and voluntary work), clinics and partnered projects with a focus on providing support and services to people subjected to poverty, inequality and injustice.
39. The legal academy and other branches of the legal profession have crucial networking, collaborative and influencing roles to play, alone or with others from multiple disciplinary and professional backgrounds beyond law, in the public reason, advocacy and thought leadership which influences policy-development, law-making and law reform to poverty-ending effect.

40. Governments, business and academics have roles to play in joining together to help the world to achieve results under the SDGs in both developed and developing countries. This can be through research, consultancy and monitoring projects that flow from the innovative use of market mechanisms such as social bonds to achieve improvements in the conditions and opportunities for poor communities, aligned with goals and indicators under the SDGs.
41. Legal academics and students should join and contribute to a range of collaborative initiatives with others in the legal profession to achieve better equality and justice for society's most impoverished and disadvantaged members. Such activities can include professional body memberships, collaborative public submissions and NGO placements or secondments.

Institutional strategy and planning

Most law schools across the world operate within internal university and external higher education sectoral systems, in addition to their coextensive operation within systems of professional accreditation and admission to legal practice, all embedded within societal expectations of universities and law schools. Law school strategy, planning, decision-making and resourcing is therefore aligned with and subject to broader institutional directions and parameters. Academic work within a law school commonly covers education (including experiential and executive education), research (of both fundable and non-fundable types) and engagement (ie, both internal service and leadership, as well as external engagement and contribution of academic expertise to a wide variety of professional and societal stakeholders).

Therefore, the connection between law schools and poverty is not something that can or should be confined to only one dimension (eg, education), in the abstract (eg, a list of readings in a suitable subject) and at the margins (eg, a non-mandatory poverty elective or clinic). It is a vital aspect of constructing the social consciousness, justice orientations, professional identities, cognitive abilities and transferable knowledge and skills of law graduates, as agents in achieving social justice through a variety of legal and non-legal roles in society.⁸⁷ In addition, the connection between law schools and poverty is an equally crucial relationship in achieving the types of theory-building, evidence-based research, multi-stakeholder coalitions and movements,⁸⁸ and public advocacy and thought leadership that are needed to inform policy and legal changes in meaningfully addressing societal inequality and injustice.

Universities and other branches of the legal profession must ensure that they meaningfully support and do not take for granted the largely unfunded *and* impossible-to-fund academic research involved in research, advocacy and 'watchdog' activities that contribute to the public goods of law-making, law reform and legal policy development, with the empowerment of poor people and the ending of poverty as their objective (*Practical step*

42). For clarity, this means that universities and their law schools should properly value *and* resource both funded and impossible-to-fund research that contributes to such public goods in poverty-related fields of academic work, not least because of the societal and professional expectations of law schools and the ensuing benefits of such work for a law school's community, formal accreditation, professional standing, external engagement and graduate employability.⁸⁹⁹¹

On the broad view outlined above of the connection between law schools and poverty, law schools can and should mainstream a focus on poverty holistically in their law school missions, strategic planning and operations. In doing so, law schools must prioritise a deep focus on poverty, inequality and injustice in course curricula requirements, experiential learning and volunteering opportunities, year-by-year knowledge and skills training, required graduate attributes, formative and summative assessment requirements, student research topic options, academic research projects and cross-disciplinary collaborations, academic workforce capability profiling and development, organisational and institutional (eg, university-to-university) partnering initiatives, sponsorship and philanthropic proposals and CLE (*Practical step 43*). This does not mean that all law schools must incorporate a focus on poverty in all of these things and to a requisite level in each of them, but only that a whole-of-institution commitment to examining and taking action on poverty and associated inequality and injustice requires a multifaceted approach across various related domains of law school, university and external activity.

Practical steps

42. Universities and other branches of the legal profession must ensure that they meaningfully support and do not take for granted the largely unfunded and impossible-to-fund academic research involved in research, advocacy and 'watchdog' activities that contribute to the public goods of law-making, law reform and legal policy development, with the empowerment of poor people and the ending of poverty as their objective.
43. Law schools must mainstream a focus on poverty holistically in their law school missions, strategies and course curricula requirements. This holistic approach can be embedded within experiential learning and volunteering opportunities, year-by-year knowledge and skills training, required graduate attributes, formative and summative assessment requirements, student research topic options, academic research projects and cross-disciplinary collaborations, academic workforce capability profiling and development, organisational and institutional (eg, university-to-university) partnering initiatives, sponsorship and philanthropic proposals and CLE.

Academic orientation and capability

Poor people are not just like rich people without money. Poor people do not have legal

problems like those of the private plaintiffs and defendants in law school casebooks [...] Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms [...] Poverty creates an abrasive interference with society; poor people are always bumping into sharp legal things. The [conventional] law school model of personal legal problems, of solving them and returning the client to the smooth and orderly world in television advertisements, doesn't apply to poor people.

Additions to the law school curriculum like 'Law and the Poor' serve a useful function by making it crystal clear that the remainder of the curriculum deals with law and the rich; they do little, however, to change the law schools' treatment of legal problems, or their perception of the proper roles and concerns of a lawyer.⁹⁰

Stephen Wexler,
Practising Law for Poor People

No law school in the world has academic staff who are all equally proficient in the integration of multi disciplinary insights, legal theory, substantive law, legal practice, clinical expertise, professional orientation *and* social consciousness about poverty that would be ideal in teaching, researching and otherwise doing something meaningful about it. The impossibility of achieving that ideal provides no justifiable excuse for the impoverished state of much legal education being largely careerist rather than justice-focused in its outlook. Nor does it make it acceptable for any law school to pay lip service to a concern for education and action about inequality, injustice and poverty only through selective exposure to elective subjects or clinics on such topics, passing reference (if any) to them in the readings and emphasis of compulsory subjects in the curriculum and abstract law school mission statements about equity, social inclusion and social justice.

For law school management, equipping the legal academy with the right balance of staff to do something meaningful about poverty and related issues of inequality and injustice is a matter of staff orientation and capability, which translates into strategies and actions on workforce profiling and planning, academic workforce retention and recruitment, academic development and career progression, institutional employment categories and roles and two-way secondment and lateral career-change opportunities (*Practical step 44*). As with individual law schools, individual academics cannot be all things to all people, so they cannot all reasonably be expected to become simultaneously the best academic teacher, published scholar, research grant-winner, doctoral thesis supervisor, law school leader, good university citizen, social media star, professionally respected expert and community engager in their field, even a poverty-related one.

By the same token, it should not be left entirely to the individual and unbounded discretion of every academic whether or not to include in what they *do* teach, what they *might* research and how they *could* engage externally a basic level of sensitivity to how law and

90 Stephen Wexler, 'Practising Law for Poor People' (1970) 79 Yale Law Journal 1049, 1049–1050.

regulation in their chosen field(s) of legal expertise improve, worsen or even simply interact with endemic poverty, structural inequality, systemic injustice, long-term disadvantage and social prosperity and well being. Mastery of theory and substantive law can be achieved at too high a price if it comes without any or enough attention in a legal curriculum and work-integrated immersive student experiences to poverty, injustice and inequality and the legal orientations, outlooks and skills needed to solve them. All of this must be approached in an integrated way and from a whole-of-institution perspective.

The rehabilitation of law school orientations and capabilities to create a basic level of poverty literacy *and* interest among its academic cohort as a whole can be achieved in a number of ways, beyond the basic options of poverty-focused electives, clinics and discretionary research projects, which carry their own risks (if not handled well) of simply reinforcing the marginalisation of poverty in legal education.⁹¹ Law schools can attract and retain world-class academic experts in areas of poverty, injustice and inequality through prestigious named professorial chairs, senior professorial and adjunct positions, research centres and programme areas, academic fellowships and visiting positions and PhD scholarships (*Practical step 45*).

The way that academics design and teach fundamental legal skills to first-year law students can be broadened to include orientations about access to justice and the broader socio-ethical (and poverty-affecting) dimensions of law, in tools for student understanding of legal problem-solving, legislative scrutiny and interpretation, legal policy development and reform and legal research and advocacy (*Practical step 46*). For example, legal problem-solving approaches that structure students' understanding through step-by-step templates that cover relevant areas, issues, propositions and applications of substantive law to client-focused advice can usefully be broadened to include reference as well to the legal outcome's socio-economic context and consequences for the litigating parties and broader consequences for the system of justice and administration as a whole, given the variety of work-situated legal advisory roles and other careers in which law graduates might encounter such topics in their work.

All of this 're-tooling for justice' depends on law schools selecting future academic staff with attributes that go beyond the expected intellectual capacity and technical proficiency and who are responsibly focused on recognising and conveying these multi faceted dimensions of justice and their impacts on poverty. Some of these attributes include positive views on the worth of *pro bono publico* as a professional responsibility, personal track records of pro bono activity, normative as opposed to positivist views⁹² about the purposes of law, awareness of pedagogical debates concerning competing ethical frameworks (especially, in this Asian century, those derived from Confucian and Daoist traditions) and indeed, genuine respect for diverse cultures, gender exploitation and emotional

91 *Ibid*, 1050.

92 Adrian Evans, *The Good Lawyer* (Cambridge University Press 2014); Douglas O Linder and Nancy Levit, *The Good Lawyer: Seeking Quality in the Practice of Law* (Oxford University Press 2014); Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press 2013); Stolker, n 54 above.

intelligence as baseline indicators of balanced personalities (*Practical step 47*).⁹³ Legal, technological, financial, cultural and socio-ethical literacies become core intertwined literacies in producing law graduates who have the orientations, capabilities and ideals to do something that makes a real difference on poverty, inequality and injustice.

Practical steps

44. Law school management should equip the legal academy with the right balance of staff to substantially contribute to poverty and related issues of inequality and injustice. In practice, this translates into strategies and actions on workforce profiling and planning, academic workforce retention and recruitment, academic development and career progression, institutional employment categories and roles and two-way secondment and lateral career-change opportunities.
45. Law schools ought to attract and retain world-class academic experts in areas of poverty, injustice and inequality through prestigious named professorial chairs, senior professorial and adjunct positions, research centres and programme areas, academic fellowships and visiting positions and PhD scholarships.
46. Academics must teach fundamental legal skills to first-year law students more broadly to include orientations about access to justice and the broader socio-ethical dimensions of law (eg, basic legal problem-solving approaches that structure students' understanding through step-by-step templates).
47. Law schools should balance their overall academic workforce profiles to select and train academic staff with attributes that go beyond intellectual capacity and technical proficiency in particular disciplinary fields of knowledge, to include interest and proficiency in broader matters such as justice education and the socio-ethical roles and responsibilities of lawyers, reinforced by personal track records of pro bono activity.

Legal scholarship and advocacy

As law and poverty are linked on many levels, legal research and scholarship within universities can and should focus on poverty from a range of theoretical, doctrinal, evidence-based, practical, cross-disciplinary, policy-making and law reform-orientated perspectives. In the legal academy, poverty-focused research and scholarship is diverse, ranging from books traversing different aspects of poverty law, social policy and legal practice,⁹⁴ to articles and papers covering discrete issues as various as the practice of law in serving poor people as

⁹³ See n 55 above, Appendix 3.

⁹⁴ Eg, Juliet M Brodie et al, *Poverty Law, Policy and Practice* (Wolters Kluwer 2014).

clients,⁹⁵ cross-institutional initiatives on poverty and legal education,⁹⁶ curricular integration of poverty law and work-situated roles of lawyers,⁹⁷ systemic legal institutional reform and access to justice for poor people,⁹⁸ theory-building about poverty law and its associated social mobilisation,⁹⁹ and legal clinics based on poverty concerns.¹⁰⁰

Universities and law schools have several institutional levers to prioritise, coordinate and support such research and at sufficient collaborative mass and scale to have a meaningful impact of society. The broader ecosystem for universities and research by the legal academy includes state funding and regulation,¹⁰¹ professional accreditation of university courses and employment of law graduates, public research funding agencies and their research priorities,¹⁰² contracted and philanthropically supported research projects, industry-supported PhD scholarships and academic fellowships and law school partnerships and sponsorships.¹⁰³

Accordingly, a series of public, professional, community and university mechanisms can be aligned to elevate attention to poverty and galvanise impactful research to bring it to an end, through mechanisms such as funded academic and PhD-based poverty research projects, sponsored professorial chairs and other fellowships in poverty law, legal clinics dedicated to public interest research and advocacy on poverty, prioritising poverty research in setting public and philanthropic research priorities and encouraging cross-institutional networks of research excellence that make poverty research a key pillar of associated research and educational programmes (*Practical step 48*).¹⁰⁴

Legal academics also make important contributions to the public goods of policy development, law-making and law reform through contributions to public reason, advocacy and thought leadership. CLCs and clinical programmes associated with law schools

95 See n 90 above.

96 Howard S Erlanger and Gabrielle Lessard, 'Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress' (1993) 43(2) *Journal of Legal Education* 199.

97 Snow, n 84 above; Marie A Fallinger, 'A home of its own: The Role of Poverty Law in furthering Law Schools' Mission' (2007) 34(4) *Fordham Urban Law Journal* 1173.

98 Ronald Sackville, 'Law and Poverty: A Paradox' (2018) 41(1) *UNSW Law Journal* 80.

99 Loffredo, n 88 above; Edgar Cahn, 'Reinventing Poverty Law' (1994) 103 *Yale Law Journal* 2133; Anthony V Alfieri, 'The Antinomies of Poverty Law and a Theory of Dialogic Empowerment' (1987) 16 *New York University Review of Law and Social Change* 659.

100 Philip F Iya, 'Fighting Africa's poverty and ignorance through clinical legal education: Shared experiences with new initiatives for the 21st century' (2000) 1 *International Journal of Clinical Legal Education* 13; Margaret Barry, 'Clinical Legal Education in the Law University: Goals and Challenges' (2007) 11 *International Journal of Clinical Legal Education* 27; Horrigan, n 43 above; Loffredo, n 88 above.

101 Many universities have governing statutes, enacted by the jurisdiction in which they operate and some depend in part on public funding for their activities.

102 Many national and transnational research funding agencies fund academic research across disciplines and have identified priority areas of need.

103 The legal academy receives financial and in-kind support by other areas of the legal profession in a variety of ways, including support for academic projects, positions and partnering.

104 In the US, eg, see the Interuniversity Consortium on Poverty Law, established with Ford Foundation funding support, as discussed in see n 96 above, 199 and the networked initiatives with philanthropic, professional, NGO, or international institutional support in Russian, European and other countries in both northern and southern hemispheres, as discussed in Stephen Golub, *Forging the Future: Engaging Law Students and Young Lawyers in Public Service, Human Rights and Poverty Alleviation* (Open Society Justice Initiative Issues Paper, January 2004) 5–8.

characteristically engage in research-based advocacy in the interest of their poor, vulnerable and disadvantaged clients, including public submissions and reports to inform future policy and laws (*Practical step 49*). Law societies and bar associations contribute to the public interest through their committees and members also engaging in public submissions and advocacy to similar effect, in exposing gaps and offering solutions on law's treatment of poverty, inequality and injustice, often in conjunction with law school collaborators (*Practical step 50*).

In many countries, the old position for scholars in the legal academy was one in which the audiences for their published research were largely other academics in their field(s). Their external engagement was pursued largely through academic collaborations, networks and conferences and their impact was viewed mainly in terms of their academic contribution and standing to the body of knowledge in their field(s). In other words, the excellence of their research was assessed in terms of the quality of their research, as judged almost exclusively by academic peers.

The new world for legal scholars is one in which there are multiple audiences, users and beneficiaries for their research-based scholarship, thought leadership and advocacy. Like all academics, legal academics strive to do research that matters to and for somebody. Their research excellence translates into transfer of legal knowledge and expertise through legal training, engagement and impact, alone and with others. Bringing individual and collective research-based academic legal expertise to bear on global problems of poverty, inequality and injustice is now more necessary, technologically enabled, network-assisted, framework-assisted and valued by more audiences than ever before.

Practical steps

48. Public, professional, community and university mechanisms ought to be aligned to elevate attention to poverty and galvanise impactful research to bring it to an end, through mechanisms such as funded academic and PhD-based poverty research projects, sponsored professorial chairs, legal clinics dedicated to public interest research and advocacy on poverty and by encouraging cross-institutional networks of research excellence that make poverty research a key pillar of associated research and educational programmes.
49. Community legal centres and clinical programmes associated with law schools should engage in research-based advocacy in the interests of their poor, vulnerable and disadvantaged clients, including public submissions and reports to inform future policy and laws.
50. Law societies and bar associations must contribute to the public interest through their committees and members engaging in public submissions and advocacy to expose gaps and offer solutions on law's treatment of poverty, inequality and injustice. Legal academics, students and alumni can become involved through such mechanisms in supporting and achieving those aims.

Legal engagement and impact

In the 21st century, one of the key ways in which law schools and their constituencies can translate their research-based expertise and other involvement into meaningful mass action at scale on poverty, injustice and inequality is through participation in national and global multi-stakeholder coalitions and standard-setting initiatives. They can do so either directly as participants within networks engaged in developing such initiatives, or indirectly through creating individual and collaborative research projects focused on them (*Practical step 51*).

Once again, a number of UN and IBA standards provide suitable examples. In particular, the legal profession's representative bodies, including the IBA globally as well as national and regional professional representative bodies such as law societies and bar associations, whether alone or in tandem with other transnational institutions (eg, the UN) and norms (eg, SDGs), might engage in various forms of multi-stakeholder coalitions and standard-setting mechanisms with solutions to poverty as their focus. In particular, the UNGPs and SDGs are rich with untested potential for transnational networks and projects involving several partners (including law schools) on poverty-focused study and work, especially in developing measures and sharing good practice in meeting their aspirations.

A strong connecting thread exists between law, poverty, the SDGs and involvement of the legal academy, for example. Poverty is directly relevant (eg, SDG 1) or indirectly relevant (eg, SDGs 2, 6, 8, 10, 13 and 16) to a number of the SDGs. Partnerships across public, private and community sectors in both developing and developing economies (ie, SDG 17)

can involve law schools collaborating with other organisations from the legal profession and elsewhere in combatting poverty (*Practical step 52*).

To take another example, the IBA's 2020 *Climate Crisis Statement* is a high-profile global initiative that implicates climate change, poverty, law schools and other branches of the legal profession. Its preamble specifically mentions and links climate change and poverty, in at least two specific instances by:

'Acknowledging the impact of climate change and the current climate crisis on the world's inhabitants and its natural environment and its disproportionately negative impact on all living creatures, but especially the poor and those who have contributed least to it, most notably those living in developing countries;
[and]

Accepting that failure to address the challenges posed by the climate crisis already has and will have even more devastating consequences, including social, security and human rights impacts, for billions around the world – irrespective of nationality, wealth, or education – and particularly the world's most vulnerable.

Various resolutions of the IBA *Climate Crisis Statement* also directly or indirectly implicate poverty and law and therefore what law schools might do to tackle poverty. For example, Resolution 1 encourages lawyers to facilitate corporate client disclosures of climate risks that might affect a business's supply and distribution chain to relevant official or stakeholder bodies. Both the subjects and objects of that disclosure can contemplate poor people and communities who, in one way or another, are affected by a company's operations. It also 'urges lawyers [...] to consider [...] engaging in climate dispute resolution generally (including mediation, negotiation or litigation) and specifically on a pro-bono, volunteer or reduced fee basis, for those negatively affected by the climate crisis'. Poor people and communities can be the beneficiaries of such actions. This resolution is consistent with growing transnational legal awareness of the necessity for corporate boardrooms to address and manage climate changes risks, disclosures and stakeholder (including shareholder) engagement, under pain of breaching directors' duties and other non-compliance under corporate law.¹⁰⁵

Resolution 2 calls on lawyers to engage with policy-making and law-making processes aimed at addressing the global climate crisis and in so doing to be conscious of measures 'to address future risk to populations that are, or potentially could be, vulnerable to the devastating effects of the climate crisis'. Resolution 3 specifically brings into play lawyerly awareness and support of relevant SDG goals, including those that directly or indirectly relate to poverty.

105 Noel Hutley and Sebastian Hartford Davis, *Climate Change and Directors' Duties* (Memorandum of Opinion, 7 October 2016); Noel Hutley and Sebastian Hartford Davis, *Climate Change and Directors' Duties* (Supplementary Memorandum of Opinion, 26 March 2019); as discussed in Lord Sales, 'Directors' Duties and Climate Change: Keeping Pace With Environmental Challenges' (Speech, Anglo-Australasian Law Society, 27 August 2019).

Finally, in an endorsement of multi-stakeholder partnering across the various branches of the legal profession (explicitly mentioning law schools), all collaborating and working together at scale for the greater common good, the first part of Resolution 4 states:

‘The IBA recommends that bar associations, law societies and similar bodies around the world each consider:

Engaging with law students and schools concerning education on legal elements of the climate crisis and its impact on human rights; [...]’

Each of those resolutions, culminating in the last one, takes a step towards identifying and acting on the connections between poverty, climate change, human rights and lawyers – including law schools and their constituencies. In addition, the bolstering of the IBA’s *Climate Crisis Statement* by associated initiatives such as the IBA Climate Change Justice and Human Rights Task Force’s *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change*¹⁰⁶ creates new mechanisms for lawyers to hold governments to account for action or inaction on climate change that worsens the position of poor people within their jurisdictions.

Law schools and their constituencies can become involved in action based on such frameworks and standards in various ways, beyond participating in their genesis or subjecting

and standard-setting initiatives (eg, IBA and UN standards), either directly as participants within networks engaged in developing such initiatives, or indirectly through creating individual and collaborative research projects focused on them.

52. Law schools must collaborate with other organisations from the legal profession and elsewhere across public, private and community sectors in both developed and developing economies to combat poverty, injustice and inequality, especially in pursuit of a number of the SDGs.

53. Legal clinics associated with law schools should conduct strategic litigation in attempts to compel remedial climate action, sometimes joining forces with relevant research centres and external partners, to advance the cause of poor communities and countries who are severely affected by climate inaction from government and industry.

Legal education and ethics

A law school course in law and poverty must address the historic, economic, social and political context of poverty, as well as the role that law has played and continues to play

106 IBA Climate Change Justice and Human Rights Task Force, *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change* (Report, February 2020).

107 A nascent network of law school clinics focussed on climate litigation is getting under way in several jurisdictions, principally the US, UK and Australia. See, eg, the Monash Climate Justice Clinic, at ‘Law4803 Clinical Placement/Law4811 In House Placement’, *Monash University* www.monash.edu/law/home/cle/clinical-placement-offerings accessed 4 January 2021.

*in promoting, protecting and increasing economic inequality. To accomplish this in the modern law school requires teaching materials substantially different from the standard law school casebooks currently in use in most law school courses.*¹⁰⁸¹¹⁰

Stephen Wizner,
Book Review: Poverty Law, Policy and Practice

Legal scholars reinforce the idea that sensitivity and expertise in poverty law are integral and not simply optional parts of law school curricula and extracurricular experiences.¹⁰⁹ More broadly, law schools can and should expose law students to a wide range of careers and work-situated roles in those careers that involve doing something about poverty, as citizens, legal practitioners, community leaders, institutional advocates and partners in poverty-ending initiatives (*Practical step 54*).¹¹⁰ Curricular exposure for students to poverty and its causes and effects through a suitably contextualised legal lens can include:

- studying the structural inequalities that exacerbate poverty in foundation-year programmes about legal and justice systems;
- including poverty-sensitive coverage and work-situated roles in study of substantive areas of law (eg, the non-neutral design and impact of taxation, property, corporate and criminal law on poor people);
- introducing students to the panoply of ‘hard law’, ‘soft law’ and other regulatory mechanisms and standard-setting initiatives in the 21st century that relate to connections between law, poverty and both pro bono and client-related work;
- designing and promoting specific subjects with poverty, inequality, injustice and law as their direct focus;¹¹¹
- providing work-integrated, co-curricular and extracurricular student experiences of the realities and needs of marginalised and poor communities and opportunities alone and with partner organisations to empower those communities, whether through legal clinics, placements, voluntary work, partnering programmes, sponsored or philanthropic initiatives, case studies, personal story-telling or otherwise;
- exposing students to simulated conflicts between consequentialist, Kantian, virtue-based and Confucian approaches to resolving arguments around policy priorities in transactional law, as between the interests of capital and human rights, in the interests of developing a habituated lawyer conscience around alleviating poverty, inequality and injustice; and
- regularly self-assessing whether the law school’s own teaching programmes are delivering a balanced education on ethics and social responsibility, having regard to a range of measurable criteria.¹¹² (*Practical steps 55 to 61*).

108 Stephen Wizner, ‘Book Review: Poverty Law, Policy and Practice’ (2015) 22 Georgetown Journal on Poverty Law & Policy 441, 444.

109 Eg, Fallinger, n 99 above.

110 *Ibid.*

111 Eg, Stanford University, n 71 above.

112 See n 55 above, Appendix 1.

Yet, law schools face multiple and interconnected challenges in making their educational design, delivery and student experiences inclusive of understanding and action on poverty and associated factors. One hurdle lies in incorporating and prioritising them in legal education, in competition with competing needs in compliance with sectoral, university and professional accreditation requirements. A second hurdle looms in orientating and equipping law school academic staff with what is required to make poverty a core focus of legal education, which goes against the grain of much conventional legal academic training and practice.¹¹³

‘A traditional law school curriculum can effectively extinguish students’ fire in the belly for social justice. Although many schools now offer pro bono and clinic opportunities, these curricular realignments do not ensure that every law student receives sufficient training in representing low-income clients, just as they would receive preparation in legal writing, contracts, torts, or criminal law. Instead, schools promote social justice as something tangential to practising law, creating a hidden curriculum – a curriculum that minimises lawyers’ ethical duty to address the access-to-justice crisis.’

Law schools must find a way to overcome that second hurdle, within the constraints of their accreditation, missions, resourcing and staff profile and capabilities. Although the reality facing even the best law schools, as outlined earlier, is that no single law school and no individual legal academic is simultaneously expert and experienced in all of the dimensions of legal theory, substantive law, CLE, legal practice, personal qualities, cross-disciplinarity and socio-ethical awareness that are desirable in an academy of world-class legal educators as a whole, we can approach these targets by selecting for as many of these skills and attributes as possible in all new teaching staff (*Practical step 62*).

A third hurdle arises in the socialisation of both the legal profession and law graduates to the importance of justice education and meaningfully improving access to justice for those people most in need of it. Unless attention to poverty in legal education, practical legal training and CPD for lawyers is actively addressed as a matter of lifelong education for lawyers, it can easily be marginalised or lost through pressures from the globalisation of the legal profession, disruptive influence of technology and pandemics on legal services and perennial demand for legal education to be practical, relevant and capable of producing work-ready lawyers for transactional legal practice. It is therefore both axiomatic and just as easily downplayed by academic curriculum and recruitment committees, that the socio-ethical socialisation of law students and legal practitioners alike with a poverty-sensitive professionalism, values-set and sense of justice is as important in 21st century lawyering as technical, technological and other literacies.

In *Tomorrow’s Lawyers*, legal futurologist Richard Susskind contrasts yesterday’s and tomorrow’s law students and graduates as follows:¹¹⁴

113 Snow, n 84 above, 643.

114 Susskind, n 67 above, 162.

‘Are we schooling aspiring lawyers to become traditional one-to-one, solo, bespoke, face-to-face, consultative advisers who specialise in the black-letter law of individual jurisdictions and who charge by the hour? Or are we preparing the next generation of lawyers to be more flexible, team-based, technologically-sophisticated, commercially astute, hybrid professionals, who are able to transcend legal and professional boundaries and speak the language of the boardroom [...]? My fear, in short, is that we are training young lawyers to become 20th-century lawyers and not 21st-century lawyers.’

While we do not suggest that Susskind means to exclude or deprioritise an ethic of justice for law students, in short our fear is that such a binary distinction, framed simply as a contrast between traditional – one might almost say ‘neoliberal’ – legal education and a future for legal education that is more professionally and technologically forward-looking, carries particular risks. It is missing something without an additional and equally important dimension of future lawyering being made equally explicit and given equal priority with the other dimensions – namely, the socio-ethical grounding of law students as future lawyers who understand and work to achieve justice in all of its dimensions, whatever their ultimate career choice and trajectory.

Moreover, if we do not give equal and balanced priority to a technical, technological *and* socio-ethical grounding for the lawyers of the future, with everything that such a tripartite focus really requires of legal education and training, our view is that we shall risk failing to produce what the world needs from legally qualified professionals to deal with a century that has already seen what a global financial crisis, worldwide pandemic, climate emergency and resulting systemic ethical failures and sectoral shut-downs can do around the globe. And this says nothing at all about global political challenges within and beyond Western democracy that are also emerging.

In terms of the content of a poverty-inclusive legal curriculum, the literature affirms the multi dimensional nature of the relationship between law and poverty. Law can remedy or exacerbate structural inequality, injustice and poverty. At the same time, most (if not all) areas of law and work-situated roles for lawyers can be taught with a view to poverty, not least because all legal instruments, documents and precedents must affirm and reinforce some values and interests over others – in many cases, the values of those who have the power and resources to shape and use law in protecting their interests to the maximum and often at the expense of those with less influence and wealth. As we discussed above, a new level of consciousness needs to be reached in law schools’ workforce profiling and recruitment planning, to prioritise selection of new academic staff with demonstrable socio-ethical awareness and capability to deliver justice education (refer to *Practical step 63*).

A final obstacle relates to the diversity of a law school’s student profile and the barriers to opportunities for students from poor communities to attend and remain at law school. Equity and hardship scholarships for commendable students are only part of the necessary mix of measures and need support from sponsorships, donations and philanthropy. Nor are such scholarships needed only to support students from the locality or country in which a law

school operates, given the importance of providing equivalent opportunities for advancement through tertiary education to students from developing countries, as recognised in the SDGs (eg, SDG 4). Creating opportunities for law students in impoverished circumstances to have better lives and careers through equal access to tertiary education requires law schools to play their part in removing barriers to access and providing scholarships and other support which targets worthy candidates from poor local and overseas communities (*Practical step 64*). Law schools need to be assisted in such endeavours by their host universities, alumni and community philanthropy and the legal profession at large.

Practical steps

54. Law schools can and should expose law students to a wide range of careers and work-situated roles in those careers that involve doing something about poverty, as citizens, legal practitioners, community leaders, institutional advocates and partners in poverty-ending initiatives.
55. Law schools must expose law students to the structural inequalities and injustices that exacerbate poverty in foundation-year programmes about legal and justice systems, reinforced by capstone programmes in later years of study.
56. Law schools must include poverty-sensitive coverage and work-situated roles in study of substantive areas of law (eg, the non-neutral design and impact of taxation, property, corporate and criminal laws on poor people).
57. Law schools should introduce students to the panoply of 'hard law', 'soft law' and other regulatory mechanisms and standard-setting initiatives in the 21st century that relate to connections between law, poverty and both pro bono and client-related work.
58. Law schools must design and promote specific subjects with poverty, inequality, injustice and law as their direct focus.
59. Law schools should provide work-integrated, co-curricular and extracurricular student experiences that demonstrate the realities and needs of marginalised and poor communities. This can involve partnership opportunities to empower those communities through legal clinics, placements, voluntary work, partnering programmes, sponsored or philanthropic initiatives, case studies, personal storytelling or otherwise.
60. Law schools must expose students to simulated conflicts between consequentialist, Kantian, virtue-based and Confucian approaches to resolving arguments around policy priorities in transactional law and as between the interests of capital and human rights, with the intention of developing a habituated lawyer conscience around alleviating poverty, inequality and injustice.

61. Law schools must regularly self-assess whether their own teaching programmes are delivering a balanced education on lawyerly ethics and social responsibility, having regard to a range of measurable criteria.
62. While no single law school is simultaneously expert and experienced in all of the dimensions of legal theory, substantive law, CLE, legal practice, personal qualities, cross-disciplinarity and socio-ethical awareness that are desirable in an academy of world-class legal educators as a whole, law schools can approach these targets by selecting for as many of these skills and attributes as possible in all new teaching staff.
63. A new level of consciousness needs to be reached in law schools' workforce profiling and recruitment planning, to prioritise selection of new academic staff with demonstrable socio-ethical awareness and capability to deliver justice education.
64. Law schools and universities should promote equal access to tertiary education by removing barriers to access and providing scholarships and other support which targets worthy candidates from poor local and overseas communities.

Part 3

Legal clinics and placements

*A growing array of research demonstrates that legal services for disadvantaged populations contribute to the rule of law, good governance, human rights, empowerment of the poor and poverty alleviation. Yet the development and human rights communities pay insufficient heed to a cost-effective set of tools for forging the future of legal services and legal systems across the globe: CLE and similarly oriented efforts to engage law students and young lawyers in public service.*¹¹⁵

Stephen Golub,
*Forging the Future: Engaging Law Students and Young Lawyers in Public Service,
Human Rights and Poverty Alleviation*

It is strange that by and large, the broad development and global human rights communities have not realised the enormous potential of clinical legal methodologies to make a substantial difference to worldwide poverty.¹¹⁶ To the extent that CLE does generally assert the priority of fairness over wealth creation and accretion, it is fundamentally transformative

¹¹⁵ Golub, n 104 above, 1.

¹¹⁶ The *Global Alliance for Justice Education* (GAJE) is a network of law teachers, lawyers and law students who have made poverty eradication through access to justice and clinical programmes, their mission (see GAJE, n 30 above), but their impact tends not to be broadly integrated with the large poverty NGOs or, for the most part, other NGOs such as the ICJ and even the IBA.

when permitted to interrogate privilege about ethical processes and objectives. Individual UN agencies¹¹⁷ and philanthropists¹¹⁸ have actively supported CLE for just this reason, but it is not yet the ‘go to’ strategy in all legal sectors (including attorneys-general), when it comes to motivating new lawyers about their responsibilities to humanity and its ecosystems.

The central reality and tension of legal education throughout the world is its necessary but alienating positivism, focused more on the sources and doctrines of law than on its ideals and effects, for the better. The focus of legal educators is typically and understandably on delivering – to law students and lawyers – as much ‘certainty’ around transactional rules as is functionally possible, in support of market economies. And quite a lot of certainty has been achieved, even in authoritarian nations and communities, because market structures are, or have been to date, highly globalised. Increasing collaboration and communication, especially through the World Trade Organisation (WTO) and the agency of professional associations such as the IBA and the Institute of Advanced Legal Studies (IALS), has promoted a loose international harmonisation around much of this market-serving body of law. So far, so good.

But the intellectual and financial effort focused on these outcomes has not been replicated in a similar legal professional effort to secure the livelihoods of those in extreme poverty – over 700 million people globally (ie, ten per cent of humanity).¹¹⁹ Extreme market wealth for a few and moderately comfortable lifestyles for billions, has come at a tremendous social cost for the most marginalised and, in the first two decades of this century, these social costs are accumulating. Social trust, financial stability, political predictability, wealth-sharing, climate defence and global health are all retreating together and everywhere. At the extremes, developments such as populist victimisation, state assassination and detention, organised addictions and deprivations, corruption and fraud, state and non-state terror and unlawful violence and killings are all normalised phenomena and yet remain particularly devastating to those many millions of people leading lives of abject poverty.

Of course, the traditional professions are increasingly responding. Countless aid organisations, including *Médecins Sans Frontières* and now *Engineers Without Borders*,¹²⁰ are going into the field and providing very practical assistance programmes. And within law, the IBAHRI and the International Commission of Jurists are just two bodies active in many countries attempting to highlight human rights abuses. One or two governments are even prepared to enact *Magnitsky* legislation,¹²¹ personally to sanction human rights abusers.

117 Eg, UNDP in Thailand, in its support of *BABSEACLE* see www.babseacle.org accessed 4 January 2021.

118 Both the Ford Foundation and more recently, the Soros Foundation have been very active in Eastern Europe in supporting CLE as both an access to justice strategy, as well as transition to democracy mechanism in post-Soviet societies. See, eg, Wilson, n 30 above.

119 See The World Bank, *Poverty*, (16 April 2020) www.worldbank.org/en/topic/poverty/overview accessed 4 January 2021.

120 See, eg, *Engineering Without Borders Australia* www.ewb.org.au accessed 4 January 2021.

121 *Magnitsky* legislation, named after assassinated Russian tax adviser Sergei Magnitsky, imposes personal financial and related sanctions on named human rights’ abusers. See, eg, the discussion at Latika Bourke, ‘Calls to Hit Lam with Sanctions’, *The Age* (Melbourne 8 July 2020) 16.

Lawyers and legal educators are beginning to rise to their social role of combatting all of this mayhem by asking existential questions about what law is, the societal contexts in which it operates and whose purposes it actually serves. But we struggle to be taken as seriously as we might, not least by those who wield public and economic power over billions of lives. More and more, our integrity as lawyers is suspect;¹²² and social trust in us as professionals is provisional,^{123, 125} at best. Culturally, when our best senior counsel are admired for their daily fees and our legal aid services are starved for funds by neoliberal governments, we are uncomfortable but also largely silent. We are too often identified with profit before justice.

Unsurprisingly, in the wake of those matters, there is an underlying crisis of character and courage in the legal profession globally. Lawyers have the means to tackle the inequality and injustice at its roots if they choose, but so also do law schools, perhaps even more so, because law schools *form* minds and hearts. What are law schools to do about it?

While it is fair to say that law is first a positivist system of rules and protocols to regulate societies and not primarily a normative vehicle for delivering compassion, that priority has been accentuated in the centuries since the first industrial revolution.¹²⁴ Today, if law delivers real justice in the face of economic power, it is too often celebrated as exceptional. And for those without financial or cultural access to the processes of law, the exceptions are still too few. But law schools everywhere can work to adjust this priority over time and inculcate a sense of care and respect in law students for everyone and for the endangered ecosphere which accentuates poverty – sufficient to balance our law students' typical market priorities with personal generosity and a renewed sense of justice and fairness.

The proven mechanism to deliver this powerful social responsibility of law schools is CLE. Diverse and innovative CLE programmes, supported by reflective mentoring¹²⁵ of all students, focused supervision¹²⁶ and relevant assessment,¹²⁷ are capable of turning around otherwise positivist, passive and transactional 'technician' attitudes to law and replacing them with an active determination to provide justice to those in poverty (*Practical step 65*).

Many law schools have clinical programmes¹²⁸ and, in major jurisdictions, there are only a few hold-out (and robustly positivist) law schools that disdain an association with the term 'clinical'. There is much scholarship in most major jurisdictions on the profound impact they can make to students' motivation, their employability and readiness to practise law and

122 See n 55 above; *Royal Commission into the Management of Police Informants Australia* (Progress Report, 1 July 2019).

123 Evans, n 92 above ch 2.

124 See generally David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press 1988); William H Simon, *The Practice of Justice* (Harvard University Press, 2000).

125 Anna Copeland, 'Reflective Practice: The Essence of Clinical Legal Education' in Adrian Evans et al (eds) *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School*, (ANU Press 2017) 153.

126 Jeff Giddings, 'The Importance of Effective Supervision' in Adrian Evans et al (eds) *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (ANU Press 2017) 123.

127 Adrian Evans, 'Clinical Assessment of Students' Work' in *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (Adrian Evans et al, eds) (ANU Press 2017) 179.

128 For the global picture, see Bloch, n 55 above; and for Australia, see Kingsford Legal Centre UNSW Sydney, *Kingsford Legal Centre Clinical Legal Education Guide* (Guide, 2019).

their capacity to integrate substantive law concepts into realistic case strategies.¹²⁹ Attorneys-general and judges understand it, bar associations and law societies mostly understand it and, above all, law firm employers understand it – especially when they are alumni of well-established clinical law schools.

The core international consensus among clinicians is that the best ‘clinic’ programmes place a law student ‘in charge’¹³⁰ of a real client with a real problem. The intimacy of this relationship is transcending for students and clients at multiple levels. There are many types of clinic,¹³¹ including those for business and business innovation purposes,^{132,134} but if the clinic focuses on poverty law environments and the client is burdened by poverty, then very frequently law students come to identify with the injustice not just of the presenting legal problem, but of the poverty itself.

Highly innovative teaching approaches aid this awareness. For example, the advent of multi disciplinary clinics that bring together students and supervisors from law, social work, psychology, medicine and finance,^{133, 135} to tackle the multitude of issues afflicting a single person and family, all essentially mired in and caused by poverty. After all, clients in legal distress often also face financial, psychological, medical and familial distress. For all levels of government and the legal profession, such multi disciplinary clinics can also serve an important community function in providing an ‘early warning’ indication for societies facing mass emergencies, as in the rise of financial distress, mental health issues and family violence incidents during the Covid-19 pandemic from 2020 onwards.

Over the course of a clinical semester, all of those students’ understanding of the nature of power and wealth, its use (and abuse) and how it can be redistributed, grows. Their professional formation as carers and justice artificers begins and their character-building journey commences.

For these reasons, by and large, law deans are happy to support clinical programmes provided that they are not too costly. In a few cases, deans are prepared to spend significant resources to develop the depth and range of their clinics because of the difference this makes to justice in their communities (and not unhelpfully differentiates them from less enthusiastic competitor law schools in their catchments). For example, at Monash University’s Faculty of Law, there are now clinics focused broadly on poverty and its incidents, including general practice clinics¹³⁴ and specialised clinics tackling sexual assault, family violence, employment discrimination, refugees and human rights, not to mention trade justice, capital

129 William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007). See also, the European Network for Clinical Legal Education at *Improving the Future: Using Clinical Legal Education to Educate Lawyers for a Just Society*, Northumbria University Newcastle (2019) www.northumbria.ac.uk/about-us/news-events/events/2019/07/jcle-2019 accessed 4 January 2021; Association for Canadian Clinical Legal Education <http://accle.ca/category/news> accessed 4 January 2021.

130 Of course, the clinical supervisor (the clinician) takes formal legal responsibility for the client’s representation, but best-practice supervision encourages the student to recognise that it is their efforts (not the supervisor’s) which will make the difference to this client.

131 See, eg, Kingsford Legal Centre, n 128 above.

132 See Monash University, n 107 above.

133 *Monash Law Clinics*, Monash University www.monashlawclinics.com.au accessed 4 January 2021.

134 *Ibid*; Springvale Monash Legal Service (2020) www.smls.com.au/#section_2 accessed 4 January 2021.

punishment, anti-slavery and climate justice.¹³⁵ In short, legal and multi-disciplinary clinics can incorporate poverty-sensitivity directly or indirectly and from a variety of work-situated standpoints across sectors and jurisdictions (*Practical step 66*).

It is for good reason that law schools which are intent on reducing poverty, inequality and injustice focus on this retinue of issues, as matters of interdependent local, national, regional and global concern. They all to a greater or lesser extent circle around poverty and endemic poverty hampers their resolution. Climate justice is particularly deserving of law schools' attention for this reason. As we have mentioned previously and as IBA and UN standards reinforce, almost every indication of global poverty is amplified by the climate emergency: access to water, food production and distribution, female education, the number of children per family, malnutrition and brain function, respiratory ill-health, disaster recovery and refugee and economic migration are just the most obvious affected areas.¹³⁶ It might even be argued that, today, a law school which professes to address poverty will be lacking in credibility if it is without an active clinical advocacy programme involving climate justice. The connection between poverty and climate justice is also explicitly reinforced in the SDGs covering poverty (SDG 1) and access to justice (SDG 16).

The direct and indirect injustices represented in these different clinics have human faces; whether they be fisher people who cannot harvest food because of rising sea temperatures, abandoned parents whose children have been abducted and families destroyed by an abusive partner fleeing the jurisdiction, or the anguished families of drug mules whose loved ones face execution because (while trying to earn enough for a basic education) they have been caught trying to smuggle methamphetamine. When these faces come into the clinics - often in person but also through their families and online in these pandemic times - clinical law students are confronted in a manner that a casebook discussion or a simulation can only emulate, but never equate.

Clinical law students learn to recognise and reflect clearly on the consequences of poverty and indifferent or oppressive legal structures. With insightful and experienced supervision, their underlying character is strengthened and sizeable numbers develop a profound pro bono consciousness. Fortunately, some also acquire a determination to bring about change through law reform and strategic advocacy, whatever their ultimate career destination and some fundamentally rethink their choice of career through their transformational and immersive clinical experience, committing themselves to careers in the forefront of work on poverty, injustice and inequality.

The best of these programmes will complete their clinical pedagogy with reflective seminars that will address much more of the theory of personal character development,

135 Most clinical units are shown at Monash University, n 107 above; see also Monash University, n 133 above; 'Clinical legal education program develops to meet community needs', *Monash University* (Forum Post) www.monash.edu/law/news-and-events/news/articles/archive/cle-community accessed 4 January 2021.

136 UN Development Programme (2020) www.undp.org/content/undp/en/home.html accessed 4 January 2021; *Conference of the Parties (COP)*, UN Climate Change (2020) <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> accessed 4 January 2021.

particularly in the legal professional context,¹³⁷ in an effort to reinforce and more acutely contextualise students' consciousness and identification with the importance of ethics and character formation to their careers and in the process supporting and strengthening their commitment to social justice and poverty reduction.

Practical steps

65. Diverse and innovative CLE programmes, supported by reflective mentoring of all students, focused supervision and relevant assessment, are capable of turning around otherwise positivist, passive and transactional 'technician' attitudes to law and replacing them with an active determination to provide justice to those in poverty.
66. Legal and multi disciplinary clinics can incorporate poverty-sensitivity directly or indirectly and from a variety of work-situated standpoints across sectors and jurisdictions, such as specialised clinics tackling sexual assault, family violence, human rights, trade justice and capital punishment.

None of these outcomes simply happen, however. Resourceful and energetic deans need to find the funds, recruit and retain the clinicians and also combat less-persuaded colleagues' anxiety about any number of shibboleths concerning clinics. And if they are to address systemic poverty through their clinics, they have to ensure that the course design process is thorough,¹³⁸ and that social justice is entrenched in that design.¹³⁹ Recurring global pandemics are also to be reckoned with in the conduct of clinics, for the health and safety of all clinical participants and clients, as part of the 'new normal' in undertaking clinical work.

As many law schools move to online teaching and 'remote delivery' in order to limit mass Covid-19 infection and protect student and staff health, clinical course design becomes particularly important for clients in poverty. A virtual clinic dealing with a sophisticated business client is one thing, but a homeless client with substance abuse and underlying mental health issues is rarely capable of managing, for example, to deposit complex electronic documents, even if they have physical access to the technology. It is not straightforward to deliver a poverty law service direct to such clients via video-link; the clinic design will almost always require an intermediating agency with which the law school partners. These links require their own development, interpersonal trust and ongoing, time-consuming maintenance. In that important sense, preparation for mass pandemics joins NewLaw, technological innovation and online dispute resolution as disruptors of conventional client-facing clinical work and CLE more broadly.

For law student-client relationships as well, it is not yet empirically clear (because

¹³⁷ See, eg. Evans, n 92 above, ch 4.

¹³⁸ Simon Rice, 'Course Design for Clinical Teaching' in Adrian Evans et al (eds) *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (Adrian Evans et al, eds) (ANU Press 2017) 67.

¹³⁹ Anna Cody and Simon Rice, 'Teaching Social Justice in Clinics' in Adrian Evans et al (eds) *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (ANU Press 2017) 97.

the research is yet to be undertaken) that students can develop the same empathy and a commitment to alleviating poverty, if their interaction with clients in need is vicarious only. It may be that students will feel as much connection to someone on a screen as they do to someone sitting in front of them, but that remains unknown. If students' essential empathy and compassion are not reliably germinated by the virtual environment, then the core ingredient of law schools' clinical contribution to alleviating poverty in a remote context, may be unfulfilled or at best, unreliable.

Conclusion

*If a free society cannot help the many who are poor, it cannot save the few who are rich.*¹⁴⁰

President John F Kennedy

Are conditions right for a new global movement combatting poverty, inequality and injustice, in which law schools join not only other parts of the legal profession but also broader coalitions and networks across geographical and sectoral borders, working hand-in-hand with poor communities in developed and developing countries alike?

Global movements can be the harbingers of radical change in societal attitudes and conditions, from the environmental, consumer, human (including labour) rights and feminist movements of the late 20th century to the 'Make Poverty History', climate emergency, #MeToo and 'Black Lives Matter' movements of the early 21st century.¹⁴¹¹⁴³ Multinational business enterprises now put their reputations, profitability and value-creation at risk if they are insufficiently attentive to the interdependencies between socio-environmental considerations and whole economies, including impacts on climate-affected, indigenous and poor communities.

When such movements and societal preconditions for business success are accompanied by the proliferation and sophistication of frameworks and norms directed at poverty, inequality and injustice, of the kind and granular detail now available for example in the UNGPs, SDGs and IBA standards and joined by aspirations and actions in the same direction by almost all branches of the legal profession and other multi-stakeholder coalitions, conditions are ripe for law schools and their constituencies to play their part in helping to end poverty before the current generation of law students reaches retirement. We offer the analysis and menu of suggestions in this chapter as hopeful stimuli to reflection and action by law schools on multiple fronts to address poverty, injustice and inequality, to make their end a practical reality and not just an academic ideal.

Justice education in justice law schools is a critical part of the largest system of social accountability worldwide. Justice-focused law schools are both the starting point (and a sustaining source) for the flow of skills, values and paradigm shifts that the legal profession will need to play its role in alleviating poverty and safeguarding humanity. If law schools are

¹⁴⁰ Kennedy, n 6 above.

¹⁴¹ On the contribution of global social movements to policy, legal and regulatory change generally, see n 28 above, 598, 604–605, 609–611.

to rise to the challenge (and not to retreat into mediocre servants of untrammelled wealth), then the practical steps we outline are central.

The reorientation of understanding, responsibility and practical action that we urge for law schools and their associated constituencies and communities must also permeate and energeise other strands of the legal profession. The lives and positions of the world's poorest peoples under the rule of law are intertwined, in the ways that we have argued, with the public standing and responsibility of the world's lawyers, who all owe fidelity to that same rule of law.

The late Anglo-American legal and political philosopher, Professor Ronald Dworkin, once said that '[t]he courts are the capitals of law's empire and judges are its princes'.^{142, 144} Gendered and colonial terminology aside, 'law's empire' is a vast domain with millions of participants, offering multiple points of entry and opportunities for all lawyers to succeed or alternatively fall short in realising the values and ideals of law and justice. If law schools and the other branches of the global legal profession do not rise to the challenge of doing all that they reasonably could and must do in ending the poverty, inequality and injustice that currently prevails under cover of the rule of law, all of us lawyers risk becoming accomplices to the resulting social division, legal inequity and public loss of standing for the profession.

We are architects of our own professional destiny in fulfilling our lawyerly responsibility to contribute to the end of poverty. The people in poverty throughout the world, whose identities and needs are explicitly acknowledged in IBA norm-shaping about matters ranging from pro bono work to the looming climate emergency, seek a voice and empowerment from lawyerly attention to poverty, inequality and injustice as matters of the highest priority. *All* lawyers in *all* branches of the legal profession will be judged harshly in the court of public opinion if we fail to rise to that challenge.

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¹⁴² Ronald Dworkin, *Law's Empire* (Fontana Press 1986) 407.

Fostering a culture of pro bono among law school faculty: a US perspective

Fatemah Albader

Synopsis

While arguments that law school faculty should adhere to the same pro bono ethical obligation as lawyers is well established today, what that entails is not.¹ This could be contributing to the reason why the rate of pro bono work among faculty members is less than ideal. In seeking to identify pro bono opportunities in which a law school could engage, this chapter will be divided into six parts.

The chapter begins by outlining the history of pro bono culture among law school faculty. It will then identify pro bono opportunities for faculty members who are also licensed within their jurisdictions. The next part of the chapter identifies pro bono opportunities both for faculty members working at law schools who are not themselves licensed lawyers as well as those law school faculty which are licensed but do not wish to engage in work (eg, litigation) requiring admission to practice. This is followed by a discussion about the possibility of making monetary contributions instead of engaging in pro bono work, concluding that financial contributions should not discharge a faculty member's ethical duty to practice pro bono work but can, sometimes, stand in lieu of pro bono work, based on the individual circumstances each year. The penultimate part of the chapter discusses ways to motivate faculty members into committing to pro bono service. The final part discusses ways to motivate law schools to encourage faculty member involvement in pro bono work.

While the focus of this chapter is on law schools in the US, given the historical roots and ample examples of public interest work, what is outlined is applicable to all jurisdictions.

Introduction

Ensuring access to justice for all and promoting respect for the rule of law are vital for the eradication of poverty. Currently, pro bono representation is one of the most critical ways to promote the rule of law and ensure that the needs of the poor and the under-represented are met, through upholding their personal and financial interests, and avoiding exploitation.² Engaging in pro bono legal services strengthens the public's confidence in the

¹ See Erwin Chemerinsky, *A Pro Bono Requirement for Faculty Members*, (2004) 37 Loy L A L Rev 1235, 1244. '[M]any faculty members would like to do more pro bono work, but do not know how'.

² Robert Granfield and Lynn Mather, *Private Lawyers and the Public Interest: The Evolving Role of Pro bono in the Legal Profession* 8 (Oxford University Press 2009).

legal profession and promotes seeking access to those services.

In recognising the importance of pro bono work, the International Bar Association (IBA) has called on ‘lawyers, law firms and bar associations to provide pro bono legal service [...] on a consistent year-round basis, in all manner of criminal, civil and administrative matters where legal aid may be limited and on a national and international level [...]’³

The United Nations has also recognised the importance of serving the public interest and ensuring access to justice for all in its adoption of the Basic Principles on the Role of Lawyers (the ‘Basic Principles’).⁴ The Sixth Basic Principle reads: ‘Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer [...] in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services’.⁵ Although the Basic Principles are not binding, the International Covenant on Civil and Political Rights (ICCPR), which is binding on 173 States Parties,⁶ reiterates the importance of equality before the judiciary with a more expansive scope.⁷ While the Basic Principles apply in the context of criminal proceedings,⁸ Article 14 of the ICCPR sets out both general and specific obligations with respect to access to justice, most notably the ICCPR expressly guarantees legal assistance in criminal cases but also encourages free legal aid in civil cases for those who cannot afford it.⁹

Similarly, many bar associations have also stressed the importance of serving the needs of the poor and marginalised, especially in the wake of Covid-19. For example, the Georgian Bar Association has launched a collaborative initiative with the Council of Europe to provide free legal services for single parents affected by Covid-19.¹⁰ The American Bar Association (ABA) has created the ABA Coronavirus (Covid-19) Task Force of volunteer lawyers and judges to address the US public’s current legal needs.¹¹

More generally, in Japan, specific local bar associations *require* lawyers who are members of bars in these districts ‘to perform mandatory public interest service’.¹² In nations without compulsory pro bono requirements, the pro bono culture is still strong. In 2012, Spain hosted the European Pro Bono Forum, which gave rise to a pro bono culture in Spain

3 IBA, Pro Bono Declaration (16 October 2008).

4 UN, Basic Principles on the Role of Lawyers (7 September 1990).

5 *Ibid.*

6 UN Treaty Collection, *Status of Treaties: International Covenant on Civil and Political Rights* (19 August 2020), see https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtmsg_no=IV-4&src=IND accessed 3 January 2021.

7 G A Res 2200A (XXI), ICCPR, Art 14, 16 December 1966; Human Rights Committee General Comment No 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Art 14), UN Doc CCPR/C/GC/32 (2007) (General Comment No 32).

8 Basic Principles on the Role of Lawyers, see n 4 above.

9 ICCPR, see n 7 above; General Comment No 32, see n 7 above.

10 Council of Europe, *Council of Europe is supporting the Georgian Bar Association to provide pro bono legal services for financially vulnerable single parents*, COE (10 July 2020), www.coe.int/en/web/tbilisi/-/council-of-europe-is-supporting-the-georgian-bar-association-to-provide-pro-bono-legal-services-for-financially-vulnerable-single-parents accessed 3 January 2021.

11 ABA, The ABA Coronavirus (Covid-19) Task Force, see www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem accessed 19 August 2020.

12 Latham & Watkins LLP, ‘A Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions’, (August 2012) ‘*Pro Bono Inst*’ see www.probonoinst.org/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf accessed 3 January 2021.

and Spanish-speaking countries.¹³ Spain's Constitution provides a mandated right to legal aid, which is further complemented by the General Council of the Spanish Bars and the local bar associations.¹⁴ Because of this, the Spanish legal community distinguishes between pro bono for charities and non-governmental organisations (NGOs) and legal aid for individuals.¹⁵ Because Spain has an incredibly strong, constitutionally mandated access to justice facilitation, the concept of pro bono there is rather new.¹⁶ In recent years, Spain has nevertheless expanded its pro bono efforts and, in 2018, the Pro Bono Spain Foundation was formed, with the purpose of strengthening commitment to pro bono in Spain and Spanish-speaking countries.¹⁷ Like Spain, there is no compulsory pro bono service requirement in the US.

The ABA's Model Rule 6.1 states that: 'A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year'.¹⁸ While merely aspirational and not a mandatory requirement, lawyers are nonetheless ethically obliged to and should take on pro bono work.¹⁹ Many, if not all, law firms across the legal community recognise the importance of pro bono practice, such that many lawyers do provide legal services without a fee for those who are unable to pay or on behalf of NGOs and so on. Each year, the Law Firm Pro Bono Project of the Pro bono Institute in the US, for example, challenges large law firms to honour their commitment to pro bono work.²⁰ In 2018, it was reported that 128 firms represented an aggregated total of over five million hours of pro bono work.²¹ Today, the pro bono culture is well documented among law firms outside the US; it has expanded to many countries, across all continents. In fact, a study conducted in 2012 surveyed 71 nations with a strong or emerging pro bono culture, indicating that the culture of pro bono among law firms has become increasingly widespread.²² In recent years and especially amid the Covid-19 pandemic, the number of lawyers across nations are increasingly engaging in pro bono work.

In face of the widespread practices of pro bono legal services among legal professions, it is imperative to instil this value among law students. Therefore, in the law school setting, compulsory pro bono graduation requires that pro bono clinics are set up so as to ensure

13 Latham & Watkins, 'Pro Bono Practices and Opportunities in Spain' (4 September 2015) *Pro Bono Inst* www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-spain.pdf accessed 3 January 2021.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 'The Pro Bono Spain Foundation Is Born', *Lawyers in Barcelona* (17 July 2018), www.lawyers-in-barcelona.com/civil-law/the-pro-bono-spain-foundation-is-born accessed 3 January 2021.

18 ABA, Model Code of Professional Responsibility, 6.1 (1983).

19 Nadine Strossen, 'Pro Bono Legal Work: For the Good of Not Only the Public, but Also the Lawyer and the Legal Profession' (1993) 91(8) *Mich L Rev* 2122, 2122.

20 Law Firm Pro Bono Challenge® Initiative, *Pro bono Inst*, www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge accessed 6 May 2020.

21 'Report on the Law Firm Pro Bono Challenge® Initiative', *Pro bono Inst* (6 June 2019), www.probonoinst.org/wp-content/uploads/2018-Report-on-the-Law-Firm-Pro-Bono-Challenge-Statistics-6.10.19.pdf accessed 3 January 2021.

22 Latham & Watkins, 'A Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions', (August 2012), *Pro Bono Inst*, www.probonoinst.org/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf accessed 3 January 2021.

that the value of pro bono work is instilled in students well before they graduate.²³ At the University of Buenos Aires in Argentina, all law students in their final year of study must provide some form of legal aid, whether through a clinical programme or otherwise, before graduating.²⁴ Similarly, the State of New York in the US imposes a mandatory 50-hour pro bono requirement as a pre-condition to become licensed as a lawyer in the State of New York.²⁵ Pro Bono Students of Canada (PBSC) was formed in 1996 with the goal 'to enhance pro bono services within the Canadian legal profession' and to ensure 'that each new generation of lawyers enters the profession already schooled in and committed to pro bono philosophy and practice'.²⁶ PBSC is the only national pro bono student organisation in the world and now consists of students from all Canadian law schools.²⁷ While the pro bono culture began in the US, it has now expanded to virtually all countries. Therefore, the importance of public service work does not go unnoticed. In addition to the rewarding experience gained as lawyers litigate on behalf of disadvantaged individuals, engaging in pro bono work also allows them to build on their existing legal skills, thereby proving beneficial to lawyers' development while, at the same time, benefiting the community.

While the importance of pro bono work is well established across law firms and throughout law school programmes, there is yet a subgroup of people belonging to the legal profession who may find themselves not engaging in pro bono work as much, if even at all: law school faculty.²⁸ The significance of faculty participation in pro bono work is so important that the Association of American Law Schools (AALS) Commission has recommended that 'all law schools adopt a formal policy to encourage and support faculty members to perform pro bono work'.²⁹ Nonetheless, very few schools in the US have adopted such formal policies.³⁰ At the same time, many law schools have faculty members that are performing pro bono work independently or work alongside the clinical and pro bono programmes associated with their respective law schools.³¹ Furthermore, a number of law schools recognise the achievements of their faculty in the interest of pro bono work.³²

23 See, eg, 'Clinical and Pro Bono Programs', *Harv L Sch*, <https://hls.harvard.edu/dept/clinical> accessed 6 May 2020; *Richard and Ginni Mithoff* 'Pro Bono Program', *U Tex Austin*, <https://law.utexas.edu/probono> accessed 6 May 2020; 'Pro Bono', *Colum L Sch*, www.law.columbia.edu/explore-columbia-law-school/experiential-learning/pro-bono accessed May 6, 2020; 'Pro Bono Litigation Clinic', *J Marshall L Sch*, <https://jmls.uic.edu/experiential-education/clinics/pro-bono> accessed 6 May 2020.

24 Latham & Watkins, see n 22 above.

25 ABA Standing Committee on Pro Bono and Public Service, *New York's 50-hour Preadmission Pro Bono Rule: Weighing the Potential Pros and Cons*, (October 2013), see www.americanbar.org/content/dam/aba/administrative/probono_public_service/lb_pb_preadmission_pro_bono_requirement_white_paper.authcheckdam.pdf accessed 3 January 2021.

26 Granfield and Mather, see n 2 above, at 8-9.

27 *Ibid*, at 8; 'Who We Are', PBSC, www.probonostudents.ca/aboutus accessed 7 June 2020.

28 Deborah L Rhode, *Pro bono in Principle and in Practice: Public Service and the Professions* 24 (Stanford University Press 2005).

29 Cynthia F Adcock and Alison M. Keegan, *A Handbook on Law School Pro Bono Programs* (AALS Pro Bono Project 2001).

30 *Ibid*.

31 *Ibid*.

32 *Ibid*.

Unfortunately, it appears that law school professors' dedication to pro bono work has been met with much resistance worldwide.³³ Nevertheless, the importance of pro bono work for law school faculty has been gaining momentum and will soon be at the forefront of all law schools, setting those law schools that stress the importance of pro bono work among law school faculty apart from those that do not. Consequently, the time is ripe for law school faculty to understand what is entailed in pro bono work. While the AALS recommendation has stated that faculty members should engage in pro bono work, what that would require is not well known. This chapter will provide recommendations on how law school faculty members can contribute to pro bono work. In doing so, it will provide recommendations for both law school faculty members who are licensed to practise, as well as law school faculty members who are not admitted to practice. It is important that all law school faculty members provide meaningful pro bono work, so that they may serve their community and importantly, be viewed as role models by their students. If law schools are to mandate pro bono service requirements for students, an important way to instil the values of pro bono on the students is to ensure that law school faculty members also abide by the same policies.³⁴

Accordingly, let us first turn to the history surrounding the culture of pro bono among law school faculty members.

The history of the culture of pro bono among law school faculty

When the culture of pro bono began, it was thought of as demanding public service only of lawyers. For example, the ABA's Code of Professional Responsibility, which was adopted in the 1970s, addressed 'lawyers' obligations to broaden access to the legal system'.³⁵ It was not until the late 1980s that the culture of pro bono shifted to include law schools.³⁶ This transformation was guided by law students, who initially had to find their own pro bono opportunities, requesting the proper support from law schools to engage in pro bono service.³⁷ Accordingly, 'a growing number of faculty, administrators and students, as well as bar leaders, began encouraging law schools to do more to promote public service'.³⁸ Therefore, what spearheaded the development of pro bono culture within law schools was the work of, inter alia, law school faculty who were motivated to instil the values of public service within the law school environment. Because of these initiatives, '[i]n 1996, the ABA amended its accreditation standards to provide that every law school "should encourage its students to participate in pro bono activities and provide opportunities for them to do so."'³⁹ Recognising the importance of pro bono service within the entire law school community, '[t]he revised standards also encouraged schools to address the obligations of faculty to the

33 Rima Sirota, 'Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case', (2018) 78(2) La L Rev 546, 549.

34 Adcock and Keegan, see n 29 above.

35 Rhode, *Pro Bono in Principle*, see n 28 above, at 13.

36 *Ibid*, at 21–22.

37 *Ibid*, at 22.

38 *Ibid*.

39 *Ibid*.

public, including participation in pro bono activities'.⁴⁰

Yet, although faculty are, at most law schools, required to promote the culture of pro bono in law schools, the culture of pro bono among law school professors themselves is lacking. In a survey conducted by the AALS Commission, it was reported that 'only half of administrators agreed that "many" faculty at their schools were providing "good role models to the students by engaging in uncompensated pro bono service themselves"'.⁴¹ This is, in part, due to the fact that law schools do not require faculty participation in pro bono service,⁴² as the focus rests on teaching, research and publication.⁴³ Dean Erwin Chemerinsky, Dean of the University of California-Berkeley School of Law,⁴⁴ has argued that the AALS should 'adopt a specific policy requiring that law schools insist that every faculty member spend a specified amount of time each year doing pro bono work'.⁴⁵ To date, the AALS has merely recommended that law school faculty adopt such policies, without any compulsory requirements.⁴⁶ In such case, Dean Chemerinsky has stated that: 'In the absence of an AALS mandate, law schools, on their own, should adopt such a requirement for their faculties'.⁴⁷ This is in fact a necessary means to obtain the participation of law school faculty and Dean Chemerinsky has noted that the form that the policy takes is for law schools to decide.⁴⁸ The important point is to ensure compliance of faculty members in engaging in pro bono services, no matter the form it takes, so as to eradicate the inequality that persists in the community and to improve the reputation of the legal profession.

Contributing to public service enhances the reputation of the legal community.⁴⁹ If that is the case, then law school faculty, who are entrusted to train the many generations of lawyers to come, must also contribute to pro bono service to 'improve [public] opinion of [their] profession'.⁵⁰ '[E]ducators worry about the hypocrisy of having a faculty impose a requirement on students that it is unwilling to impose on itself'.⁵¹ The idea that professors should engage in service for the public good is not unique to law professors but crosses all disciplines: it is asserted that all professors should participate in philanthropic work.⁵² Faculty engagement in philanthropic work has been recognised to 'shape and inform faculty work, enhance its meaning and influence faculty career paths'.⁵³ That is rightly so, because 'faculty work is imbued with and the faculty profession is grounded in, a responsibility to contribute

40 *Ibid.*

41 *Ibid.*, at 24.

42 *Ibid.*

43 Chemerinsky, see n 1 above, at 1235.

44 Erwin Chemerinsky, *Berkeley Law*, www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky accessed 5 June 2020.

45 Chemerinsky, see n 1 above, at 1235–1236.

46 Adcock and Keegan, see n 29 above.

47 Chemerinsky, see n 2 above, at 1236.

48 *Ibid.*

49 Deborah L Rhode, *Access to Justice* 147 (Oxford University Press 2005).

50 *Ibid.*

51 Deborah L Rhode, *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation* 276 (Oxford University Press 2000).

52 See Genevieve G Shaker, *Faculty Work and the Public Good: Philanthropy Engagement and Academic Professionalism* 9 (Teachers College Press 2015).

53 *Ibid.*, at 11.

to the public good'.⁵⁴ Taking this argument to be true, then, law professors should be held to the same standards as all other professors. Accordingly, now is the ideal time for faculty members to be willing to contribute to the welfare of the community by engaging in the much-needed practice of public interest service.

Faculty members can take advantage of unique benefits available to them in the pursuance of pro bono work. For example, faculty members may be less inhibited in taking pro bono cases than a practicing lawyer because the income of professors is not dependent on ensuring that the interests of private clients are met.⁵⁵ Faculty members also bring a unique perspective to pursuing individual and social justice due to their role as legal academics.⁵⁶ Faculty members spend the majority of the time engaged in teaching and research. These activities could contribute to the broader achievement of adequate access to justice should faculty members choose to use their scholarship and expertise for the greater good. Faculty members could be a powerful force for good if they considered and undertook activities from among the ample opportunities that are available to them to engage in pro bono work as would a practicing lawyer.

It is recognised that many faculty members may very well be interested in participating in pro bono but do not know what that may entail. Accordingly, the rest of the chapter will discuss ways in which faculty members can also contribute to the culture of pro bono, so as to reinforce the culture of pro bono service not only among lawyers (now law students) but also among law school faculty who are pivotal for the strengthening of pro bono commitment among law students, future lawyers.

Pro bono opportunities for faculty members of bars

Law school faculty involvement is a vital component to any successful pro bono programme.⁵⁷ In fact, pro bono work is equally as important for law school faculty members as for the practicing lawyer, as not only does pro bono work serve the needs of the underrepresented but it also serves a dual role of creating 'a model for students to emulate'.⁵⁸ As the AALS has stated, law professors often belong to two professions requiring adherence to professional standards. These are: law professors who are also lawyers are subject to the standards of their respective jurisdictions in which they practice; and all law professors are subject to institutional and more general regulations with respect to teaching.⁵⁹ These standards require law professors to ensure that students recognise 'the responsibility of lawyers to advance individual and social justice'.⁶⁰ One of the ultimate obligations of each lawyer is to

⁵⁴ *Ibid.*

⁵⁵ AALS, AALS Handbook: Statement of Good Practices, www.aals.org/about/handbook/good-practices/ethics accessed 11 June 2020.

⁵⁶ *Ibid.*

⁵⁷ Rhode, *Pro Bono in Principle*, see n 28 above, at 24.

⁵⁸ David L Chambers and Cynthia F Adcock, 'Learning and Serving: Pro Bono Legal Services by Law Students', (2000) 79(8) Mich B J 1056, 1057.

⁵⁹ AALS Handbook, see n 55 above.

⁶⁰ *Ibid.*

be involved in pro bono service. 'As role models for students and as members of the legal profession, law professors share this responsibility'.⁶¹ Law school faculty therefore have an obligation, not only to engage in pro bono work themselves, but also to prepare law students to include pro bono in their practice.

It is reported that law students who have been required to engage in pro bono practice in law schools are more likely to be involved in pro bono service as lawyers later on.⁶² Even though there is a lack of information regarding whether it is in fact true that law students attending law schools with requirements of pro bono engage in more pro bono work on graduation,⁶³ law students who are nonetheless exposed to inequalities in the justice system through pro bono representation in law schools and will have increased awareness of the deficiencies in the law and its availability to those in need who are too often largely ignored. Law students engaged in pro bono service will understand the value of pro bono early on and be equipped with learned values which can be used in their law-firm settings as lawyers.

Faculty members play a pivotal role in shaping the minds of law students and the best way to instil these values is by showing students that they are engaged in that which they teach: they 'practice what they teach'. As the AALS has stated: '[I]aw teachers teach as much about professional responsibility by what they do as by what they say'.⁶⁴ In recognising that students practice by example, in 2000, Georgetown Law School 'adopted a resolution encouraging all faculty who are [District of Columbia] bar members to meet their bar obligation of 50 hours of pro bono work a year'.⁶⁵ The resolution also encouraged unlicensed faculty members to participate in pro bono service and complete the same amount of hours, all for the purpose of demonstrating the importance of servicing the disadvantaged to students.⁶⁶ To teach law students about the importance of pro bono work, it is important that law students view their professors as also being motivated to serve the needs of the public.⁶⁷

Law school faculty members who are also lawyers admitted to practice have the same ethical obligations under Model Rule 6.1 as any other lawyer.⁶⁸ Consequently, law school faculty working at law firms may, for example, provide legal services for free (for those who are unable to afford legal services) at the law firms where they work. Additionally, many lawyers who serve on the boards of pro bono service committees or legal services entities are, of course, engaging in meaningful pro bono practice. There are plenty of opportunities to engage in pro bono work for all law school faculty members and these opportunities are discussed in the next section.

Model Rule 6.1's voluntary pro bono service is met either by providing legal services at no cost or at a substantially reduced fee *or* through 'participation in activities for improving

61 *Ibid.*

62 Rhode, *Access to Justice*, see n 49 above, at 158.

63 *Ibid.*, at 147.

64 Adcock and Keegan, see n 29 above.

65 *Ibid.*

66 *Ibid.*

67 Chemerinsky, see n 1, at 1239.

68 See David Luban, 'Faculty Pro Bono and the Question of Identity', (1999) 49 J Legal Educ 58, 60.

the law, the legal system or the legal profession'.⁶⁹ It therefore appears that, for lawyers who are subject to voluntary pro bono service, the opportunities are ample, beginning first with pro bono consultative work.

Pro bono consultancy

Serving as a legal consultant provides 'the real-world contact that faculty otherwise lack, making them better able to bridge the worlds of academia and practice'.⁷⁰ Many philanthropies, NGOs and interest groups actively seek lawyers to act as pro bono consultants for their respective foundations. The ABA Center for Human Rights, for example, often seeks 'pro bono attorneys to provide legal assistance to human rights defenders who are the subject of harassment in retaliation for their advocacy efforts...'.⁷¹ Accordingly, faculty members can serve as pro bono consultants in this capacity, where they can take on cases in which they can practice their specific areas of expertise, in this case human rights law. Similarly, a patent law professor can join the Patent Pro Bono Programme for independent investors and small businesses, set up, for example by the US Patent and Trademark Office.⁷² An immigration law professor can act as consultant for immigration law firms or otherwise provide immigration assistance to those who cannot afford it. A family law professor, if trained, may volunteer as a mediator. A tax law professor can counsel organisations on tax-related matters. A constitutional law professor can engage in pro bono work defending an individual or group's constitutional rights. A public policy professor can act as an adviser to state or local government officials without accepting recompense for services. Pro bono consultancy is therefore not only rewarding but also a worthwhile means of engaging in practical work that is well within a faculty member's area of interest.

Involvement in legal clinics that serve persons of limited means

Almost all law schools offer enriching programmes that allow law students to gain legal practical experience and prepare them for legal work after graduation. Harvard Law School, for example, has established clinics on practically every field of expertise, ranging from international human rights to cyberlaw.⁷³ The school also provides law students with many opportunities to engage in pro bono work, which counts towards the compulsory graduation requirement of 50 hours' pro bono service.⁷⁴ Through student practice organisations, for

⁶⁹ *Ibid.*

⁷⁰ Paul T Hayden, 'Professorial Conflicts of Interest and "Good Practice" in Legal Education', (2000) 50(3) J Legal Educ 358, 367.

⁷¹ *Current Opportunities*, ABA Ctr Hum Rts, www.americanbar.org/groups/human_rights/justice_defenders/opportunities accessed 6 May 2020.

⁷² USPTO, *Patent Pro Bono Program for independent inventors and small businesses*, www.uspto.gov/patents-getting-started/using-legal-services/pro-bono/patent-pro-bono-program accessed 6 May 2020.

⁷³ *In-House Clinics*, Harv L S, <https://hls.harvard.edu/dept/clinical/clinics/in-house-clinics> accessed 6 May 2020.

⁷⁴ *Pro Bono Program*, Harv L S, <https://hls.harvard.edu/dept/clinical/pro-bono-program> accessed 6 May 2020.

example, law students at Harvard have the opportunity ‘to gain practical legal experience under the supervision of a licensed attorney’.⁷⁵

Similarly, the Bluhm Legal Clinic at Northwestern Pritzker School of Law, Chicago, provides pro bono services to various clients, ranging from delinquent teenagers to entrepreneurs in need of affordable legal services.⁷⁶ The clinic consists of students working alongside clinical faculty, ensuring that students gain hands-on experience prior to graduation.

While legal clinics are created to provide students with experience they may not otherwise gain before entering the field of law, legal clinics may also provide opportunities for faculty members to engage in pro bono work. Faculty members may choose to lead legal clinics within their field of expertise or, if there is no legal clinic already established within their expertise, they may choose to start one at their law school. Consequently, legal clinics should not only be composed of clinical professors, but also be open to all faculty members, including non-admitted faculty members wishing to take part in legal clinics.

Pro bono training opportunities

The above examples have focused on engaging in the practice area that is of relevance to the law school faculty member. However, sometimes law school faculty members may have no desire to participate in the practice of law but purely enjoy the academic aspect of it. If that is the case, litigation is not the only pro bono opportunity available for admitted law school faculty members. These faculty members could also teach and train current lawyers about how to engage in public service work in their area of expertise. For instance, professors teaching immigration law could donate their time to training young lawyers on how to assist clients who are seeking asylum or who face deportation. Likewise, a bankruptcy law professors could train lawyers on how to assist clients in filing for bankruptcy.

Seeking pro bono opportunities in this capacity is incredibly easy in the US, as all state and local bar associations and the ABA, have created pro bono centres dedicated to providing opportunities and training.⁷⁷ Law school faculty may choose to volunteer with their respective bar associations to train lawyers interested in undertaking pro bono assignments. Additionally, law school faculty members can choose to take on leadership roles within their respective bar associations’ pro bono committees. For example, District of Columbia bar members can serve on the Pro Bono Committee, which oversees the daily activities of the DC Bar’s Pro Bono Center.⁷⁸

⁷⁵ *Student Practice Organizations*, Harv L S, <https://hls.harvard.edu/dept/clinical/student-practice-organizations-spos> accessed 6 May 2020.

⁷⁶ *Bluhm Legal Clinic: About The Clinic*, Nw Pritzker Sch Law, <http://www.law.northwestern.edu/legalclinic/about> accessed 6 May 2020.

⁷⁷ See, eg, *Center for Pro Bono*, ABA, www.americanbar.org/groups/center-pro-bono accessed 6 May 2020; *Pro Bono Resources*, Atlanta B Ass’n, www.atlantabar.org/page/OLRProBono accessed 6 May 2020; *Pro Bono Resource Center*, St B Georgia, www.gabar.org/committeesprogramssections/programs/probonoproject/index.cfm accessed 6 May 2020; *Pro Bono Partnerships*, Fla B Ass’n, <https://thefloridabarfoundation.org/pro-bono-partnerships> accessed 6 May 2020.

⁷⁸ *About the Center: Pro Bono Center Leadership*, DCB, www.dcb.org/pro-bono/about-the-center/leadership.cfm accessed 6 May 2020.

The opportunities for faculty members who are lawyers are not just limited to the above examples. They can also carry out the types of pro bono work described in the next section. This is particularly the case for faculty members wishing to focus their efforts strictly on academic matters.

Pro bono opportunities for non-admitted faculty members

The following examples are relevant to both non-admitted faculty members, as for faculty members who do not wish to litigate cases. In addition to serving in the clinical programme, law school faculty members who are not members of a bar association can elect to engage in various ways to provide pro bono services. For example, they can develop and use 'legal materials to teach adult [legal] literacy – and at the same time [make students] far better able to navigate a legal system that poses constant threats to their well-being'.⁷⁹ Since non-admitted law school faculty train the next generation of lawyers, it is equally as important that they, too, engage in pro bono work to motivate their students to continue this work. There are many ways in which such faculty can practice pro bono work, limited only by an individual's imagination. The following are some noteworthy examples.

Service as *amicus curiae*

An *amicus curiae* or 'friend of the court', is defined as someone who is not a party to a given case but provides the court with information based on his/her own expertise, which is helpful to the court in deciding the matter before it.⁸⁰ While only lawyers may file an amicus brief, anyone may assist in writing one. Both lawyers and non-lawyers can therefore contribute their knowledge in writing such briefs.⁸¹ Professors who are interested in a certain matter that is in litigation can therefore assist the court, by way of public interest pro bono work and provide the court with their knowledge on the matter.⁸²

A professor is in the best position to assist the court as *amicus curiae*, since the professor in a given field will have the necessary expertise and will to be able to provide information in order to ensure the court does not fall victim to potential error.⁸³ It has been acknowledged that *amicus curiae* are at times 'in a better position than either of the parties to advocate for their own unique point of view'.⁸⁴ Law teachers, especially, are able to provide the court with new arguments or frameworks on how best to interpret a given piece of legislation and are also able to pinpoint information that is vital to interested parties that may not be

⁷⁹ Luban, see n 68 above, at 73.

⁸⁰ See Samuel Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy', (1963) 72 Yale L.J. 694, 694, 695.

⁸¹ *Ibid.*, at 695.

⁸² See Arleigh P Helfer III, *Niche Appellate Practice: Pro Bono Appellate Representation*, ABA (6 September 2019), www.americanbar.org/groups/judicial/publications/appellate_issues/2019/summer/niche-appellate-practice-pro-bono-appellate-representation accessed 3 January 2021.

⁸³ *Ibid.*

⁸⁴ Sarah F Corbally and Donald C Bross, *A Practical Guide for Filing Amicus Curiae Briefs in State Appellate Courts*, CDN (2001), https://cdn.ymaws.com/naccchildlaw.site-ym.com/resource/resmgr/amicus_curiae/amicuspracticalguide.pdf accessed 3 January 2021.

so apparent.⁸⁵ One professor has deemed writing *amicus* briefs so fundamental to the legal profession because of its potential ‘to achieve a more just society’.⁸⁶ Consequently, professors should and often do, file *amicus* briefs in matters of interest.⁸⁷

Law reform and other research assistance

Law teachers have studied law for many years and continue to do so as they teach and research their various fields of expertise. As such, they are able to benefit society by preparing reports to governments or community agencies in furtherance of legal reform. For example, a human rights professor could reform the law as it relates to women’s rights. An employment law professor could look for ways to reform the existing labour laws so as to ensure that there are no discriminatory provisions. Law reform work is therefore plentiful and is not limited to law faculty. In 1994, Emory University faculty members in the Rollins School of Public Health, Atlanta, assisted in legislative reform relating to healthcare.⁸⁸ As such, faculty can engage in similar work regarding their identified areas in need of legislative reform.

Similarly, law school faculty members can conduct legal research assistance on behalf of disadvantaged and vulnerable groups to seek improvements in the judicial system with respect to such groups. Any legal research assistance that would benefit disadvantaged groups would serve for the ethical obligation of pro bono service being met. Social justice law professors could, for example, research the best ways to implement a rights-protection framework to those who are often excluded due to structural discrimination, including but not limited to the elderly, migrant workers, women, children, ethnic minorities and people living with diseases or disabilities. Criminal law professors might engage in research activity related to prison reform. A professor interested in poverty law could provide a research assistance support programme to tackle homelessness.

Working on law reform and providing other informative research assistance is useful not only because it benefits society as a whole, but it also helps professors tailor their research. In conducting this sort of pro bono work, the professor will also have more expertise in conducting their own research activities. At the same time, professors are considered experts in their respective fields. As such, sharing this knowledge and allowing society to benefit from it in the shape of legislative reform or other research assistance will prove to be relatively convenient for such professors.

Community legal education

Teaching law students would, of course, not count as pro bono. Educating the community

85 See, eg, *Professors’ Amicus Curiae Briefs Shape the Law*, Colum L Sch (15 January 2019), www.law.columbia.edu/news/archive/professors-amicus-curiae-briefs-shape-law-0.

86 *Ibid.*

87 See, eg, Brief of Law Professors as Amici Curiae Supporting Petitioner at 1, *Mission Product Holdings, Inc v Tempnology, LLC*, 587 U S 5 (2019) (No 17-1657). This amicus curiae brief was written by ‘law professors who study the US bankruptcy system’.

88 Carol Holtz, *Global Health Care: Issues and Policies* 536 (2nd edn, Jones & Bartlett Learning 2012).

about the law, however, particularly if it relates to the rights of the disadvantaged, would count as such. In fact, students at most law schools are already familiar with such initiatives, otherwise known as legal outreach.⁸⁹ Many law schools participate in some form of legal outreach programme. One legal outreach programme has partnered with law schools in New York 'to inspire students from underserved communities in New York City to strive for academic excellence and to pursue careers in the law'.⁹⁰ Law school professors can therefore dedicate their time to teaching students from underserved communities about their rights as well as preparing them for a future career in the legal profession. Such activities include coaching students for mock trials in addition to teaching them the relevant substantive law.⁹¹

A similar initiative, known as the Know Your Rights Initiative, which is set up by the First Defense Legal Aid to 'conduct street outreach, workshops, leadership development [...] to build the hope, skills and knowledge necessary for people to access their constitutional rights' when in contact with police'.⁹² Similar Know Your Rights initiatives have been established with respect to the interests of the respective outreach programmes.⁹³ Since 1972, the Georgetown Street Law Attorney Mentor Program has allowed law students at Georgetown, DC, to teach and provide high school students with complex legal information in a straightforward and easy-to-digest manner.⁹⁴ The Street Law initiative has been expanded to more than 150 law schools worldwide.⁹⁵

Law professors can join these initiatives or create their own to improve the legal profession by teaching those with limited access to academic resources or finances about their legal rights. Law professors teaching civil rights and civil procedure courses could teach the community about their civil rights and how to navigate the court system. Law professors interested in immigration law could teach immigrants about their respective rights, including developing the best arguments for the tribunal. In addition, law professors who travel abroad to teach can use their time abroad to engage in meaningful pro bono work, helping to improve the legal profession in the country in which they teach.

Community legal education is not limited only to teaching law. It could also include developing law-related materials for use by other faculty members. Pro bono work in this regard could also constitute the translation of legal documents for use by other professionals. One individual with a passion for human rights and humanitarian law has 'started a movement to translate human rights law into pictures'.⁹⁶ This was undertaken

89 See, eg, *Raising the Bar Since 1983*, LEGAL Outreach, <https://legaloutreach.org> accessed 6 May 2020.

90 *Become a Legal Teaching Fellow at the 2020 Legal Outreach Summer Law Institute (SLI)*, Legal Outreach, www.dropbox.com/s/31h03se6hr0vdch/Legal%20Outreach%20Legal%20Teaching%20Fellow%20Announcement%2012.12.19.pdf?dl=0 accessed 6 May 2020.

91 *Ibid.*

92 *Know Your Rights Peer Education Initiative*, FDLA, www.first-defense.org/community accessed 6 May 2020.

93 See, eg, *Know Your Rights*, ACLU Mich, www.aclumich.org/en/Know-your-rights accessed 6 May 2020; *Know Your Rights*, Advocates Hum. Rts www.theadvocatesforhumanrights.org/kyr accessed 6 May 2020.

94 *History of Street Law*, Street Law, www.streetlaw.org/who-we-are/history accessed 19 August 2020.

95 *Street Law Around the World*, Georgetown, www.law.georgetown.edu/experiential-learning/clinics/dc-street-law-program/street-law-around-the-world accessed 19 August 2020.

96 Tedx Amsterdam, *The Geneva Convention in Pictures*, Shayne Smart, YouTube (18 November 2015), www.youtube.com/watch?v=i3_tuRbkRf8 accessed 3 January 2021.

for the purpose of educating the community, through the use of pictures, on their rights, since many people are illiterate, but they are able to identify with and understand pictures.⁹⁷ Consequently, any activity that would contribute to the knowledge and awareness of the law or empowers individuals to engage with the legal system would constitute community legal education.

Monetary contribution in lieu of pro bono work

Model Rule 6.1 also states that, in addition to providing at least 50 hours of pro bono services annually, ‘a lawyer should voluntarily contribute financial support to organisations that provide legal services to persons of limited means’.⁹⁸ Pro bono work and making financial contributions are often viewed as a dichotomy, where lawyers can either engage in pro bono practice or make a financial contribution.⁹⁹ They are and should, however, be viewed as complementary. The Model Rule is clear such that financial contributions should be provided in addition to the 50 hours of pro bono services. Nevertheless, it is acknowledged that, like lawyers, law school faculty may face difficulty in committing to pro bono work in a particular year, yet in another, they may have a relatively light workload. In such instances, financial contributions may act in lieu of pro bono practice. In different parts of the world, law teachers may not be well paid and unable to make financial contributions. However, law school faculty should strive to provide at least 50 hours of pro bono services, as well as make financial contributions annually whenever they are able, as the norm and make financial contributions in lieu of pro bono services only as the exception.¹⁰⁰ Making a financial contribution will rarely provide the equivalent of providing legal services to those who so urgently need them. Motivating law school faculty to engage in pro bono practice is essential.

Motivating faculty members

None of the provided recommendations for ways to engage in pro bono practice will be productive unless faculty members are motivated to engage in pro bono service. This chapter does not argue that faculty pro bono should be imposed on faculty as a compulsory requirement rather, that faculty should be motivated to practice pro bono work so as to ensure commitment to best results when engaged in pro bono work. As such, the law school must promote an environment and culture of commitment to serve the public interest. While large law firms are incentivised through various means, including the Pro Bono Institute Challenge described above,¹⁰¹ law school faculty members require different incentives. This section will therefore discuss ways in which law school faculty members can be motivated to engage in public interest work.

⁹⁷ *Ibid.*

⁹⁸ Model Code of Professional Responsibility r 6.1, see n 18 above.

⁹⁹ Chemerinsky, see n 1, at 1244–1245.

¹⁰⁰ *Ibid.*, at 1245.

¹⁰¹ See n 19 above; Lawrence J Fox, *Raise the Bar: Real World Solutions for a Troubled Profession* 226 (ABA 2007).

First and foremost, it is difficult to convince law school faculty members of the importance of their engaging in pro bono activities due to a prevailing mind set among faculty members that their career is in legal academia and not in the practice of law, and that pro bono is the practice of law.¹⁰² Consequently, law school faculty rarely view practicing lawyers as their peers rather, that their peers are university faculty in other departments, such as professors of economics or history; in fact, they do not see themselves as lawyers.¹⁰³ Such a strong identity is counterproductive to fostering a culture of commitment to pro bono. Even among law school faculty who are not engaged in the practice of law, pro bono service must be viewed in the context of academia, as the above recommendations have provided.

Tying faculty interests to pro bono service

Of course, if faculty members engage in pro bono service which interests them, either personally or professionally, faculty members will find pro bono practice rewarding. That is, in addition to the benefits that are reaped by engaging in meaningful work towards individuals who would otherwise be left without legal representation. If faculty members are involved in pro bono projects that they have the most interest in, this would ensure renewed interest in taking more pro bono cases. Dean Chemerinsky put it best when he said: ‘We make time for the things we care about’.¹⁰⁴ Faculty members should therefore consider working for a causes in which their members have significant interest. Law professors who are interested in human rights will find more motivation using their time servicing human rights groups. Animal rights law professors will find greater motivation serving animal rights groups, and so on. Faculty members can find meaningful pro bono work within their own particular interests. If law schools encourage faculty members to find such pro bono opportunities, they could ensure that law school faculty members continue to provide pro bono service for many years.

It is noted that one of the barriers to continued pro bono service is the unfortunate opposition that is often encountered in taking on cases of significant societal interest.¹⁰⁵ That is especially true when taking on controversial cases on behalf of individuals who would have a more difficult time finding lawyers to represent them. For example, when Dean Chemerinsky took on a case on behalf of a Guantanamo detainee, he received much criticism and hate mail.¹⁰⁶ Coupled with the fact that these cases are rarely won, this could have been most disheartening and led to the inevitable consequence that individuals are unable to obtain representation and stop fighting for their causes.¹⁰⁷ Nonetheless, Dean Chemerinsky took this as an opportunity to fight even harder and he subsequently ‘urged students to use their legal education to fight for the public interest, however hard it is to

¹⁰² Luban, see n 68 above, at 67.

¹⁰³ *Ibid.*

¹⁰⁴ *Faculty Lives in Public Service: Professor Erwin Chemerinsky*, Duke Law News (22 April 2008), <https://law.duke.edu/news/faculty-lives-public-service-professor-erwin-chemerinsky> accessed 3 January 2021.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

affect social change'.¹⁰⁸ It is much easier to develop this mind set for causes in which the person taking on the case has a keen interest. Accordingly, law professors should be involved in pro bono opportunities which most interest them, despite any criticism this may bring.

Enhancing teaching in the classroom

Many law professors had practical experience in their fields before entering legal academia. This experience leads many lawyers to take up law teaching on retirement or at the end of their careers after many years of practice. For them, realising that the law is often changing to keep up with social changes, the best way to keep up with the law is to continue the practice of law in one form or another. Even younger law professors who entered academia with little legal practice are able to complement their academic skills through practicing law in conjunction with teaching.

In the US, law professors and lawyers earn the same degree, a Juris Doctor (JD), which translates to doctor of law.¹⁰⁹ Almost all US professors teaching in law schools throughout the US will hold a JD.¹¹⁰ When US law professors hold PhDs, the degree is often in a subject other than law as PhDs in law 'are almost unheard in the US'.¹¹¹ A study has found that, 'of 26 "leading" law schools [...] 361 of 1,338 current law professors (27%) have [PhDs]'¹¹² and 296 of the professors with PhDs also have law degrees.¹¹³ The remainder only hold JDs. So, it is not common for a US law professor to hold a PhD. Some have argued that this is because law schools in the US should focus on the practice of law in order to best prepare law students for future law practice.¹¹⁴ This makes sense, as students coming to law school will, for the most part, become lawyers and not law professors. Only a small minority will become law professors. Therefore, being involved in the practice of law during law school and having faculty who can supervise law students in this regard is highly beneficial to the students.

In compliance with the ABA Standards and Rules of Procedure for Approval of Law Schools, US law schools now require students to complete some form of experiential learning of at least six credit hours.¹¹⁵ If that is the case, then law professors definitely need

¹⁰⁸ *Ibid.*

¹⁰⁹ J Gordon Hylton, 'What Should be the Prerequisites for Becoming a Law Professor', *Marq U L Sch Fac Blog* (8 September 2011) <https://law.marquette.edu/facultyblog/2011/09/what-should-be-the-prerequisites-for-becoming-a-law-professor> accessed 3 January 2021.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* See also 'The Age of the PhD Law Professor Is Upon Us, Study Says', Bloomberg L (19 February 2016), <https://news.bloomberglaw.com/business-and-practice/the-age-of-the-phd-law-professor-is-upon-us-study-says> accessed 3 January 2021.

¹¹⁵ *Chapter 3: Program of Legal Education*, ABA (2014-2015), www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf accessed 3 January 2021; I. (F) *Experiential Learning Requirement*, Harv L Sch, <https://hls.harvard.edu/dept/clinical> accessed 6 June 2020; *Courses satisfying Requirement 2020-2021*, B U Sch L, www.bu.edu/law/current-students/jd-student-resources/curricular-requirements/experiential-learning-requirement last updated 29 May 2020 accessed 3 January 2021; *Experiential Learning*, Colum L Sch, www.law.columbia.edu/academics/experiential accessed 6 June 2020; *The Six-Credit Experiential Learning Requirement*, Emory L Sch, <https://law.emory.edu/academics/>

to be involved in the practice of law to be more able to prepare their law students for the practice of law and to oversee law students' experiential learning placements. Furthermore, one way in which law students are influenced to engage in pro bono during law school is if people they look up to, namely faculty, also engage in pro bono work.¹¹⁶ Therefore, faculty involvement in pro bono plays a direct role in garnering interest to engage in pro bono service among law students.¹¹⁷ Yet, faculty members are not always engaged in the practice of law. In fact, one of the critiques most often cited for the disconnect between law schools and law practice is 'faculties' lack of connection to law practice'.¹¹⁸ One of the factors which contributes even more to this disconnect is when lawyers who enter the field of legal academia stop being involved in the practice of law and as the law is often changing, 'law professors who practiced law in the past might not be familiar with the current realities of law practice'.¹¹⁹ For that purpose, law professors should continuously be engaged in the practice of law and therefore the structure of US legal education benefits in particular.

PhDs in law are far more common outside the US.¹²⁰ Therefore, law professors in other countries do graduate with PhDs in law, whereas practicing lawyers usually hold only a bachelor's degree in law. Still, since law professors outside the US will hold a bachelor's degree prior to pursuing a PhD in law, this means that they can qualify to become lawyers in their respective jurisdictions if they seek admission to practice and meet the necessary requirements.

For law professors, it is beneficial to be engaged in the practice of law and it is equally as beneficial to be immersed in scholarship surrounding the law. The best format, however, is one that makes use of both. In that sense, if law professors across all jurisdictions were able to practice law, then balancing the two would provide for better engagement in the classroom.

Law professors often teach students based on their experience with the practice of law. For instance, an intellectual property (IP) law professor would probably be able to paint a better picture for their students if they was engaged in IP law, such that they could touch on 'real world' examples to supplement the theoretical study. Likewise, transactional law professors who are also an experienced transactional lawyers will better be able to teach their students the hands-on practical experience required to understand the complex fields of transactional law.¹²¹ That is true of professors across all disciplines. Professors who are involved in practical experience in the field they teach are more confidently able to prepare students for future law practice than is the case for law professors who 'are unfamiliar with what their students will be doing as practicing lawyers'.¹²² Law students who are taught

experiential-learning-requirement.html accessed 6 June 2020.

116 Margaret M Cordray, 'Expanding Pro Bono's Role in Legal Education', (2011) 48 *IDAHO L REV* 31, 38.

117 *Ibid.*

118 Emily Zimmerman, *Should Law Professors Have a Continuing Practice Experience (CPE) Requirement?*, (2013) 6(1) *NE UL J* 131, 136.

119 *Ibid.*, at 138.

120 Hylton, see n 109 above.

121 See Jay G Finkelstein, 'Practice in the Academy: Creating "Practice Aware" Law Graduates', (2015) 64(4) *J LEGAL EDUC* 622, 633.

122 Zimmerman, see n 118 above, at 145.

through both theory and practice are, on graduation, more likely to understand what law practice entails. Professors who touch on ‘real life’ examples in the classroom will be better able to relay what law practice is like to their students.

Furthermore, many Master of Laws (LLM) programmes worldwide prefer applicants to have some form of professional work experience before applying to these programmes.¹²³ This is because these law schools recognise that those with professional work experience are able to ‘get more out of their LLM year’.¹²⁴ In addition, studying in an LLM programme is more enriching when students are able to contribute to class discussions through their diverse work experiences. Similarly, then, law professors who are engaged in the different area practices of law can enrich the classroom experience based on their various practice areas. Therefore, if law professors are able to embrace the benefits that law practice could bring to their classrooms, they may be more enticed to practice law through pro bono service.

Honouring faculty members’ pro bono efforts

Like many others, faculty members respond well to positive incentives.¹²⁵ Providing incentives to faculty members who perform pro bono work is likely to increase the chances of faculty engagement in pro bono service. Such pro bono work could entail promotion and tenure consideration.¹²⁶ The promotion and tenure committees might consider the average number of hours of pro bono work contributed by faculty members applying for promotion and/or tenure. So, where most law schools require faculty to report on their research and service activities for the year, ‘[a] faculty member’s pro bono efforts should be considered as well’.¹²⁷

Another incentive that law schools can adopt includes distinguishing faculty members who perform pro bono work and recognising their accomplishments through honouring ceremonies and awards. By rewarding faculty members who have demonstrated a strong commitment to public service, law schools convey to their faculty members that pro bono service is an important aspect of a law professor’s career.¹²⁸ As the ABA has stated: ‘Institutions award and recognise that which they consider important – in order to give due praise but also to show others what can be accomplished and, in some cases, what is expected’.¹²⁹ Awards given by law schools to showcase their students and faculty who engage in pro bono demonstrate these schools’ commitment to and respect for pro bono values.¹³⁰

A number of law schools already honour faculty members who engage in substantial pro bono service with some form of recognition.¹³¹ Many law schools recognise faculty

123 See, eg, LL M Admissions, U Wash Sch L, www.law.uw.edu/admissions/llm-admissions accessed 6 June 2020; Admissions, U Toronto Fac L, <https://gpplm.law.utoronto.ca/admissions> accessed 6 June 2020.

124 LL M Admissions, Harv L Sch, <https://hls.harvard.edu/dept/graduate-program/llm-admissions> accessed 6 June 2020.

125 Chemerinsky, see n 1 above.

126 *Ibid.*

127 *Ibid.*

128 See *Awards & Recognitions*, ABA, www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pb_awards accessed 8 June 2020.

129 *Ibid.*

130 *Ibid.*

131 See *Faculty & Administrative*, ABA, www.americanbar.org/groups/center-pro-bono/resources/

members who have performed outstanding pro bono service with various types of honours and awards.¹³² In addition to award recognition, Columbia University School of Law faculty members wear a blue ribbon on their gowns to indicate that they have performed outstanding pro bono work.¹³³ To ensure that law school professors continue to service the public good, more law schools might adopt such policies of rewarding law school professors with favourable consideration during tenure and promotion decisions and/or with awards and other honours.

Identifying research topics

Finally, as has been a recurring theme throughout this chapter, engaging in the practice of law, by way of pro bono service, is beneficial to law school professors, in the sense that it 'could help law professors identify topics for their scholarship: both legal issues that arise in a practice setting and issues about the context in which law is practiced'.¹³⁴ Therefore, law school faculty should engage in pro bono service as it also helps them to discover topics for further research and scholarship.

Motivating law schools to encourage faculty pro bono service

The key players in increasing pro bono service among faculty are law schools. Law schools are pivotal in the development and maximisation of pro bono work among both law professors and law students. It is therefore not only faculty members who require motivation to engage in pro bono, but, if law schools give less credence to faculty pro bono work, faculty members may be less inclined to look for pro bono opportunities, thereby setting a perception among law students that pro bono work is not that important. This was recognised by the ABA in 1996, when it published a report calling 'for law schools to focus greater attention on the significance of faculty as role models for law students' perceptions of lawyering, even to give greater weight to this role-model function in decisions about hiring and evaluating faculty'.¹³⁵ In fulfilling this function, the ABA encouraged faculty to be more experienced in the practice of law.¹³⁶

Similarly, the 2007 Carnegie *Report Educating Lawyers: Preparation for the Profession of Law*¹³⁷ has also made recommendations to legal educators to provide advanced practical training to law students, emphasising 'that legal educators must link their interests with the needs of legal practitioners and the public the profession takes an oath to serve'.¹³⁸ The report, which called for law schools and educators to rethink their ways of teaching legal education, was

directory_of_law_school_public_interest_pro_bono_programs/definitions/pb_faculty accessed 6 May 2020.

132 *Awards & Recognitions*, see n 128 above.

133 *Ibid.*

134 Zimmerman, see n 118 above, at 141.

135 William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* 157 (Jossey-Bass 2007).

136 *Ibid.*

137 William M Sullivan, 'The Carnegie Report and Contemporary Legal Education', (2018) *U St Thomas L.J* 331, 331.

138 Doug Ferguson, 'What Is the Carnegie Report and Why Does It Matter', *Slaw* (21 May 2014), www.slw.ca/2014/05/21/what-is-the-carnegie-report-and-why-does-it-matter accessed 3 January 2021.

instrumental in changing curriculums across many law schools in America'.¹³⁹ Law schools that place more emphasis on faculty participation in law practice, most notably through pro bono work, can safeguard the profession to which they belong.

For the most part, however, law schools do not view faculty pro bono as an important factor in making tenure or hiring decisions. Nor is it given the same value as scholarship, teaching and law school service.¹⁴⁰ That said, professors are increasingly involved in pro bono opportunities and schools which do distinguish these professors stand apart from those that do not. Nevertheless, in order to show commitment to faculty pro bono service, in addition to honouring professors who engage in pro bono service, which motivates law professors to undertake a greater amount of pro bono service, as already described, law schools with a commitment to faculty pro bono work should also be honoured.

The AALS Section on Pro Bono & Public Service Opportunities annually awards faculty members or deans with the Deborah L Rhode Award for having 'made an outstanding contribution to increasing pro bono and public service opportunities in law schools through scholarship, leadership, or service'.¹⁴¹ When these faculty members or deans are recognised, their respective law schools gain recognition too. For example, the 2020 Deborah L Rhode Award recipient was Dean Aviam Soifer of the University of Hawaii, William S Richardson School of Law.¹⁴² On making his statement on receiving this prestigious honour recognised nationwide, Dean Soifer stated that his 'recognition really ought to be to the entire Richardson Law School – students, faculty and alumni – for their ongoing support for free legal assistance to those most in need'.¹⁴³ Certainly, that is true of Richardson Law School, which requires its students to complete at least 60 hours of pro bono work before graduating.¹⁴⁴

The ABA also recognises pro bono work through its annual Pro Bono Publico Award, which the ABA awards to a total of five lawyers and organisations, including law schools, for outstanding commitment to public service.¹⁴⁵ Only three law schools have been awarded this top honour for their outstanding achievements to pro bono service since 1984. They are: the University of Pennsylvania Law School in 2000; Fordham University School of Law in 2008; and, most recently, Baylor University School of Law in 2015.¹⁴⁶

In addition to these prestigious awards, organisations such as the AALS and the ABA could consider recognising the top law schools each year, separate from other categories, which have demonstrated the strongest commitment to public service each year. This would be similar to the *National Law Journal's* recognition of the top law firms in the annual Pro

139 Patricia E Roberts, 'From "War on Poverty" to Pro Bono: Access to Justice Remains Elusive for Too Many, Including Our Veterans', (2014) 34 B C J L & Soc Just 341, 356.

140 Chemerinsky, see n 1, at 1243–1244.

141 *Section on Pro Bono & Public Service Opportunities*, AALS, www.aals.org/sections/list/pro-bono accessed 7 June 2020.

142 *Ibid.*

143 'Law school dean to receive top national award', *UHaw News* (24 December 2019), www.hawaii.edu/news/2019/12/24/soifer-aals-rhode-award accessed 3 January 2021.

144 *Ibid.*

145 *Award Nomination Criteria*, ABA, www.americanbar.org/groups/probono_public_service/projects_awards/pro_bono_publico_award/award_nomination_criteria accessed 7 June 2020.

146 *Past Recipients*, ABA, www.americanbar.org/groups/probono_public_service/projects_awards/pro_bono_publico_award/past_recipients accessed 7 June 2020.

Bono Hot List (the ‘Hot List’).¹⁴⁷ The Hot List recognises law firms which ‘are dedicated to making a monumental impact on the lives of those in need’.¹⁴⁸ Before legal publications began ranking law firms by the amount of pro bono service undertaken, there were few law firms engaged in the practice of pro bono.¹⁴⁹ Since then, however, lawyers were enticed by competition to making sure that their law firms would be ranked as one of the nation’s top law firms.¹⁵⁰ The positive reputation created by the rankings in doing more public good gave rise to the importance of pro bono demonstrated among law firms today.¹⁵¹ Furthermore, the effects of rankings was much broader than simply being limited to reputation: ‘[o]nce some firms began hiring pro bono counsel, others felt pressure to do the same, both to maintain their position and to signal their commitment to public service’.¹⁵² Consequently, publication rankings of law firms – hinging on pro bono services – became a pivotal turning point to ensuring that the newly created pro bono work culture would continue to drive and motivate law firms to become more involved in pro bono work. This was successful, as more law firms were recruiting lawyers actively engaged in pro bono work so that they could have someone to showcase on their websites and lead the pro bono efforts in their respective law firms.¹⁵³ In a field driven by competition, ranking law firms became the (initial) means with which to enhance public service among them.

A *Guide to Law Schools* has existed since 2005, where Equal Justice Works, a non-profit focused on the promotion of legal careers in public interest, has ranked law schools ‘by compiling extensive data on issues related to public service’.¹⁵⁴ This guide is meant to help law school applicants in choosing which law schools to apply to, serving as an incentive for law schools to compete in terms of public service programmes.¹⁵⁵ In addition, the AALS and the ABA could recognise the top law schools that are dedicated to providing legal services for those who are disadvantaged or otherwise not able to obtain legal service. This could be similar to the ranking of law firms by legal publications, prompting law firms to be more involved in pro bono. The IBA could consider annually recognising top universities worldwide which have made the greatest contribution to public service. The IBA Pro Bono Committee currently honours one lawyer who has demonstrated commitment to pro bono work each year.¹⁵⁶ Similar awards could be developed by the IBA Pro Bono Committee to recognise law professors and faculties of law separately.

147 See ALM Staff, ‘The 2020 Pro Bono Hot List’, Nat’l LJ (4 May 2020), www.law.com/nationallawjournal/2020/05/04/the-2020-pro-bono-hot-list accessed 3 January 2021.

148 *Ibid.*

149 Scott L Cummings and Deborah L Rhode, ‘Managing Pro Bono: Doing Well by Doing Better’, (2010) 78(5) *Fordham L Rev* 2357, 2370.

150 *Ibid.*, at 2371.

151 *Ibid.*, at 2372.

152 *Ibid.*, at 2374.

153 *Ibid.*

154 *Ibid.*, at 2431.

155 *Ibid.*

156 Annual IBA Pro Bono Award, IBA, www.ibanet.org/Committees/Divisions/Legal_Practice/Pro-Bono-Award.aspx accessed 7 June 2020.

Once law schools are incentivised to create a culture of pro bono in the law-school setting, this will create a positive impact not only on law students who will themselves be expected to engage in pro bono service during their careers as lawyers, but also on law professors. Whatever the form of incentive, the point is that as practitioners and scholars in the field of law, we are in a position to influence future generations of lawyers and, we should therefore have ethical duties to contribute meaningfully to our community too.

Conclusion

Pro bono service is an instrumental part of the legal community. It is vital for the eradication of inequality among classes in access to justice. Without meaningful pro bono work, many individuals from disadvantaged communities will not be able to have their day in court. It goes without saying that each individual must be afforded the protection of the law. This means serving under-represented communities and providing legal services to those who might not be able to afford it. Law schools and law school professors should therefore consider fostering a culture of pro bono by being dedicated to pro bono service themselves. If law professors were exempt from performing pro bono work, then that would be an injustice for all. Law schools should encourage law professors to be more involved in pro bono work and offer resources that would be tremendously beneficial to the legal community as a whole.

This chapter has provided some examples on how law faculty members, both licensed and unlicensed, can engage in pro bono work. However, the opportunities are not limited to those listed in this chapter and law professors are encouraged to engage in pro bono work as they deem fit. To that end, law schools may elect to adopt formal pro bono policies, which can include examples of what will count as pro bono work, so as to ensure that law faculty members are motivated and will understand what pro bono work law professors might engage in. The time is ripe for law school faculty to participate in the practice of pro bono work, as they have so much to offer and refraining from doing so is a disservice to the profession and the public. Law school faculty are in a position to engage in very meaningful pro bono work and, at the same time, are able to call for generations of law students and future lawyers to engage in a type of service that is both rewarding and beneficial. As Dean Chemerinsky has stated: 'I have no doubt that the pro bono work I do greatly enhances my teaching and my scholarship. If nothing else, my work as a lawyer has greatly enhanced my ability to relate the material in every class to what my students will be doing as lawyers'.¹⁵⁷

This chapter serves as a good starting point for law school faculty wondering where to begin.

¹⁵⁷ Chemerinsky, see n 1 above, at 1240.

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Litigating for climate justice for the poor

Varun Mansinghka and Sonal Garg

Synopsis

Many of the recent successes in climate justice litigation have been achieved by lawyers working in a pro bono capacity. Through this chapter, other lawyers, who may be considering engaging in similar pro bono work, can acquire a broad understanding of the current trends, challenges and issues involved in climate justice litigation. This understanding will help assess whether, out of the many roles that lawyers can assume in the field of climate justice and the broader area of anti-poverty, climate justice litigation is a good fit for their or their firm's pro bono practice.

Climate change: the silent crisis

Climate change, like much adversity in our world, disproportionately affects the poorest the most. There is clear evidence to show that poorer nations which have contributed least greenhouse gas (GHG) emissions to the atmosphere are now first in line to face the worst consequences of climate change. At the same time, past emissions have enabled wealthier populations to insulate themselves from the immediate threats of climate change whereas the poor have remained defenceless to increasingly frequent extreme weather events. Given the global scale of this challenge, it is natural and intuitive to think initially of international treaty-making and cooperation as the appropriate legal response. The 2015 Paris Agreement is a significant leap forward in this respect and has led many states to formulate ambitious mitigation targets. Yet, internationally, there is no forum for ensuring that these targets are set and met. Of late, state courts are increasingly being called on to fill this gap.

With climate change threatening to push a greater proportion of the world's population further into poverty, initiating climate justice litigation against states is emerging as a critical means for lawyers to contribute towards poverty alleviation efforts in a pro bono capacity. Non-compliance of statutory law, both traditional environment protection statutes and newer climate change statutes, constitutes the cause of action in a large number of such cases. There have also been instances where plaintiffs have successfully argued that non-mitigation of climate change amounts to a breach of human rights. The legal underpinning for these arguments can be found either in state constitutions or conventions such as the European Convention on Human Rights, which has already been cited on numerous occasions in climate justice litigation before European state courts, with varying degrees of success. Another international convention which is increasingly forming the basis of climate

justice litigation is the 2015 Paris Agreement, with plaintiffs seeking strict observance of their state's contribution commitments under the agreement. But the standing of plaintiffs to initiate such cases and separation of powers, which may limit the reliefs that courts may grant in such cases, are two closely related hurdles which arise in a majority of climate justice cases. Together, these two questions form the issue of 'justiciability.'

The variance in the degree of rigidity of various state courts' test(s) of justiciability has resulted in contrasting judgments' even in cases with similarly placed plaintiffs and defendant states. As of yet, only a few state courts in Europe and courts of developing countries in the Global South have been seen to adopt a lenient approach in testing the justiciability of reliefs sought in climate justice litigation. Courts in other jurisdictions have been more cautious in their approach. Nevertheless, some common ground does exist among all state courts which have decided climate justice cases so far. For instance, almost all courts have concluded that there is sufficient proof of climate change and its adverse consequences. Similarly, there appears to be a broad agreement among courts that states are principally liable for trying to prevent these adverse consequences. At times, such in-principle findings have been sufficient to encourage governments to adopt more climate-friendly policies. In other cases, plaintiffs have managed to secure more specific pronouncements from courts, directing states to take adaptive or mitigating steps against climate change.

Introduction

Preventing climate change and addressing its various effects are key elements of the fight against poverty.¹ Contrary to the well-meaning and popular portrayal of climate change as a threat for future generations, climate change is a present-day reality for the world's poor. While its most devastating effects are still to reach the developed world, the present-day effects of climate change in many parts of the developing world are already catastrophic.² Despite climate change being an emerging threat that is due to worsen by all estimates, extreme weather events, rising sea levels and other tragedies caused by climate change have already been affecting the world's poor for some time.

Take for instance, the story of Abdul Gaffar from Bangladesh,³ a country where one in five of its citizens live in poverty.⁴ Bangladesh is also one of the most vulnerable places on

1 Kishan Khoday and Walid Ali, *Climate Change and the Rise of Poverty*, UN Development Programme Blog (19 December 2018) see www.undp.org/content/undp/en/home/blog/2018/Climate_Change_and_the_Rise_of_Poverty.html accessed 2 January 2021.

2 Meeting Coverage: Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate, GA/EF/3516, UN General Assembly (8 October 2019), see www.un.org/press/en/2019/gaef3516.doc.htm accessed 2 January 2021.

3 The Climate Reality Project, *The Human Impact of Climate Change: Personal Stories from Bangladesh, India and China*, at 04:08 minutes, www.climaterealityproject.org/video/human-impact-climate-change-personal-stories-bangladesh-india-and-china accessed 2 January 2021.

4 *Basic Statistics 2020*, Asian Development Bank (April 2020), www.adb.org/sites/default/files/publication/601126/basic-statistics-2020.pdf accessed 2 January 2021; 'Bangladesh: One in five people live below poverty line', Al Jazeera (26 January 2020), www.aljazeera.com/news/2020/01/bangladesh-people-live-poverty-line-200126100532869.html accessed 2 January 2021.

earth to the impacts of climate change.⁵ Gaffar is a fisherman who used to own 1.2 hectares of land.⁶ By 2013, the island village in which he lived had shrunk by half due to rising sea levels and the resulting river bank erosion meant that Gaffar lost all his land.⁷ After losing their homes and livelihoods in rural coastal villages, many Bangladeshis have been forced to migrate to the state's already overcrowded cities.⁸ Rising sea levels are estimated to displace up to 13 million Bangladeshi citizens by 2050.⁹

Yet, the sufferings of climate refugees do not cease at being displaced from their homes. Each year, the rate of internal migration in Bangladesh reaches a new peak, with approximately 2,000 migrants arriving in Dhaka, the country's capital, every day.¹⁰ It is no wonder that today Dhaka is the most densely populated city in the world.¹¹ This means that migrants in the city live in overcrowded slums where, as a United Nations correspondent reports, it is 'hard to differentiate the humidity from the smells of food, garbage and sluice water.'¹²

Stories such as these are necessary to give a face to the present-day horrors of climate change encountered by the poor, a disaster that a 2009 report called the 'silent crisis.'¹³ Now, over a decade later, there is near-universal recognition of the effects of climate change on the poor. The 2015 Paris Agreement explicitly recognises 'the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty'¹⁴ and states that 'sustainable development and efforts to eradicate poverty' provide the context for the global response to climate change.¹⁵ The International Bar Association (IBA) also recognises that lawyers have an important role to play in this global response, especially in a pro bono capacity.¹⁶ Similarly, the American

5 Marcin Szczepanski et al, 'Bangladesh: A Country Underwater, a Culture on the Move, on Earth', *NRDC* (13 September 2018) www.nrdc.org/onearth/bangladesh-country-underwater-culture-move accessed 2 January 2021; *Views of Bangladesh on Climate Change and its Possible Security Implications*, https://sustainabledevelopment.un.org/content/dsd/resources/res_pdfs/ga-64/cc-inputs/Bangladesh_CCIS.pdf accessed 2 January 2021.

6 *Ibid.*

7 *Ibid.*

8 Sonja Ayeb-Karlsson et al, 'A People centred Perspective on Climate Change, Environmental Stress and Livelihood Resilience in Bangladesh', (2016) 11 *Sustainability Science* 679–694, <https://doi.org/10.1007/s11625-016-0379-z> accessed 2 January 2021.

9 Kanta Kumari Rigaud et al, *Groundswell: Preparing for Internal Climate Migration*, World Bank Group Report (March 2018), at 148, <https://openknowledge.worldbank.org/handle/10986/29461> accessed 2 January 2021.

10 Kevin Moss, 'Leaders Share Global Climate Change Stories, Solutions', *Cornell Chronicle* (6 May 2020), <https://news.cornell.edu/stories/2020/05/leaders-share-global-climate-change-stories-solutions> accessed 2 January 2021.

11 Callum Brodie, *These are the world's most crowded cities*, World Economic Forum (22 May 2017), www.weforum.org/agenda/2017/05/these-are-the-world-s-most-crowded-cities accessed 2 January 2021.

12 Sonja Ayeb-Karlsson, *A Climate Migrant's Story from an Urban Slum in Dhaka*, Our World brought to you by UN University (16 November 2016), <https://ourworld.unu.edu/en/a-climate-migrants-story-from-an-urban-slum-in-dhaka> accessed 2 January 2021; See Poppy McPherson, 'The dysfunctional megacity: why Dhaka is Bursting at the sewers', *The Guardian* (London, 21 March 2018), www.theguardian.com/cities/2018/mar/21/people-pouring-dhaka-bursting-sewers-overpopulation-bangladesh accessed 2 January 2021.

13 Global Humanitarian Forum Geneva, *The Anatomy of a Silent Crisis: Human Impact Report Climate Change* (January 2009).

14 Conference of the Parties Twenty-first Session, UN Framework Convention on Climate Change, Paris Agreement, Preamble, UN Doc FCCC/CP/2015/10/Add.1 (12 December 2015)

15 *Ibid.*, Art 2.

16 IBA Climate Crisis Statement (5 May 2020), at para 1, see www.ibanet.org/Article/NewDetail.aspx?ArticleUid=cac6e15d-ec80-4669-9025-2773e9019519 accessed 2 January 2021.

Bar Association (ABA) has also urged lawyers to engage in pro bono activities to help in the fight against climate change.¹⁷ However, in the ABA's 2018 survey of over 47,000 lawyers, environmental law or climate change do not feature in a 32-item list of areas of law in relation to which United States lawyers have given pro bono representation.¹⁸

This is not to say that climate justice is more worthy of pro bono engagement than other areas of law. Just in the field of poverty eradication, as this book illustrates, there is a wide variety of pro bono activities in which lawyers can engage to make a difference. But, given the scale of the climate crisis and its severely disproportionate impact on the poor, the authors believe that the field merits more pro bono engagement than what has been observed until now. In support of these views, this chapter will first highlight the extent of climate change's disproportionate impact on the poor and discuss climate justice as one of the key roles for lawyers in the fight against poverty. This chapter will then examine litigation as a means of procuring climate justice and provide an overview of the current trends, issues and considerations at play in climate justice litigation, which can serve as the starting point for practising lawyers considering the inclusion of climate justice litigation in their or their firm's pro bono work.

Climate change and the poor

The unequal impact of climate change

According to the 2019 Global Climate Report of the US National Oceanic and Atmospheric Administration, annual temperature has increased at an average rate of 0.32°F (0.18°C) per decade since 1981, more than twice the annual growth rate since 1880.¹⁹ In its most recent report,²⁰ the UN Intergovernmental Panel on Climate Change (IPCC) concluded that it is extremely likely (which, as per the IPCC, signifies a probability of 95 to 100 per cent)²¹ that this acceleration in the growth rate of annual global temperature is mainly caused by anthropogenic emissions of GHG since the mid-20th century.²²

While populations around the globe are threatened by climate change, the magnitude and direction of its impact depends, to a large extent, on each country's location and level of development.²³ To further tip the scales, countries that have contributed the most towards

17 Resolution of the House of Delegations of the ABA (12–13 August 2019), www.americanbar.org/content/dam/aba/directories/policy/annual-2019/111-annual-2019.pdf accessed 2 January 2021.

18 ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice: A Fourth Report on the Pro Bono Work of America's Lawyers* (April 2018) at 14, www.americanbar.org/content/dam/aba/administrative/probono_public_service/lis_pb_supporting_justice_iv_final.pdf accessed 2 January 2021.

19 National Centers for Environmental Information, State of the Climate: Global Climate Report for Annual 2019 (January 2020), www.ncdc.noaa.gov/sotc/global/201913 accessed 2 January 2021.

20 Rajendra K Pachauri et al, *Climate Change 2014: Synthesis Report: Contribution of Working Groups I, II and III to the Fifth Assessment Report of the IPCC* (Core Writing Team, R K Pachauri and L A Meyer, eds, 2015).

21 *Ibid.*, at 37.

22 *Ibid.*, at 47.

23 Nicholas H Stern and Cabinet Office – HM Treasury, *The Economics of Climate Change: The Stern Review* (2006) at 29.

altering the earth's climatic conditions are those which are both favourably located and are better equipped to insulate themselves from the catastrophic effects of climate change.²⁴ In fact, median income gains on account of temperature rise are estimated to be as large as 25 per cent for colder countries (which are mostly developed) for the period of 1960 to 2010.²⁵ By contrast, low-income and middle-income countries have benefitted least from fossil fuel combustion²⁶ but are disproportionately bearing the brunt of the climate catastrophe. This is due, in part, to the fact that the majority of the world's developing and least developed countries are disadvantageously located in hotter regions. Most of their citizens, especially those relying on the agricultural sector for subsistence, or those living in coastal areas or informal urban settlements, are extremely vulnerable to the recurring climate shocks of droughts, floods and heat waves.²⁷ As such, while the average rate of temperature rise is surely a cause for alarm in and of itself, a mere look at the average does not paint the complete picture of the unequal impact of climate change and global warming.

According to the UN's *World Social Report 2020*, climate change has widened the gap between the incomes of the richest and the poorest ten per cent of the global population by a staggering 25 per cent.²⁸ The *World Social Report* also points out that even within a country, the impact of climate change varies greatly in magnitude across different population groups. A country's poorer households are more susceptible to the damage caused by changing climatic conditions as, in comparison to their wealthier counterparts, they have limited access to the resources needed to cope with crises.²⁹

Another manifestation of the unequal impact of climate change is in the form of mortality risk associated with it. A study attempting to relate the temperature and wealth of a country to its future mortality risks has estimated that climate-induced mortality risks will vary drastically for rich and poor countries.³⁰ For example, while Accra in Ghana is projected to experience roughly 160 additional deaths per 100,000, Oslo in Norway is projected to save approximately 230 lives per 100,000.³¹

24 Sebastien Mejia et al, *Weather Shocks and Output in Low-Income Countries: Adaptation and the Role of Policies*, Working Paper No WP/19/178, International Monetary Fund (August 2019) at 6–7, www.imf.org/~media/Files/Publications/WP/2019/wpica2019178-print-pdf.ashx accessed 2 January 2021.

25 Noah S Diffenbaugh and Marshaal Burke, 'Global Warming has Increased Global Economic Inequality', (2019) 116(20) *Proceedings of the National Academy of Sciences* 9808–9813 at 9809–9810, <https://doi.org/10.1073/pnas.1816020116> accessed 2 January 2021.

26 Tamma A Carleton et al, *Valuing the Global Mortality Consequences of Climate Change Accounting for Adaptation Costs and Benefits*, National Bureau of Economic Research Working Paper No 27599 (July 2020), www.nber.org/papers/w27599 accessed 2 January 2021. For an interactive graph depicting this study, see Eric Roston et al, 'Life and Death in Our Hot Future will be Shaped by Today's Income Inequality' *Bloomberg* (New York 3 August 2020), www.bloomberg.com/graphics/2020-climate-heat-inequality/?srnd=green&sref=v5vOHa2G accessed 2 January 2021.

27 Robin Leichenko and Julie A Silva, 'Climate Change and Poverty: Vulnerability, Impacts and Alleviation Strategies', (2014) 5(4) *Wiley Interdisciplinary Reviews: Climate Change* 539–556 at 543, <https://doi.org/10.1002/wcc.287> accessed 2 January 2021.

28 UN Department of Economic and Social Affairs, *World Social Report 2020: Inequality in a Rapidly Changing World* (January 2020) at 88, www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/02/World-Social-Report2020-FullReport.pdf accessed 2 January 2021.

29 *Ibid*, at 93–98.

30 Carleton et al, n 26 above.

31 *Ibid*, at 32.

In another study, a group of researchers at the International Monetary Fund have attempted to establish the relationship between a country's level of development and its capacity to insulate itself from the negative effects of climate change.³² The study uses provincial-level data to compare the impact of 1°C rise in temperature on the per capita output of hot regions of advanced economies with that of hot regions (with identical temperature) of developing countries. The result of the study strongly suggests that the impact of temperature shocks on hot areas in developing countries is significantly more than in areas with identical temperatures in developed countries.³³

A global justice concern

A healthy climate is a public good.³⁴ GHG emissions, emanating largely from developed countries, have adversely affected the global climate which is shared between the affluent and less prosperous populations of the world. This inequity is exacerbated since not only have the poor not contributed to the diminishing of this shared common good, but they are also additionally saddled with a higher cost of adapting to such diminishment. Of late, this tragic scenario has been quantified by 'social cost of carbon' (SCC)³⁵ analyses.

A higher degree of exposure to climate shocks imposes higher damage costs on developing countries, regardless of their contribution to GHG emissions. An analysis which calculated the country-level share of global SCC and compared it with the country's share in global emissions, concluded that developing countries such as India, Indonesia and Brazil would have to incur a much greater share of the global SCC in proportion to their contribution to global emissions.³⁶ On the other hand, the ratio of global SCC share to global emissions share is low for developed countries, including, such as the US and Japan.³⁷ At the extreme end of the SCC spectrum are cold countries such as Russia and the United Kingdom, which have a negative ratio and are expected to gain from the increased level of emissions and resultant global warming because of their location.³⁸ The ratios of some countries' share of global SCC to their share in global emissions are presented in the table below. With the exception of Russia and China, the ratio for developing countries is much higher than their developed counterparts.

³⁶ *Ibid.*, at 897 and 899.

³⁷ *Ibid.*

³⁸ *Ibid.*

| Country | Level of development | Ratio of global SCC share to share in global GHG emissions* |
|-----------|----------------------|---|
| US | Developed | 3:4 |
| Japan | Developed | 1:2 |
| UK | Developed | -1:2 |
| Russia | Developing | -1:2 |
| China | Developing | 1:4 |
| India | Developing | 4:1 |
| Brazil | Developing | 4:1 |
| Mexico | Developing | 2:1 |
| Indonesia | Developing | 2:1 |

Source: Katharine Ricke, et al, 'Country-level Social Cost of Carbon', (2018) 8(10) 'Nature Climate Change' 895–900 (2018).

* A ratio greater than 1:1 (represented by the darker shades of grey) implies that a country's share of the global SCC exceeds its contribution to global GHG emissions. A ratio less than 1:1 shows that the country's share of the global SCC is less than its contribution to global emissions. A negative ratio indicates a negative SCC, that is, the country benefits economically from climate change and global warming.

When developed countries do not account for the damage costs in proportion to their share in exacerbating climate crisis, the financial burden of the climate crisis falls disproportionately on poorer countries. Furthermore, while the rich can afford to take measures to adapt to a changing climate, the poor lack the ability, resources and know-how to cope with it. This stark reality of climate change, which results in the exacerbation of inequality and poverty by unequally affecting those who are geographically and socio-economically disadvantaged, making it a 'global justice concern'.³⁹

Climate change exacerbates poverty

Poor people have limited assets to help them recover from natural calamities and their livelihoods are usually dependent on sectors that are sensitive to climate shocks. In addition, they are less likely to be insured against adverse climatic events and are equipped with only a limited knowledge and awareness about adaptation strategies and climate resilient practices.⁴⁰ Economic activities which require people to work outside or without air conditioning are bound to experience a dip in labour productivity due to rising temperatures.⁴¹ Additionally,

³⁹ Darrell Moellendorf, 'Climate Change and Global Justice' (February 2012) 3 Wiley Interdisciplinary Reviews: Climate Change 131–143, <https://doi.org/10.1002/wcc.158> accessed 2 January 2021; Simon Caney, 'Global Justice, Climate Change and Human Rights' in Douglas A Hicks and Thad Williamson (eds) *Leadership and Global Justice* (2012) 91–111.

⁴⁰ See n 27 above, at 542.

⁴¹ Julie Rozenberg and Stephen Hallegatte, 'Poor People on the Front Line: The Impacts of Climate Change on Poverty

spending long hours in heat can have detrimental effect on workers' health. In fact, sustained exposure to extreme heat can increase the mortality risk from stroke, cardiovascular disease and pulmonary conditions by 50 per cent.⁴²

Low-income households are also likely to live in areas that are more affordable. Paradoxically, climate change could impose huge costs in the form of loss of lives, shelter and livelihoods as such areas tend to be more disaster-prone.⁴³ High population density in areas that are prone to frequent climactic shocks can be a key contributing factor in increasing internal migration. According to World Bank projections, in the absence of urgent action, climate change can force more than 143 million people in the regions of Sub-Saharan Africa, South Asia and Latin America to migrate within their countries by 2050.⁴⁴ Taking Bangladesh's example again, under a worst-case scenario (high emissions and high inequality), climate migrants are projected to constitute over seven per cent of the state's total population by 2050.⁴⁵ However, the projection falls to a quarter of this value under more climate-friendly scenario (low emissions, unequal development), even if there is no change in the economic state of the poor.⁴⁶

It is also true that poorer households face more vulnerability to climate-related food price fluctuations.⁴⁷ Since food constitutes a major share of the total expenditure for low-income households, 'price and income elasticity of food demand'⁴⁸ is greater for the poor than for the rich.⁴⁹ Consequently, when climate-induced food supply shocks lead to rises in food prices, poorer households are left with no choice but to lower their food consumption or switch to inferior options, which in turn can lead to a rise in instances of malnutrition. In Tanzania, an increase in maize prices has been shown to reduce its intake among the rural poor, leading to vitamin A and iron deficiencies.⁵⁰ Similarly, frequent droughts and reduction in rice yields have had disastrous implications for 115 million Indonesian poor whose food and income is mainly dependent on rice production. An estimated 13 million Indonesian children suffer from malnutrition as households find it difficult to afford food amid drought-induced crop failures.⁵¹

in 2030' in Ravi Kanbur Henry Shue (eds), *Climate Justice: Integrating Economics and Philosophy* (2018)

42 Roston et al, n 26 above.

43 See n 28 above, at 9

44 Kanta Kumari Rigaud, et al, *op cit*, at 110–111.

45 *Ibid*, at 147–148.

46 *Ibid*.

47 See n 41 above, at 25.

48 Price (income) elasticity of demand is a measure of the responsiveness of a good's demand to price (income) changes. It is a ratio of percentage change in quantity demanded to percentage change in price (income).

49 Matin Qaim, 'Food Consumption Patterns in Developing Countries' in Pasquale Ferranti et al (eds) *Encyclopedia of Food Security and Sustainability* 556-560 (2019) <https://doi.org/10.1016/B978-0-08-100596-5.22445-1> accessed 2 January 2021.

50 Food and Agriculture Organisation of the UN, *The State of Agricultural Commodity Markets: Agricultural Trade, Climate Change and Food Security* (2018) at 15 citing Awudu Abdulai and Dominique Aubert, 'A Cross-section Analysis of Household Demand for Food and Nutrients in Tanzania' (February 2004) 31(1) *Agricultural Economics* 67–79.

51 See n 13 above, at 27.

Those who are already poor tend to have a higher exposure to climate shocks and, as stated above, lack the ability and resources to recover from effects of such shocks. This inability can have long-lasting effects by pushing the poor further below the poverty line, thereby making them even more susceptible to adverse climatic events than before. Such a 'self-reinforcing mechanism which causes poverty to persist' is known as a poverty trap,⁵² through which generations are condemned to suffer under poverty. The above analysis highlights the role of climate change in pushing the poor into the poverty trap, through the disproportionately high economic, social and human cost, both present and future, that it imposes on them. While inclusive sustainable development policies are key to eradication of poverty, the authors believe that addressing exacerbating factors such as climate change is also critical for achieving UN Development Programme's Sustainable Development Goal No 1. As such, any work towards procuring climate justice would constitute a fine addition to a lawyer or a firm's body of anti-poverty pro bono work.

Why litigate for climate justice?

The previous section highlights the disproportionate impact of climate change on the poor and sets the context for lawyers' engagement in ensuring a drop in global GHG emissions and preventing the worst impacts of climate change. This engagement can take several forms. The IBA's 2020 *Climate Crisis Statement* identifies several of them,⁵³ including '[engaging] in climate dispute resolution generally (including mediation, negotiation or litigation) and specifically on a pro-bono, volunteer or reduced fee basis, for those negatively affected by the climate crisis.'⁵⁴

At first glance, state courts may not appear to be the most suitable platform for seeking the large-scale policy reforms that are required to reduce GHG emissions or adapt to the changing climate. As some of the cases discussed later in this chapter will show, it is true that courts are not and cannot be, the first port of call for matters of governance and policy-making of the scale that the challenge of climate change requires. The executive and the legislative arms of governments are certainly more suited to this role. Yet, as seen below, courts of various states are increasingly being asked to play a more prominent role in the fight against climate change. It is not the case that governments are oblivious to the climate catastrophe. At the international level, the 2015 Paris Agreement constitutes an unprecedented recognition by 195 states of the need to prevent climate change and of their respective roles.⁵⁵ Given the scale of the challenge, such international cooperation is critical to the hopes of avoiding warming beyond 2°C and this is precisely what the Paris

52 Costas Azariadis and John Stachurski, 'Poverty Traps' in Philippe Aghion and Steven N Durlauf (eds), *Handbook of Economic Growth* (2005) 295–384.

53 See n 16 above, at paras 1–3.

54 *Ibid*, at para 1.

55 UN Treaty Collection, Status of Treaties: Paris Agreement, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en accessed 2 January 2021.

Agreement aims to achieve.⁵⁶ However, even the ‘ambitious’ Paris Agreement⁵⁷ contains only voluntary pledges by states to reduce GHG emissions without any mechanism for ensuring the fulfilment of such pledges.⁵⁸ With 2020 being the first deadline for submission of updated and more ambitious voluntary pledges under the Paris Agreement, barely any state parties to the Paris Agreement have submitted their updated and more ambitious targets.⁵⁹ This is not a criticism of the Paris Agreement. Inherently, international treaties can never truly compel sovereign nations to reduce their emissions. This is where state courts and climate justice litigation come into play.

An annual study conducted by the London School of Economics estimates that a total of 1,587 cases of climate litigation were filed between 1986 and May 2020.⁶⁰ In an analysis of a smaller subset – decided non-US cases between 1994 and 2020, the study found that over half of the cases in this period had an outcome favourable to climate change policy.⁶¹

Climate justice litigation can have both direct and indirect positive impacts. Direct impact will flow from the order of the court itself, which may direct the government to take mitigating/adaptive steps or form policies in this respect, or cancel a licence granted to a new coal mine. But a favourable court decision is not the only measure of success of climate justice litigation. Even if a case is decided unfavourably, it may have positive knock-on effects on public discourse, government policy, political debates and even business practices, in apprehension of future litigation or an impact on stock prices. An unfavourable decision might also yield a dissenting judgment,⁶² which could potentially be a precedent for future cases with a different set of facts.⁶³

⁵⁶ See n 14 above, Art 2, para 1 (a).

⁵⁷ Michael Jacobs, *The Paris Agreement is Highly Ambitious and Very Clever*, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science (19 December 2015), www.lse.ac.uk/granthaminstitute/news/the-paris-agreement-is-highly-ambitious-and-very-clever accessed 2 January 2021; *What is the Paris Agreement?*, Process and Meetings, UN Framework Convention on Climate Change (undated) <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> accessed 2 January 2021.

⁵⁸ David Estrin, *Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts — Despite the Paris Agreement*, CIGI Papers No 101 (May 2016) at 14.

⁵⁹ Fiona Harvey and Jennifer Rankin, ‘Paris Climate Deal: World Not On Track To Meet Goal Amid Continuous emissions’, *The Guardian* (London, 4 December 2019), www.theguardian.com/environment/2019/dec/04/paris-climate-deal-world-not-on-track-to-meet-goal-amid-continuous-emissions accessed 2 January 2021; Climate Action Tracker, Climate Target Update Tracker, <https://climateactiontracker.org/climate-target-update-tracker> accessed 2 January 2021.

⁶⁰ Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2020 Snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (July 2020) at 4, www.cccep.ac.uk/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf accessed 2 January 2021, citing Litigation Cases, Climate Change Laws of the World, https://climate-laws.org/cclow/litigation_cases accessed 2 January 2021 and Climate Change Litigation Databases, Sabin Center for Climate Change Law, see <http://climatecasechart.com> accessed 2 January 2021.

⁶¹ *Ibid* at 11–12. These figures also include cases seeking abolition of pro-environment regulations/actions of the state ie, climate change litigation and *not* climate change justice litigation. While both categories of cases are statistically and legally relevant, the authors have focused on climate justice litigation in the following sections of this chapter.

⁶² *Kelsey Cascadia Rose Juliana et al v US et al*, No 18-36082, D C No 6:15-cv-01517- AA, Court of Appeals for the Ninth Circuit, Opinion (17 January 2020), <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf> accessed 2 January 2021.

⁶³ Setzer and Byrnes, n 60 above, at 25.

A favourable decision in climate justice litigation against the government, on the other hand, can make a profound pro-regulation impact. One of the most prominent examples of such an impact is the case of *Massachusetts v Environmental Protection Agency* (EPA).⁶⁴ In this case, the US Supreme Court had directed a reluctant EPA to start regulating CO₂ emissions by motor vehicles to address climate change as part of its mandate under the federal Clean Air Act, 1963. A more recent and equally prominent example comes from the Netherlands. In December 2019, the Dutch Supreme Court upheld a 2015 district court ruling which had directed the Dutch government to reduce the state's GHG emissions by 25 per cent from pre-1990 levels by 2020.⁶⁵ It has been argued that the decision of the Dutch Supreme Court, popularly known as the *Urgenda* decision, may mark the beginning of a trend where state courts 'help achieve what 20 years of UNFCCC [UN Framework Convention on Climate Change] negotiations did not and what the Paris Agreement fails to assure – actual, timely and sufficient reductions in carbon emissions to stop the global average temperature from increasing by more than 2°C'.⁶⁶ While replicating *Urgenda*'s results in other jurisdictions may not be straightforward, the case has already inspired lawsuits in several other jurisdictions on similar grounds and each successful case is likely to encourage several others.⁶⁷ For courts and judges, although foreign precedents may not be binding, it is useful to know that they are not the first ones to decide such cases favourably and that others have already done it.⁶⁸

Unlike more particularised forms of anti-poverty pro bono action, the inherently collective nature of climate justice litigation allows lawyers to make a much greater impact. For instance, a court order directing any state's government to reduce its GHG emissions is inherently beneficial to everyone – parties before the court or not, in the state of the court or not and born or unborn – and even more so for the poor who are disproportionately vulnerable to climate change. Given the recent proliferation of climate justice litigation and the recall value effect on judges of the several high-profile victories in the past few years,⁶⁹ the IBA's call to lawyers to engage in pro bono climate justice litigation⁷⁰ could not have been better timed. The next section of this chapter provides a primer on climate justice

64 549 U S 497 (2007).

65 *State of the Netherlands v Stichting Urgenda*, No 19/00135, Hoge Raad (Supreme Court of the Netherlands), Judgment (20 December 2019).

66 See n 58 above, at 6–7.

67 See, eg, *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General*, Appeal No 205 of 2019, Supreme Court, Judgment (31 July 2020); *Verein KlimaSeniorinnen Schweiz v. Bundesrat*, No. A-2992/2017, Bundesgericht (Federal Supreme Court of Switzerland), Judgment (5 May 2020); *VZW Klimaatzaak et al v Kingdom of Belgium et al*, R G No 15/4585, *Tribunal De Premiere Instance Francophone De Bruxelles* (Brussels Court of First Instance) (pending) (further details about the case are available at www.klimaatzaak.eu/en accessed 2 January 2021).

68 Raveena Aulakh, 'Pakistan Judge Orders State to Enforce Climate Policies' *The Star* (Toronto, 3 October 2015), www.thestar.com/news/world/2015/10/03/pakistan-judge-orders-state-to-enforce-climate-policies.html accessed 2 January 2021 (quoting Michael Gerrard, Director of Columbia Law School's Sabin Center for Climate Change Law: '[e]ach successful ruling motivates people in other countries to try it...[I]t is useful to be able to say to a judge that you are not the first one to do this. Others have already done it. Having a precedent is not binding, but it's helpful.').

69 See n 65 above; *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above; *Thomson v Minister for Climate Change Issues*, (2017) NZHC 733 (New Zealand).

70 See n 16 above.

litigation to help lawyers rise to the IBA's call to action and assess whether climate justice litigation could be a good fit for their or their firm's anti-poverty work.

Issues and considerations in climate justice litigation

Climate justice litigation can take several forms. A broad categorisation would include cases seeking: mitigation measures; adaptation measures; and compensation for harm caused by climate change. The first two categories of cases are generally filed against governments, whereas the third is against private entities.⁷¹

Another way to categorise climate justice cases could be to draw a distinction between 'strategic' and 'routine' cases.⁷² It could be said that climate litigation wherein the litigant makes strategic decisions about who will bring the case, where and when the case will be filed and what legal remedy will be sought, is a strategic case.⁷³ An underlying aim of achieving outcomes such as change in policy or behaviour of state or state entities, which go beyond the individual litigant's interest, has also been identified as a characteristic of strategic cases.⁷⁴ A routine climate litigation case, on the other hand, could be where a specific licence or project permit is challenged on environmental grounds such as failure to undertake statutorily required Environmental Impact Assessment,⁷⁵ without any express objective of effecting broader policy change.⁷⁶ In their endeavour to provide a broad-based overview of issues and not focus on the environmental law of any particular jurisdictions, this chapter largely focuses on examples of strategic climate litigation in the following sections.

While the challenges of seeking climate justice before any state's courts will be unique, there are a number of issues that are typically addressed in most such cases. These include cause of action, standing of the plaintiff, separation of powers between the state and the judiciary and causation of harm (and evidence thereof). Some of the trends which have emerged from discussion of the above issues by courts in distinct parts of the world are analysed below. This analysis may serve as a helpful bird's eye view of 'what has worked', 'what could work' and 'what may not work' in future climate justice litigation. This section is not intended for seasoned environmental law or climate change experts, who are already keenly aware of these issues and are innovating arguments (both in courts and in academic discourse) to overcome the current limitations of climate justice litigation. Rather, this section draws inspiration from the work of such experts and is targeted at lawyers who are not practising environmental law but are looking to engage in pro bono work aimed at alleviation of poverty. Given this focus, the preference for addressing broader climate policy

71 IBA Climate Change Justice and Human Rights Task Force, *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change* (February 2020) at 3.

72 Setzer and Byrnes 2020, n 60 above, at 4.

73 *Ibid.*

74 *Ibid.*

75 David Markell and J B Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual', (2012) 64(1) *Florida Law Review* 15 at 38.

76 Setzer and Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science (July 2019) at 2.

concerns⁷⁷ and the absence of any significant successful precedents at the time of writing,⁷⁸ the below discussion focuses on cases against states and state entities as opposed to ad hoc cases against private entities.

Cause of action

Traditionally, litigation for climate justice has arisen from environmental law statutes of states.⁷⁹ Much of such environmental litigation has focused on challenges to licences/approvals for emission-heavy projects on the grounds non-fulfilment of statutory requirements such as undertaking of an Environmental Impact Assessment.⁸⁰ But, as discussed below, it may be possible to initiate strategic cases with broader policy challenges under such environmental statutes, as well as more recent climate change statutes. Of late, climate justice litigation has also witnessed a trend towards causes of action founded in a broader set of sources including constitutional law, human rights law, tort law and various combinations of the above.

Statutory law

In countries such as the UK,⁸¹ which have dedicated climate change legislation, it could be possible to challenge plans and policies formulated under such legislations. This was recently accomplished in the *Friends of Irish Environment* case which came to be decided by the Supreme Court of Ireland in July 2020.⁸² Here, the government's mitigation plan under the Climate Action and Low Carbon Development Act, 2015 was challenged on the ground of being vague and not sufficiently specific.⁸³ According to the Supreme Court, a mitigation

77 IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014) at 127 www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx accessed 2 January 2021 ('The Task Force is conscious that litigation that secures declaratory or interim relief against states, whereby individuals can hold governments to account for their domestic regulation of GHGs, is preferable to ad hoc litigation against individual emitters that does not address broader climate concerns').

78 UN Environment Programme, *The Status of Climate Change Litigation: A Global Review* (May 2017) at 19–20 <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf> accessed 2 January 2021 ('Although several courts have recognized the scientific consensus regarding the causal relationship between anthropogenic GHG emissions, climate change and the adverse impacts resulting from climate change, no court has yet found that particular GHG emissions relate causally to particular adverse climate change impacts for the purpose of establishing liability').

79 See, eg, *Gray v Minister for Planning et al*, [2006] 152 LGERA 258 (Australia), where the approval of a coal mine was successfully challenged on the ground the government's failure to account for all the potential GHG emissions that could be caused by the mine; see also Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?', (March 2018) 7(1) *Transnational Environmental Law* 37–67 at 39, <https://doi.org/10.1017/S2047102517000292> accessed 2 January 2021.

80 See n 75 above, at 38.

81 See Introductory Text, *Climate Change Act, 2008* (UK) ('An Act to set a target for the year 2050 for the reduction of targeted greenhouse gas emissions; to provide for a system of carbon budgeting; to establish a Committee on Climate Change; to confer powers to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere; to make provision about adaptation to climate change...').

82 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at paras 2.3, 4.1 and 4.2.

83 *Ibid*, at para 6.35.

plan that fails to state *how* future emissions reduction targets are to be met, would not be sufficiently specific.⁸⁴

Other than vagueness of mitigation policies, a failure to periodically review mitigation policies can also be challenged under climate change legislations. In respect of New Zealand's Climate Change Response Act, 2002, a court has held that the existing mitigation policy and its targets must be reviewed periodically, particularly, in this case, on release of the IPCC's Fifth Assessment Report which contained new scientific findings.⁸⁵ Naturally, an omission by the state or its instrumentality to fulfil its mandate under climate change/environment protection legislation can also be challenged. This was the case in the previously mentioned earlier decision of *Massachusetts v EPA*.⁸⁶ In this case from 2007, the EPA's decision of not regulating CO₂ emissions from motor vehicles was challenged and the US Supreme Court found EPA to have failed in its mandate under the Clean Air Act, 1963 and compelled it to begin regulating vehicular CO₂ as an 'air pollutant' under the act.⁸⁷

As such, judicial review of a state's decisions/actions/inactions in respect of applicable climate change and/or environmental statutes is possible in many jurisdictions. The extent of such review will vary between countries, but some of the common grounds observed

from recent cases include: inaction or omission; failure to fulfil the statutory mandate; and procedural deficiency.⁸⁸

HUMAN RIGHTS

Early commentators, while acknowledging climate change's 'increasingly obvious' impact on human rights, doubted whether this impact generates sufficient evidence for an actionable rights violation.⁸⁹ These concerns were echoed by the 2009 report of the UN Office of the High Commissioner for Human Rights (OHCHR).⁹⁰ But, at the time, OHCHR remained unconvinced if such impact can be categorised as a human rights violation in a strict legal sense (inter alia, due to the complex causal relationships at play).⁹¹ While the report was hailed for explicitly linking climate change with human rights, it was also criticised for overstating the chain of causation between states' emissions and the effects of climate change on human rights, which prevented it from concluding that at least some effects of climate change breach human rights.⁹²

⁸⁴ *Ibid*, at paras 6.45–46.

⁸⁵ *Thomson v Minister for Climate Change Issues*, n 69 above, at para 94.

⁸⁶ *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007).

⁸⁷ *Ibid* at 522–525.

⁸⁸ See Jutta Brunnée, et al, 'Overview of Legal Issues Relevant to Climate Change', in Richard Lord QC et al (eds), *Climate Change Liability: Transnational Law and Practice* (2012) at 31.

⁸⁹ John H Knox, 'Climate Change and Human Rights Law' (2009) 50(1) *Virginia Journal of International Law* 163–218 at 166; cf more recent literature including Peel and Osofsky, n 79 above, at 46.

⁹⁰ OHCHR, Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61 (15 January 2009), <https://digitallibrary.un.org/record/647215?ln=en> accessed 2 January 2021.

⁹¹ *Ibid*, at para 70.

⁹² John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33(2) *Harvard*

Today, however, the link between climate change and human rights is more firmly established. In 2016, the UN Human Rights Council (UNHRC) acknowledged that OHCHR's 2009 conclusions may no longer be valid as 'scientific knowledge improves and the effects of climate change become larger and more immediate, tracing causal connections between particular contributions and resulting harms becomes less difficult'.⁹³ The Council also unequivocally noted that states are required to provide protection against the infringement of human rights by climate change.⁹⁴ The 2015 Paris Agreement also acknowledges the intrinsic link between human rights and climate change,⁹⁵ further fuelling the viability of human rights-based climate justice litigation. In light of this linking of climate change to human rights, violation of human rights is becoming a prominent cause of action in climate justice litigation.

The starting point for any discussion of human rights trends and considerations in climate justice litigation is generally the widely celebrated case of *Urgenda Foundation v State of the Netherlands*. In this case, the Dutch Supreme Court held that protection of rights under the European Convention on Human Rights, 1950 (ECHR) requires states to take preventive steps against the impact of climate change. Specifically, the court found breaches of Article 2 (which protects the right to life) and Article 8 (which protects 'right to respect for private and family life') of the ECHR by the Netherlands' insufficient mitigation policy.⁹⁶ In identifying these violations, the Supreme Court applied the European Court of Human Rights' (ECtHR) test of 'real and immediate risk' and interpreted 'immediate' to not refer to imminence in terms of time, but rather that the risk in question is directly threatening the persons involved.⁹⁷

The *Urgenda* case was closely followed globally and has influenced several similar lawsuits in other countries.⁹⁸ On the strength of the Dutch Supreme Court's decision in *Urgenda*, it is possible for future climate justice litigants to directly rely on the ECHR as a ground for seeking mitigation measures. However, results may not always be as favourable as the *Urgenda* case. In Switzerland, the Federal Court refused to find any violation of ECHR in a case brought forward by the Union of Swiss Senior Women for Climate Protection.⁹⁹ It held that the future threat of global warming does not constitute violation of any rights under the ECHR with the sufficient intensity.¹⁰⁰ The court seemed to disagree with the *Urgenda* court on the interpretation of 'imminence' and also found favour with the state's argument of lack of direct impact on the plaintiff's rights, an argument which was expressly rejected by the *Urgenda* court. Despite the ultimate rejection of the claim by the court, this case illustrates

Environmental Law Review 477–498 at 488.

93 UN Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (1 February 2016) at 10.

94 *Ibid.*

95 Paris Agreement, n 14 above, Preamble.

96 *Ibid.*, at para 5.

97 *Ibid.*, at para 5.2.2.

98 See *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above; *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above; *VZW Klimaatzaak et al v Kingdom of Belgium et al*, n 67 above.

99 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above.

100 *Ibid.*, at para 5.4.

an inherent benefit of formulating human rights arguments in climate justice litigation: replicability. Potentially, the replicability of human rights arguments, such as the ones deployed in *Urgenda* and the Swiss Federal Tribunal case is quite high given the similarities in formulations of rights in legal instruments available for future climate litigation, including international treaties and rights provisions of national constitutions.¹⁰¹ Indeed, in addition to the above Swiss case, the *Urgenda* decision has inspired lawyers in several countries first to theorise about the viability of *Urgenda*'s arguments in their jurisdictions¹⁰² and eventually initiate litigation relying on some of *Urgenda*'s arguments.¹⁰³

Endorsement of climate change's impact on human rights has also come from courts in developing countries. The most celebrated example of this comes from the Lahore High Court in *Leghari v Pakistan*, which involved a constitutional rights claim, as discussed in the next section.¹⁰⁴ Along with *Massachusetts v EPA*, the cases of *Urgenda* and *Leghari* have been identified as the three cases which have laid the foundations of climate justice litigation against governments.¹⁰⁵

Human rights-based arguments may also be deployed in future climate justice litigation seeking asylum for climate refugees. This was tried, albeit unsuccessfully, in relation to New Zealand's deportation of a climate refugee. Teitota, a refugee from the island of Kiribati, had argued that rising sea levels had forced him to leave his homeland and made him eligible for protection under the 1951 UN Convention relating to the Status of Refugees.¹⁰⁶ The New Zealand Supreme Court did not agree and held that Teitota did not face any serious harm if he were to return to Kiribati.¹⁰⁷ Teitota also filed a complaint against his deportation before the UN Human Rights Committee which came to be decided early in 2020.¹⁰⁸ The Committee held that it could not conclude that Teitota's rights under International Covenant on Civil and Political Rights¹⁰⁹ (ICCPR) were violated as the claimed threat of climate change was not imminent,¹¹⁰ and that this threat was still ten to 15 years away, during which time Kiribati could adopt sufficient adaptation measures.¹¹¹ Yet, promisingly for future climate justice litigation, both the New Zealand Supreme Court and the UNHRC noted that their opinions were without prejudice to future developments, when the threat of climate

101 Peel and Osofsky, n 79 above, at 40.

102 See, eg, Josephine van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (October 2015) 4(2) Transnational Environmental Law 339–357, <https://doi.org/10.1017/S2047102515000199> accessed 2 January 2021; Don Anton, 'A Dutch Blueprint for Climate Change Litigation' *The Sydney Morning Herald* (Sydney, 2 July 2015), www.smh.com.au/opinion/a-dutch-blueprint-for-climate-litigation-20150702-gi3d5d.html accessed 2 January 2021.

103 See eg, *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above; *VZW Klimaatzaak et al v Kingdom of Belgium et al*, n 67 above.

104 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No. 25501/2015, Lahore High Court, Order (4 September 2015).

105 IBA Climate Change Justice and Human Rights Task Force, Model Statute for Proceedings Challenging Government Failure to Act on Climate Change (February 2020) at 4–5.

106 *Ioane Teitota v The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107 at para 5.

107 *Ibid*, at para 12.

108 UN Human Rights Committee, Views Adopted by the Committee under Art 5 (4) of the Optional Protocol Concerning Communication No 2728/2016, CCPR/C/127/D/2728/2016 (7 January 2020).

109 International Covenant on Civil and Political Rights (1966), 999 UNTS 171.

110 See n 108 above, at para 9.6.

111 *Ibid*, at para 9.12.

change and its impacts may become sufficiently imminent to merit protection under the 1951 UN Convention relating to the Status of Refugees¹¹² or make deportation of a such persons untenable under ICCPR.¹¹³

As the above cases illustrate, imminence of the harm caused by climate change, or rather the absence of such imminence in the court's opinion, can be a hurdle in rights-based climate justice litigation. As seen in the next section, similar rights-based litigation in developing countries has relied more extensively on constitutional protections, wherein some courts have not deemed it necessary to undertake detailed factual analysis to determine whether the threat posed by climate change is indeed imminent.¹¹⁴

Constitutional right to a healthy environment

Apart from relatively recent constitutions, including those of several African countries,¹¹⁵ constitutions do not generally recognise an express right to healthy environment.¹¹⁶ India's constitution, for instance, despite specifying that it is the state's duty to protect the environment,¹¹⁷ makes this provision of the constitution non-justiciable.¹¹⁸ But India's courts have read a right to healthy environment into the constitutionally protected fundamental right to life.¹¹⁹ In at least one common law jurisdiction, however, such a right has been termed

112 See n 106 above, at para 13.

113 See n 108 above, at para 9.14.

114 See *Ashgar Leghari v Federation of Pakistan*, Writ Petition No 25501/2015, Lahore High Court, Order (25 January 2018) at para 2.

115 The Constitution of the Republic of South Africa, 1996, Art 24 ('Everyone has the right – (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'); The Constitution of Kenya, 2010, A 42 ('Every person has the right to a clean and healthy environment, which includes the right – (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70'); The Constitution of the Tunisian Republic, 2014, Art 45 ('The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate. The state shall provide the necessary means to eradicate pollution of the environment.').

116 Cf *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 8.13.

117 See also Constitution of the Federal Republic of Nigeria, 1999, Art 20 ('The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria').

118 The Constitution of India, 1949, Art 48A ('The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'); but see the Constitution of India, 1949, Art 37 ('The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws').

119 See *Virender Gaur et al v State of Haryana et al*, (1995) 2 SCC 577 (India), at para 7 ('Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, [and] [sic] water pollution, etc. should be regarded as amounting to violation of Article 21.'). A *P Pollution Control Board II v MV Nayudu et al*, (2001) 2 SCC 62 (India) at para 6 ('Our Supreme Court was one of the first Courts to develop the concept of right to "healthy environment" as part of the right to "life" under Article 21 of our Constitution').

as superfluous (ie, not extending beyond the right to life), vague and ill-defined.¹²⁰ Yet, in Pakistan, another common law country, the right to a healthy environment, as part of the right to life, has been judicially extended to include protection against climate justice within its ambit.¹²¹ In fact, the Lahore High Court has termed extreme weather impacts caused by climate change to be a ‘clarion call’ for protection of the fundamental right of life.¹²²

Similarly, developing countries with civil law systems have also recognised climate change as a facet of constitutionally guaranteed rights. The Supreme Court of Colombia has found the government’s inaction against changing climate as a breach of several constitutional rights.¹²³ The court has held constitutional right to life, health and dignity to be ‘substantially linked and determined by the environment and the ecosystem’ and found lack of efforts to prevent climate change and deforestation to be in violation of these rights.¹²⁴ Although not directly addressing climate change, courts in Argentina have also allowed constitutional rights-based claims for a healthy environment. These were cases brought by natives against proposed and ongoing deforestation.¹²⁵ A similar trend is also observable in India where, despite playing a very active and influential role in environmental protection, courts have not yet discussed ‘climate change’ per se, focussing instead on more particular issues such as deforestation or pollution.¹²⁶

In civil law jurisdictions from the developed world, results in constitutional rights-based climate litigation have been mixed. In Germany, a court has held that the government must provide adequate protection to constitutional rights including right to life and property against the impact of climate change.¹²⁷ Constitutional rights-based arguments were pressed before the Swiss Federal Tribunal as well, where the plaintiffs, women aged over 75, claimed that they were particularly susceptible to heat waves caused by climate change and sought more ambitious mitigation targets for Switzerland on the ground of a breach of their constitutional right to life.¹²⁸ However, the court found the injury complained of to be too far in the future¹²⁹ to be ‘legally relevant’.¹³⁰ It was held that the constitutional rights of

120 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 9.5.

121 See n 104 above, at paras 6–7.

122 *Ibid.*

123 *Demanda Generaciones Futuras v Minambiente*, STC4360-2018, Corte Suprema de Justicia (Supreme Court of Justice of Colombia), Judgment (4 May 2018).

124 *Ibid.*, at 13.

125 See *Comunidad Indígena del Pueblo Wichi Hoktek T’Oi v Secretaría de Medio Ambiente y Desarrollo Sustentable*, Corte Suprema de Justicia de la Nación (Supreme Court of Argentina), Judgment (11 July 2002); *Salas, Dino y otros v Salta, Provincia de y Estado Nacional*, Corte Suprema de Justicia de la Nación (Supreme Court of Argentina), Judgment (26 March 2009).

126 See *M C Mehta v Union of India*, 1987 (4) SCC 463; *M C Mehta v Union of India*, 1988 AIR 1115; *Indian Council for Enviro-Legal Action v Union of India*, AIR 1999 SC 1502; *M C Mehta v Union of India*, 2001 (4) SCC 577.

127 *Family Farmers and Greenpeace Germany v. Germany*, Verwaltungsgericht Berlin (Administrative Court Berlin), Judgment (31 October 2019) (ultimately, the claim for seeking adherence to the state’s previously announced goal of 40 per cent reduction in emissions by 2020 (as compared to 1990 levels) was dismissed as the court found the said goal to not be binding on the government and the projected reduction of 32 per cent to be adequate).

128 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above.

129 *Ibid.*, at paras 5.4 and 6.1.

130 *Ibid.*, at para 6.2.

the plaintiffs were not affected with a sufficient intensity at the present time by the alleged inadequacy of Switzerland's mitigation targets.¹³¹

It could be advisable to consider bringing future climate justice litigation in jurisdictions which have either express constitutional guarantees against adverse changes to the environment and/or a duty cast on the state to protect the environment. The same can also be said of jurisdictions where the courts have read the right to healthy environment into express constitutional rights. But such a derivative right or even a duty of the government to protect the environment may not always be justiciable. The threshold challenge of justiciability and its implications in climate justice litigation are discussed in more detail in the one of the following sections.

Torts of nuisance and negligence

In the US, common law claims for torts of nuisance on account of GHG emissions will face substantial resistance. This is so as the Supreme Court has held that the Clean Air Act, 1963 displaces any common law action for nuisance against the state,¹³² a reasoning which has been extended to such claims against private GHG emitters as well.¹³³ This could be due to

the requirement of proof for attribution, foreseeability and negligent conduct to establish tortious liability.¹³⁴

Given their origin in common law, tort liability for negligence and nuisance may not typically be applicable in civil law jurisdictions. However, statutory law may at times create tortious liability, as is the case in the Netherlands, but the proof requirement of attribution and fault will apply here as well.¹³⁵

In the environmental context, an extremely large body of tort law jurisprudence exists in India which gives effect to principles such as 'polluter pays'¹³⁶ and 'public trust',¹³⁷ and incorporates global environmental law maxims of 'inter-generational equity'¹³⁸ and the precautionary principle into Indian law.¹³⁹ The tradition of environmental activism by India's courts is also very well established and, alongside environmental activists and

131 *Ibid*, at para 5.4.

132 *American Electric Power v Connecticut*, 564 US 410 (2011) at 415.

133 *Native Village of Kivalina v ExxonMobil Corp*, 696 F.3d 849, 858-59 (9th Cir 2012); *Native Village of Kivalina v ExxonMobil Corp*, 133 S Ct 2390 (2013) (*writ of certiorari* was denied by the US Supreme Court without comment).

134 See Justice Brian Preston, *Climate Change Litigation* (Part I), 5 *Climate & Carbon Law Review* 3-14 (2011) at 4; Robert Blomquist, *Comparative Climate Change Torts*, 46(4) *Valparaiso University Law Review* 1053-1075 (2012) at 1064-65.

135 See, eg, Dutch Civil Code, Art 6:162 ('1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)').

136 *Vellore Citizens Welfare Forum v Union of India*, AIR 1996 SC 2718.

137 *M C Mehta v Kamal Nath*, 1996 (1) SCC 38.

138 *State of Himachal Pradesh v Ganesh Wood Products*, AIR 1996 SC 149.

139 *Vellore Citizens Welfare Forum v Union of India*, AIR 1996 SC 2718.

non-governmental organisations (NGOs), courts themselves frequently initiate *suo motto* inquiries into environmental matters.¹⁴⁰ In this backdrop, the authors believe that it could be very worthwhile to initiate previously untried climate justice litigation in India, relying on the vast body of environmental tort jurisprudence.

The 2015 Paris Agreement

Ratification of the Paris Agreement could potentially be a legal basis for citizens of ratifying states to proceed against their governments. As noted earlier, while the Paris Agreement itself does not contain enforceable obligations, the commitments of state signatories can be used to persuade domestic courts to take judicial notice of any state actions which are inconsistent with these internationally declared goals.¹⁴¹ In *Urgenda*, the Dutch Supreme Court held that all parties to the Paris Agreement are individually bound to meet their commitments.¹⁴² In the same vein, the Colombian Supreme Court has held that the government's failure to meet its commitment under the Paris Agreement – inter alia, to achieve zero-net deforestation in the Colombian Amazon by 2020 – violated the plaintiffs' fundamental rights under the constitution.¹⁴³ With 2020 marking the formal start of the commitments made by countries under the Paris Agreement, the stage could be set for a surge in climate justice litigation across the globe.¹⁴⁴

But the success of such litigation may not be guaranteed, especially before courts where 'imminence' of the threats occasioned by climate change is considered as a necessary ingredient for grant of relief. As such, the Swiss Federal Tribunal has ironically relied on the Paris Agreement to find support for the state's mitigation policy which was inconsistent with Switzerland's Nationally Determined Contribution (NDC) under the Paris Agreement. The Federal Tribunal noted that the Paris Agreement acknowledges that the limit of 2°C warming will not be breached in the immediate future and consequently, given the long-term goals of the Paris Agreement, Switzerland's 2030 NDC commitments cannot be sought to be enforced until the limit of 2°C warming is reached.¹⁴⁵ The Swiss court also relied on the IPCC's reports which indicated that global warming will reach 1.5°C around 2040, even at the current rate of 0.2°C per decade and therefore concluded that there was

140 See eg, *M C Mehta v Union of India*, Writ Petition (Civil) No 13029 of 1985, Supreme Court of India, Order (25 November 2019) at para 2 ('We have *suo moto* taken note of the water pollution in Delhi and other places as it appears that there are reports that impure water is being supplied to the people and there are reports to the contrary that samples have been manipulated. We cannot leave the matter at that. As a matter of fact, in such a matter of air and water pollution, it is the Constitutional duty enjoined upon all the stakeholders to do the needful for providing better air and potable water. It was also stated by the Chief Secretary to the Govt. of Delhi that there are certain problems of governance. The problem of governance, if any, cannot come in the way to deal with such matters. It is expected from the Government machineries not to enter into the rival claims, but to sit down together, work it out how to improve the air quality and whether potable water is being supplied or not and how to improve the water management.').

141 See n 78 above, at 8.

142 See n 65 above, at para 5.7.3.

143 See n 123 above, at para 11.3.

144 Peel and Osofsky, n 79 above, at 66-67.

145 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above, at para 5.3.

no immediate cause of action which could be addressed by the court.¹⁴⁶ While a refusal to undertake judicial review of the state's failure to meet NDC commitments may meet greater success elsewhere, more ambitious climate justice litigation which seeks changes to a state's NDC itself may not. In New Zealand, the state's 2030 NDC under the Paris Agreement was challenged on grounds of insufficiency or 'unreasonability'.¹⁴⁷ The High Court held that the state's 2030 commitment of 30 per cent GHG emissions reduction from 1990 levels could not be challenged.¹⁴⁸ It was held that even if the 2030 NDC was less ambitious than New Zealand's 2050 NDC and other countries' 2030 NDCs, it was not inconsistent with the overall goal of the Paris Agreement¹⁴⁹ and, in such a scenario, judicial review was uncalled for even if the 2030 NDC were an insufficient response to the dangers of climate change.¹⁵⁰ The contours of judicial review in the context of climate justice litigation are discussed in more detail in the following section.

Justiciability

Generally, justiciability has two elements: standing of the plaintiff to bring the claim; and permissibility of the relief sought under the doctrine of separation of powers between the judiciary and other organs of the state.

Standing

It is common for the standing of a non-profit entity/NGO to be called into question in climate justice litigation. As such, it may be difficult for an NGO or a corporate entity to rely on rights-based arguments, either constitutional or under international instruments.¹⁵¹ Specifically, it has been held that in the ECHR context, such an entity does not have standing as it does not have any rights under the ECHR in the first place.¹⁵² As noted by the Irish Supreme Court, *prima facie* an NGO or a corporate entity does not have any constitutional rights or rights under the ECHR and therefore would not have standing to commence rights-based climate justice litigation.¹⁵³ However, depending on the constitutional jurisprudence of a state, standing could be accorded to persons or entities when there is a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted.¹⁵⁴ This has been done in the Netherlands, where the Supreme Court permitted *Urgenda*, an NGO, to represent the interests of Dutch residents and further found such

146 *Ibid*, para 5.3.

147 *Thomson v Minister for Climate Change Issues*, n 69 above, at paras 160, 164, 168 and 179.

148 *Ibid*.

149 *Ibid*, at para 176.

150 *Ibid*, at para 160.

151 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at paras 7.5, 7.22 and 9.4.

152 *Ibid*, at paras 7.6, 7.23 and 9.4.

153 *Ibid*, at paras 7.5, 7.6, 7.23, 7.24 and 9.4.

154 *Ibid*, at para 7.21; *Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy Pty Ltd* [2011] NSWLEC 217 (Australia), at paras 69–75.

pooling of interests to be desirable in environmental cases.¹⁵⁵ Here, it may be noted that for adopting this view on *Urgenda*'s standing, the court relied on a provision of the Dutch constitution and was not remiss to note that in its absence, say in a case before the ECtHR or any non-Dutch European court, an NGO such as *Urgenda* would *not* have standing in light of Article 34 of the ECHR.¹⁵⁶

Even individuals may not have standing before European courts unless they can exhibit present and immediate danger, a threshold not met by future warming of 2°C as per the Swiss Federal Tribunal.¹⁵⁷ The General Court of the European Union has also rejected a group of individuals' challenge to the EU's emission reduction legislation on the ground that such individuals were not specifically affected by climate change or the EU's mitigation policies.¹⁵⁸ Even if the effects of climate change felt by each individual may vary, the same does not confer *locus standi* on any particular individual to challenge EU mitigation measures which are of general application.¹⁵⁹

However, special consideration may be accorded in cases brought by a constituent state, as was done in *Massachusetts v EPA*.¹⁶⁰ The US Supreme Court relied on Massachusetts' status as a quasi-sovereign and its responsibilities to prevent the harms of climate change to accord standing.¹⁶¹ Another finding of the US Supreme Court which could be advantageously referred to in future climate justice litigation is that as holder of 'territory alleged to be affected', the state of Massachusetts had standing to challenge EPA's decision to not regulate CO₂ emissions from motor vehicles.¹⁶² In the US, going by recent trends, even individual plaintiffs may have standing to initiate climate justice litigation. According to the court in *Juliana v US*, to have standing for a constitutional claim, a plaintiff must have a concrete and particularised injury that is caused by the challenged conduct and is likely redressable by a favourable judicial decision.¹⁶³ For this purpose, having to move houses due to water scarcity or dilution in property value due to rising sea levels have been found to be concrete and sufficiently particularised injuries.¹⁶⁴ For causation, it is sufficient to show that the US state contributes substantially to GHG emissions and that the injuries complained of are generally caused by climate change.¹⁶⁵ Another limb of causation is the state's grant of permission for extraction of fossil fuels, which shows its role in causing of the harm caused by GHG emissions and resultant climate change.¹⁶⁶ Yet the third limb of the test, whether the claim

¹⁵⁵ See n 65 above, at para 5.9.2.

¹⁵⁶ *Ibid*, at para 5.9.3.

¹⁵⁷ *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above, at paras 5.4 See 5.5.

¹⁵⁸ *Armando Ferrão Carvalho et al v The European Parliament and the Council*, Case T-330/18, General Court of the European Union (8 May 2019) (an appeal against this decision is pending before the Court of Justice of the EU).

¹⁵⁹ *Armando Ferrão Carvalho and Others v The European Parliament and the Council*, Case T-330/18, General Court of the European Union, Order (8 May 2019) at paras 49–50.

¹⁶⁰ See n 86 above, at 513.

¹⁶¹ *Ibid*, at 516.

¹⁶² *Ibid*, at 516.

¹⁶³ *Juliana v US*, n 62 above, at 18.

¹⁶⁴ *Ibid*, at 18–19.

¹⁶⁵ *Ibid*, at 20.

¹⁶⁶ *Ibid*.

is redressable by a judicial decision, a question not of standing but of separation of powers, is vexed and presents more difficult obstacles for such litigation in the US. This is discussed in the following section.

Generally, the courts of developing countries have been seen to scrutinise standing to a much lesser degree. Individual plaintiffs have been permitted to bring forward constitutional claims on the ground of present and future impact of climate change in several jurisdictions, without any detailed investigation by courts of the scientific evidence of causation of such impact.¹⁶⁷ In the case of *Leghari* in Pakistan, the plaintiff was a farmer who had complained that he had suffered losses due to extreme weather events in Pakistan and had sought implementation of the state's climate change adaptation plan. Other than noting that Leghari was a citizen seeking to enforce his fundamental rights, the Lahore High Court did not otherwise discuss the issue of standing.¹⁶⁸ Since the court considered the matter to be 'environmental public interest litigation',¹⁶⁹ there was no need for formal inquiry into the standing of the plaintiff and the court ultimately went on to oversee a two-and-a-half year-long process of ensuring that Pakistan's climate change adaptation plan is effectively implemented.¹⁷⁰

Questions of standing are unlikely to arise in South Asian countries such as India and Pakistan, where the judicially developed concept of 'public interest litigation' expressly permits filing of cases by persons who would otherwise have no standing, so as to represent the interests of either the public at large or any specific subset of persons.¹⁷¹ Such litigation is frequently initiated on behalf of the poor,¹⁷² an approach that could be suitable for future climate justice litigation as well. While most prominently prevalent in South Asia, public interest litigation as a means is available and has also been put into practice in other regions.¹⁷³ Given that the poor, who are the worst affected by climate change, tend to have

167 See n 114 above; See n 123 above.

168 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No. 25501/2015, Lahore High Court, Order (14 September 2015) at para 1.

169 See n 114 above, at para 4.

170 *Ibid.*

171 See Supreme Court of India, Compilation of Guidelines to be Followed for Entertaining Letters/Petitions received in this Court as Public Interest Litigation (undated), see <https://main.sci.gov.in/pdf/Guidelines/pilguidelines.pdf> accessed 2 January 2021 (The guidelines include 'Petitions pertaining to environmental pollution [and] disturbance of ecological balance' in the list of categories of petitions which may be entertained as Public Interest Litigation by the court); Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19(2) *Indiana Journal of Global Legal Studies* 555–573, www.repository.law.indiana.edu/ijgls/vol19/iss2/9 accessed 2 January 2021; but see Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India in Consequential Courts: Judicial Roles in Global Perspective* (Diana Kapiszewski et al eds, April 2013) <https://doi.org/10.1017/CBO9781139207843.013> accessed 2 January 2021.

172 See Parvez Hassan and Azim Azfar, 'Securing Environmental Rights through Public Interest Litigation in South Asia', (2004) 22(3) *Virginia Environmental Law Journal* 215–247; Prashant Bhushan, 'Supreme Court and PIL: Changing Perspectives under Liberalisation', (2004) 39(18) *Economic and Political Weekly* 1770–1774.

173 See Karen Kong, 'Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?', (2009) 28(3) *Civil Justice Quarterly* 327–343, see <http://www.law.hku.hk/hrportal-tc/wp-content/uploads/file/Public-Interest-Litigation-in-Hong-Kong-A-New-Hope-for-Social-Transformation.pdf> accessed 2 January 2021; Steven Budlender et al, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (October 2014) 25–77, see www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf accessed 2 January 2021; Oryem Nyeko, 'Public Interest Litigation Under Threat in Tanzania', (18

restricted access to the judiciary, public interest litigation is a promising avenue which should be further explored for the purpose of achieving climate justice. Naturally, the prospects of success of such litigation would, among other factors, depend on the strictness of the standing requirements in any given jurisdiction.¹⁷⁴

Separation of powers

According to the Dutch Supreme Court, while the state is free to decide how to reduce its GHG emissions, the court is empowered to direct it to do so, that, courts can issue a declaratory decision to the effect that the state's inaction or inadequate action is unlawful.¹⁷⁵ Courts may also order the state to take measures in order to achieve a certain goal – a 25 per cent reduction by 2020 from 1990 levels, in *Urgenda's* case – as long as such order does not amount to an order to create legislation/policy with particular content.¹⁷⁶ However, in a way, by directing that the mitigation plan must achieve a 25 per cent reduction, the Dutch Supreme Court did dictate the creation of a portion of the state's policy.

This view of the Dutch Supreme Court is very progressive. A similar but more conservative view had earlier been adopted by the Canadian Federal Court of Appeal in *Friends of the Earth v Canada*.¹⁷⁷ Here, it was held that judicial review extends to failure of the government to prepare a mitigation plan, but not to an evaluation of the contents of such a plan.¹⁷⁸ Other courts may adopt an even stricter test of justiciability. In dismissing a case where the relief sought was almost identical to that in *Urgenda*, the Swiss Federal Tribunal held that such claims can only be advanced by political means and not by legal action.¹⁷⁹

In a common law setting, it has been held that judicial review is permissible in respect of a mitigation policy if such policy is issued under a specific legislation and is alleged to not comply with some of the statutory requirements of such legislation.¹⁸⁰ In the US, separation of powers is a long-held argument against climate justice litigation. In the recent *Juliana* case, a divided bench dismissed the case on the grounds of separation of powers.¹⁸¹ In the decision

June 2020) Human Rights Watch, www.hrw.org/news/2020/06/18/public-interest-litigation-under-threat-tanzania accessed 2 January 2021; Salvador Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change', Herencia Carrasco, Salvador, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change', (2015) *Revue Québécoise de Droit International* 199–220, <https://ssrn.com/abstract=2441536> accessed 2 January 2021; Helen Hershkoff and Aubrey McCutcheon, 'Public Interest Litigation: An International Perspective' in Mary McClymont and Stephen Golub (eds), *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World* (February 2000) 283–296.

174 See, eg, a comparison of public interest litigation's success in India and Australia, Christine M Forster and Vedna Jivan, 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience' (2008) 3 *Asian Journal of Comparative Law* 1–32, <https://doi.org/10.1017/S219460780000017X> accessed 2 January 2021.

175 See n 65 above, at para 8.2.6–8.2.7.

176 *Ibid*, at para 8.2.6–8.2.7.

177 *Friends of the Earth v The Minister of the Environment and the Governor in Council*, [2009] 3 FCR 201; *Friends of the Earth v The Minister of the Environment and the Governor in Council* (appeal dismissed).

178 *Ibid*, at paras 33–34.

179 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above, at para 5.5.

180 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 6.27.

181 See n 62 above.

of the Ninth Circuit court which is under appeal, it has been held that it is beyond the court's power to 'order, design, supervise, or implement the plaintiffs' requested remedial plan [...] [as] any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches [...] which must be made by the People's elected representatives, rather than by federal judges.'¹⁸² As the court noted and future climate justice litigants must also note, the nature of relief sought can be the determining factor as to whether or not judicial review is permissible. In *Juliana*, the plaintiffs had sought several wide-ranging broad as well as particularised reliefs against a host of parties, including directions to the state to prepare 'a consumption-based inventory of US CO₂ emissions' and 'a national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂'.¹⁸³ This is in contrast to the bare statutory claim under the Clean Air Act, 1963 in *Massachusetts v EPA*,¹⁸⁴ which was found to be subject to judicial review.¹⁸⁵

'Proof' of climate change's impact and the state's responsibility for it

The Dutch Supreme Court in *Urgenda* relied extensively on the IPCC's work to establish the hazards of climate change and that emissions have to be reduced to prevent such hazardous climate change.¹⁸⁶ Reliance on IPCC reports is likely to become more prominent in climate justice litigation with courts considering the findings of the IPCC as determinative.¹⁸⁷ In 2020 itself, the High Court of New Zealand has also explicitly confirmed that IPCC reports are not only reflective of scientific consensus, but that they form the factual basis for the state's climate change policy decisions, which must in turn be reviewed if a new IPCC report is published.¹⁸⁸ Here, other scientific and legal resources may be useful too. For instance, for

182 *Ibid*, at 25; see also *ibid*, at 32 ('We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.').

183 *Kelsey Cascadia Rose Juliana et al v US et al*, Complaint for Declaratory and Injunctive Relief, United State District Court, District of Oregon (Eugene Division), at 94–95, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150812_docket-615-cv-1517_complaint-3.pdf accessed 2 January 2021 ('1. Declare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty and property by causing dangerous CO2 concentrations in the atmosphere and dangerous government interference with a stable climate system; 2. Enjoin Defendants from further violations of the Constitution underlying each claim for relief; 3. Declare the Energy Policy Act, Section 201, unconstitutional on its face; 4. Declare DOE/FE Order No. 3041, granting long-term multi-contract authorization to Jordan Cove Energy, unconstitutional as applied and set it aside; 5. Declare Defendants' public trust violations and enjoin Defendants from violating the public trust doctrine underlying each claim for relief; 6. Order Defendants to prepare a consumption-based inventory of U.S. CO2 emissions; 7. Order Defendants to prepare and implement a an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and will depend; 8. Retain jurisdiction over this action to monitor and enforce Defendants' compliance with the national remedial plan and all associated orders of this Court...').

184 See n 86 above, at 499.

185 *Ibid*, at 522.

186 See n 65 above, at para 2.1.

187 See n 58 above, at 8.

188 *Thomson v Minister for Climate Change Issues*, n 69 above, at paras 94, 133 and 178.

establishing the urgent need to reduce GHG emissions, the *Urgenda* court relied on the Kyoto Protocol, UN Environment Programme reports, the 2015 Paris Agreement, EU's Emissions Trading System and NDCs committed by the Dutch government itself.¹⁸⁹ But, practically speaking, this was merely an academic exercise as the government had expressly agreed with *Urgenda* that climate change presented a 'serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life [...] if global emissions of greenhouse gases are not adequately reduced'.¹⁹⁰ While the Dutch Supreme Court still took recourse to scientific material to satisfy itself of the risks posed by climate change, other courts may not require climate justice litigants to necessarily do so.

Like the Dutch government, the government of Ireland also made a similar admission about the risks of climate change in a recent case before the Irish Supreme Court.¹⁹¹ As such, the Irish Supreme Court could begin its legal analysis, without any fact-finding on the proof of climate change's impacts, on the position that 'consequences of failing to address climate change are accepted by both sides as being very severe with potential significant risk both to life and health throughout the world but also including Ireland'.¹⁹²

It is possible that specificity of the relief sought from the Dutch Supreme Court – a 25 per cent reduction in emissions to be achieved by 2020 – may have necessitated a closer look at IPCC reports and other materials. For lawyers considering future climate justice litigation in other jurisdictions, this could be a factor in deciding which remedy to seek. Additionally, the Dutch Supreme Court's aforesaid analysis helped the court overcome the government's argument that the Netherlands had a negligible gross contribution to global GHG emissions and thus did not have any enforceable individual responsibility to take mitigation measures. The court held that the ECHR imposes a responsibility on each state to play its part in preventing dangerous climate change, even though it is a global problem.¹⁹³ For this, the Dutch Supreme Court relied on the UNFCCC and held that while distribution of the measures to be taken against climate change must not be based solely on a country's past emissions, this does not detract from the underlying principle that 'partial fault' also justifies 'partial responsibility'.¹⁹⁴ In fact, the court went a step further in rejecting the Dutch government's contentions about other states' non-compliance with their mitigation goals under UNFCCC and the relatively small contribution that any Dutch reduction in emissions would make, with the express declaration that each country must effectively be called to account for its share of emissions.¹⁹⁵

The above argument of the Dutch government is also unlikely to succeed in other jurisdictions. As far back as 2007, the US Supreme Court had found GHG emissions to be attributable to the state and held it liable for failing to regulate them.¹⁹⁶ The argument of

189 See n 65 above, at para 2.1.

190 *Ibid*, paras 4.7–4.8.

191 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 3.6.

192 *Ibid*.

193 See n 65 above, at para 5.7.1

194 *Ibid*, at para 5.7.6.

195 *Ibid*, at para 5.7.7.

196 See n 86 above.

state's efforts only being capable of yielding limited results, in light of other states' emissions, therefore seems to be one which courts do not have much difficulty in surmounting since, in the words of the US Supreme Court, 'reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.'¹⁹⁷

Climate justice litigation seeking adaptation measures should anticipate even lesser reluctance from courts in accepting risks of climate change as proved. The *Leghari* court for instance, did not deem it necessary to undertake any investigation of the issue since, in the court's view, climate change had already resulted in floods and droughts and had raised concerns regarding water and food security in Pakistan.¹⁹⁸ Such a non-legalistic approach is not surprising. As the UNFCCC and the 2015 Paris Agreement unequivocally show, 195 states have recognised the challenge of climate change¹⁹⁹ and their role in redressing it by making international commitments to prevent the worst effects of climate change.²⁰⁰ With an increasing number of states also formulating domestic laws and policies to tackle climate change, courts will increasingly not feel the need to look for scientific proof linking a particular state's emissions to a particular instance of climate tragedy. An admission before the court of the risks of climate change was deemed as sufficient by the Irish Supreme Court to avoid factual scientific inquiry. It is likely that going forward, the above actions of states in recognition of the risks posed by climate change could, in and of themselves, be seen by courts as sufficient admission of the risks and their responsibility of addressing such risks.²⁰¹

As such, promisingly for future climate justice litigation and contrary to some conservative expectations,²⁰² courts have generally found little difficulty in attributing climate change and the responsibility to take adaptation or mitigation action against it, to states. As seen above, even the cases which were ultimately dismissed were unsuccessful due to legal obstacles

197 *Ibid.*, at 520.

198 See n 168 above, at para 6.

199 UN Treaty Collection, Status of Treaties: UN Framework Convention on Climate Change, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en accessed 2 January 2021; UN Treaty Collection, Status of Treaties: Paris Agreement, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en accessed 2 January 2021.

200 Paris Agreement, n 14 above, Art 4.

201 See UN Environment Programme, n 78 above, at 8–9 ('The Paris Agreement makes it possible for constituents to articulate more precisely and forcefully concerns about the gaps between current policy and the policy needed to achieve mitigation and adaptation objectives. In ratifying countries in particular, constituents can now argue that their governments' politically easy statements about rights and objectives must be backed up by politically difficult, concrete measures like restricting coastal development, foregoing development of coal-fueled power plants and imposing fees and taxes on activities reliant on fossil fuels. ... [Paris Agreement] it makes it possible for litigants to place the actions of their governments or private entities into an international climate change policy context. Placing actions at the national or regional level into that context makes it easier, in turn, to characterize those actions as for or against both environmental needs and stated political commitments.') <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf> accessed 2 January 2021.

202 See Myles Allen, 'The scientific basis for climate change liability' in *Climate Change Liability: Transnational Law and Practice* (Richard Lord QC, et al, eds, 2012) at 8 (In the context of liability of states/corporations, it is stated that '[c]limate change lawyers need not be scientists, but they need to understand the application of science, in terms of its uses and limits. This is likely to be crucial in considerations of liability for climate change, which often entails enquiry into two closely related matters: first, 'proof' of causes of climate change itself, in terms of large-scale temperature rise; and second, 'proof' of its effects in terms of specific weather events (storms, floods, heatwaves) or localised climate changes (temperature change, precipitation, wind and so on)').

of standing, limitations of judicial review or lack of imminence of the rights' violation, as opposed to lack of scientific proof or causation or the absence of states' responsibility or accountability for climate change.

Remedies to seek

As the above sections illustrate, there is a broad variety of remedies that can be sought by plaintiffs in climate justice litigation. Ultimately, changes to laws and policies will have to come from governments as separation of powers may prevent courts from formulating or dictating what policies/laws should be formulated. Even the revolutionary decision in *Urgenda* acknowledged that what measures are to be taken to address climate change is primarily a function of the political domain of the state.²⁰³ But the Dutch Supreme Court also held that the emission reduction commitments that the Netherlands had made internationally, through UNFCCC agreements, could be considered the state's 'minimum fair share' with which the court was empowered to ensure compliance.²⁰⁴ As such, relying on *Urgenda*, domestic climate justice litigation can potentially be initiated against any and all states failing to meet their own individual share of commitments under UNFCCC agreements.²⁰⁵ In EU countries for instance, even though the EU is on track to achieve the 20 per cent GHG emissions reduction in 2020 as compared to 1990 levels,²⁰⁶ plaintiffs can file cases before domestic courts seeking further reductions from their respective Member States if their individual commitments under the Paris Agreement have not been met.

It is true that not all courts may be willing to pass directions as specific as the ones passed by the *Urgenda* court. But even a non-specific direction from the court to the government to review its climate change policies can have profound results. This was the case in Ireland where its Supreme Court had asked for the state's mitigation plan to be more specific, without passing any further direction. Yet, the case and the accompanying change in government resulted in the executive committing to 'an average 7% per annum reduction in overall greenhouse gas emissions from 2021 to 2030, equivalent to a 51% reduction over the decade and to achieving net zero emissions by 2050'.²⁰⁷ Similar success was achieved in New Zealand in 2017 when during the pendency of a case seeking upward revision of the state's mitigation targets, the newly elected government committed to an even higher target of eliminating the country's GHG emissions by 2050.²⁰⁸ This commitment has been solidified by enactment of the Climate Change Response (Zero Carbon) Amendment Act, 2019.²⁰⁹ In the Netherlands, *Urgenda*, the plaintiff NGO, submitted a '54 Climate Solutions

²⁰³ See n 65 above, at para 6.2.

²⁰⁴ *Ibid*, at paras 6.2–6.6 and 7.1.

²⁰⁵ *Ibid*, at paras 7.3.1–7.3.6.

²⁰⁶ EU Climate Action, Progress Made in Cutting Emissions (undated, retrieved on 30 August 2020), see https://ec.europa.eu/clima/policies/strategies/progress_en accessed 2 January 2021.

²⁰⁷ BBC News, Climate change: 'Huge' Implications to Irish Climate Case Across Europe (1 August 2020), www.bbc.com/news/world-europe-53619848 accessed 2 January 2021.

²⁰⁸ *Thomson v Minister for Climate Change Issues*, n 69 above, at para 72 (internal citations omitted).

²⁰⁹ Climate Change Response (Zero Carbon) Amendment Act 2019, S 5Q, ('Target for 2050 (1) The target for emissions reduction (the 2050 target) requires that – (a) net accounting emissions of greenhouse gases in a calendar year, other

Plan’ proposal to the government after its initial victory before the District Court in 2015.²¹⁰ Following the 2020 decision of the Dutch Supreme Court, the government has announced its plan to comply with the directed 25 per cent reduction by the end of the year, a plan which adopts much of its content from *Urgenda’s* proposal.²¹¹

The above examples go to show that even an in-principle direction/declaration from the courts may be sufficient to promote large-scale desirable climate policy changes. As such, in jurisdictions with more pronounced separation of power jurisprudence, it may be prudent for at least some of the future climate justice litigation to seek more generalised remedies.

Alongside seeking enforcement of mitigation commitments under UNFCCC agreements, it may be possible to seek adaptation measures in parallel from states as mitigation and adaptation efforts are independent of each other.²¹² Crucially for future climate justice litigation in developing countries where emissions have still to peak, plaintiffs can arguably still seek mitigating reliefs since adaptation does not avoid the consequences of climate change and global warming.²¹³

This has already been successfully tried in Colombia where the government was directed to take *both* mitigating and adaptive steps.²¹⁴ The Colombian Supreme Court, before which the thrust of the argument was on deforestation, directed several government bodies to formulate short, medium, as well as long-term action plans to reduce deforestation in the Colombian Amazon to zero, reduce emissions and to adopt adaptation measures in response to impacts of climate change.²¹⁵

Before the activist courts of South Asia, it is also possible to ensure monitoring of the implementation of courts’ orders through a ‘continuing mandamus/rolling review’ wherein the court oversees the implementation of its directions by the executive.²¹⁶ For this purpose, commissions can also be appointed by the court, which work with the executive to ensure compliance of courts’ orders. In the context of climate justice litigation, the court-appointed Climate Change Commission in the *Leghari* case – whose proceedings were minutely monitored by the Lahore High Court for over two years – ensured that over 66 per cent of the priority items on Pakistan’s climate change policy were implemented.²¹⁷ And yet, the court did not dismiss the case even after this achievement and dissolution of the Climate Change Commission. Instead, the court appointed a Standing Committee on Climate Change and gave it the liberty to approach the court under the existing *Leghari* case for ‘appropriate

than biogenic methane, are zero by the calendar year beginning on 1 January 2050 and for each subsequent calendar year...’).

210 *Urgenda*, 54 Climate Solutions: CO2 Reduction Plan: 25 per cent in 2020, www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan accessed 2 January 2021.

211 *Ibid.* (‘About 30 of these measures are lifted from *Urgenda’s* “54 Climate Solutions Plan”).

212 See n 65 above, at para 7.5.2.

213 *Ibid.*

214 See n 123 above.

215 *Ibid.*, at 45.

216 See n 114 above, at para 4.

217 *Ibid.*, at para 19.

order [sic] for the enforcement of the fundamental rights of the people in the context of climate change, if and when required'.²¹⁸

The approach of the Lahore High Court in Leghari has been termed by one commentator as 'a model for fast track adjudication of climate change-related issues that are too often dismissed as too complicated for the courts to handle'.²¹⁹ While the Leghari court may fairly be seen to be crossing the boundaries of separation of powers, such an intensive involvement of courts is not unwarranted in the face of lax governance. As the court noted in Leghari, most of the members of the court-appointed Climate Change Commission, who were serving government officials,²²⁰ failed to turn up at the first meeting of the commission and the court had to issue a specific direction mandating their presence.²²¹ Furthermore, before the court's involvement, Pakistan's National Climate Change Policy, 2012 and Framework for Implementation of Climate Change Policy (2014-2030) had remained 'almost untouched' by the government.²²²

What the examples from Pakistan and Colombia illustrate is that courts in developing countries might be relatively less retrained in terms of remedies that may be granted and can potentially even go beyond the remedies sought by the plaintiffs. As such, there is a possibility of achieving significant victories for climate justice before these courts. Accordingly, any lawyers keen to undertake pro bono work in the field of climate justice litigation would be well advised to consider not only initiating cases in their own jurisdictions, but also, to the extent possible, before the courts in developing countries. This is advisable not only on account of the aforementioned scope of reliefs achievable, but more crucially since the vast majority of the world's poor reside in the developing world²²³ and stand to benefit the most from climate justice.

Next steps, first steps

Just as it is 'useful to be able to say to a judge that you are not the first one to do this. Others have already done it' in climate justice cases,²²⁴ it is useful for lawyers to know that other practising lawyers and firms have also engaged in pro bono climate justice litigation in the past. In arguably the biggest climate justice litigation victory as of date, *Urgenda* was represented pro bono by two Dutch international law firms, Höcker and NautaDutilh.²²⁵

218 *Ibid*, at paras 25–26.

219 Malini Mehra, 'Pakistan Ordered to Enforce Climate Law by Lahore Court', *Climate Change News* (London, 20 September 2015) www.climatechangenews.com/2015/09/20/pakistan-ordered-to-enforce-climate-law-by-lahore-court accessed 2 January 2021.

220 See n 168 above, at para 11.

221 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No 25501/2015, Lahore High Court, Order (5 October 2015) at para 10.

222 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No 25501/2015, Lahore High Court, Order (18 January 2016) at para 3.

223 World Bank, *Poverty and Shared Prosperity 2018: Piecing Together the Poverty Puzzle* (2018) at 29–30, <https://openknowledge.worldbank.org/bitstream/handle/10986/30418/9781464813306.pdf> accessed 2 January 2021.

224 Aulakh, n 68 above. (quoting Michael Gerrard).

225 Venis, *Climate Litigation: European Rulings Set Legal Precedents for Government Accountability*, IBA (21 April 2020) www.ibanet.org/Article/NewDetail.aspx?ArticleUid=3CB09942-0EE5-406D-A791-21A7A9033989 accessed 2 January 2021.

The co-lead counsel in the pending *Juliana v US* case is also a practising lawyer working pro bono.²²⁶

There is also a growing network of specialist climate justice litigation experts, one of which is the Climate Litigation Network. Started by the lawyers involved in the *Urgenda* case, the network is reported to have been involved in the recently successful decision of the Irish Supreme Court as well.²²⁷ Lawyers looking to dedicate their pro bono hours to climate justice litigation can liaise with such networks to either procure support for initiating climate justice litigation or for volunteering to aid their work on a pro bono basis. There is also a growing repository of climate justice litigation data that can be relied on for research. One of the most prominent such repositories is run by Columbia Law School, in association with the US international law firm Arnold & Porter.²²⁸ It merits mentioning that Arnold & Porter is also directly involved in pro bono climate justice litigation cases.²²⁹ Another extensive database of climate justice litigation and related resources, is managed by the London School of Economics.²³⁰ These databases are freely accessible and they document proceedings from across the world. Presently, these databases indicate an increasing proliferation of climate justice litigation in most jurisdictions. A recent 'Pro bono guide to the climate crisis' by the Australian Pro Bono Centre could be another useful starting resource, which includes a very helpful guide for dealing with commercial conflicts of interest that may come up while considering pro bono engagement in climate justice litigation.²³¹

As stated earlier, policy and legislative actions are certainly more appropriate responses to the threat of climate change.²³² Lawyers will have to assess on a case-by-case and jurisdiction-by-jurisdiction basis whether litigation is the appropriate tool for achieving climate justice or if their skills would be better put to use in a different form of climate justice initiative. As the discussion in the previous sections shows, litigation has the proven potential to be a particularly useful tool for seeking enforcement, review or formulation of legislative and policy measures against climate change. With several landmark victories in the past few years, there is increasing momentum behind climate justice litigation. As a recent report puts it, today 'outside of the US, climate litigation is more likely than not to lead to favourable

2021; NautaDutilh, *Procurator General and Attorney General Advise to Uphold Urgenda Ruling* (13 September 2019), www.nautadutilh.com/en/information-centre/news/procurator-general-and-attorney-general-advise-to-uphold-urgenda-ruling accessed 2 January 2021.

226 Darlene Ricker, Lawyers are 'Unleashing a Flurry of Lawsuits to Step Up the Fight Against Climate Change', (1 November 2019) *American Bar Association Journal*, www.abajournal.com/magazine/article/lawyers-are-unleashing-a-flurry-of-lawsuits-to-step-up-the-fight-against-climate-change accessed 2 January 2021.

227 See n 207 above. ('The Irish SC's ruling is the second win for a group called the Climate Litigation Network, which helps activist groups sue their own governments. The network was formed while the case *Urgenda* was underway – it was the first high-profile climate lawsuit to have a major win, which ended in the Netherlands in December 2019').

228 Climate Change Litigation Databases, Sabin Center for Climate Change Law, see <http://climatecasechart.com> accessed 2 January 2021.

229 See n 226 above.

230 Climate Change Laws of the World, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, <https://climate-laws.org> accessed 2 January 2021.

231 Australian Pro Bono Centre, *Pro Bono Guide to the Climate Crisis* (August 2020) at 38, www.probonocentre.org.au/wp-content/uploads/2020/08/Pro-Bono-Guide-to-the-Climate-Crisis-FINAL-27-August-2020-1.pdf accessed 2 January 2021.

232 See n 88 above, at 36.

outcomes for climate policy'.²³³ With rapid environmental deregulation underway in the garb of economic recovery measures necessitated by Covid-19,²³⁴ there has never been a time when advocacy and litigation have been required more for the cause of climate justice. In these times, the pro bono contributions of lawyers and firms would go a long way in safeguarding climate justice for the poor and aiding the fight against the overarching challenges of poverty.

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²³³ Setzer and Byrnes 2020, n 60 above, at 27.

²³⁴ See eg, Emily Holden, 'Trump Dismantles Environmental Protections Under Cover of Coronavirus' *The Guardian* (London, 11 May 2020), www.theguardian.com/us-news/2020/may/10/trump-environmental-blitzkrieg-coronavirus accessed 2 January 2021; Emma McIntosh, 'Here's Every Environmental Protection in Canada That Has Been Suspended, delayed and cancelled during COVID-19', *Canada's National Observer* (Vancouver, 3 June 2020) www.nationalobserver.com/2020/06/03/news/heres-every-environmental-protection-canada-has-been-suspended-delayed-and-cancelled accessed 2 January 2021.

Some pro bono success stories in Argentina

Colegio de Abogados de la Ciudad de Buenos Aires*

Synopsis

What can each lawyer do to help to eradicate poverty and promote social development in poor communities? For the past twenty years, members of the Buenos Aires Bar Association, working through their Pro Bono Commission, have set standards and inspiring examples for lawyers everywhere in the world. This chapter by members of the Pro Bono Commission presents only a few of many inspiring achievements, sometimes on a personal level and sometimes with profound implications for an entire community.

These case studies illustrate a variety of legal and regulatory issues that sometimes are novel and often are not always solved by traditional legal analysis. They point out the importance of a clear definition of the personal and societal interests that lawyers wish to advance. They also remind us of the great professional and personal satisfaction that lawyers and law firms can receive from investing their time, expertise and capabilities to aid less-fortunate members of their communities.

Prologue

Martín Zapiola Guerrico¹

The Comisión de Trabajo Pro Bono e Interés Público (also known as the Pro Bono Commission (the ‘Commission’)) was created in 2000 and is at the heart of the Buenos Aires Bar Association.

From its beginnings, the Commission focused its efforts on pro bono ‘public interest’ work – pursuing a goal beyond the interest of one particular beneficiary, such as public-interest litigation and legal aid for civil society organisations in the matter of public interest and different from ‘access to justice’ pro bono work, where assistance is offered to one person or a particular group of who lack the financial means to consult a lawyer.

The strategy was based on the idea that public-interest action can reach further and have extensive effects, thereby making better use of Commission’s networked resources. Consequently, we provided legal counsel to hundreds of civil society organisations, organised legal training activities and undertook high-impact public-interest litigation, all within the Buenos Aires area.

The Commission’s policy was substantially modified in 2016, when the Ministry of Justice

* For more information about the Colegio de Abogados de Buenos Aires (Bar Association of the City of Buenos Aires), see <http://colabogados.org.ar> accessed 2 January 2021.

¹ Martín Zapiola Guerrico is the founding partner of the law firm of Zapiola Guerrico & Asociados in Buenos Aires.

and Human Rights contacted us to draw up a project relating to their Access to Justice Offices network: a 'legal first aid' network, which serve the whole of Argentina.²

As a result of the proposed project, it was agreed that law firms from the Commission's network would provide legal representation in the trials of cases derived from the Access to Justice Offices in various vulnerable Buenos Aires city neighbourhoods. Although this agreement deviated from our original focus, we understood that, working alongside a coordinated network for legal aid centres, we would also achieve a public interest effect without actions and would be able to identify issues which are common in extensive areas of the community.

The experience of coming into contact with vulnerable neighbourhoods and people suffering from social exclusion and the inability to access justice first-hand, had a profound effect on young pro bono lawyers. This is when we became most aware that the experience had a positive impact both for the person who received legal pro bono assistance and the lawyers who provided it. Lawyers interacted with a very tough social reality, basically unknown to them, challenging them to broaden their professional abilities and knowledge as they faced such pressing issues.

As a Consequence, the Commission experienced some kind of 'collective epiphany'. Attention to 'access to justice' cases was a key motivational source to engage young professionals further in pro bono work, while also providing the possibility of helping extend pro bono culture to the rest of the country, as other Access to Justice Offices were allocated nationwide. Thanks to this new extended community, two very positive projects were undertaken.

First, as a way of responding to urgent legal needs created by the Covid-19 pandemic, a toll-free assistance phone line was set up for vulnerable people and the organisations which help them. Concerns are directly addressed by a team of more than 100 lawyers nationwide. To date, more than 600 consultations have been satisfactorily handled.

Second, in 2019, the Pro Bono Challenge was launched. Aimed at law students from Argentina's universities, the idea is that students identify their community's legal issues and submit a project on how to solve or alleviate the problems. Winners of the challenge receive full professional assistance from our network's law firms, as well as a modest financial support sum so that the aims of their project can be realised. Similar Pro Bono Challenges had already been in Peru and Chile.

In this chapter, we outline six personal success stories, narrated by the pro bono lawyers who have been involved in these cases. The narratives are personal in two ways, as they describe the needs and concerns of those who received legal pro bono counsel, but also the perception and experiences of the lawyers who provided assistance.

To share this array of the extension of our assistance to a diverse group of people with different specific needs, we are including testimonies of lawyers involved in pro bono work

² See Centros de Acceso a la Justicia (Access to Justice Centres), www.argentina.gob.ar/justicia/afianzar/caj accessed 2 January 2021.

offering legal assistance in cases of adoption, physical disability, femicide, lack of identity and irregularities in social security support. Our intention is to showcase the extent of our network and legal assistance across Argentina and our ability to resolve a range of diverse issues.

Proyecto Manuel: a project that changed my life

Francisco J Roggero³

I am a corporate lawyer and, while reading this article, you might be thinking ‘what does a corporate lawyer have to say about pro bono or, as in this case, the reality of abandoned children?’ I promise you, I have something to say.

As a preliminary concept, I would like to stress that we, lawyers, have a powerful tool. Yet sometimes we are not aware of the fact that we have it. We have the power to transform, we have the power to make a change, the power to make a difference and leave an imprint. I am not talking about the ability to turn everything into money, I am talking about our real power to turn and transform the world.

In the paragraphs that follow, I will share a story that changed my life and tells us something about the power to change that we have in our hands.

More than 15 years ago, on a Friday evening I ran into Guillermo Lipera, a senior partner of Bulló Abogados, the law firm where I then worked. He told me he was going to a meeting with the chief financial officer of a client for ‘something personal’ and he invited me to join them, an invitation that a junior associate can’t refuse.

During the conversation, this very high-ranking executive of a huge company told us a very sad and appalling story. His family was acting as a foster family for abandoned children and the child that they were taking care of was about to be returned to his origin family due to the decision of a judge who had not taken into account that the baby had been injured by his biological father on several occasions.

And here comes the initial question: ‘What could I do as a corporate lawyer?’

The story of this boy, called Manuel, introduced us to a very sad and difficult to solve reality: the reality of abandoned children in Argentina.

We formed a team in the law firm and began working on Manuel’s case. We then got involved in the system of abandoned children in Argentina: family courts, organisations, shelters, foster families the number of children affected.

We soon realised that it was a problem of no one taking care of their situation and when I say no one, I mean no lawyer was standing up to represent these abandoned children.

In Argentina, there are around 15,000 abandoned children in institutions, shelters or with foster families. And, if you ask me why there are so many abandoned children, the reason is the same one that I have just mentioned: no one taking care of these children and their situations.

3 Francisco J Roggero is a partner in the law firm Zang, Bergel & Viñes Abogados, Buenos Aires.

Judges are too busy with many other commitments, so they place abandoned children in shelters and forget the cases. It sounds awful, and it is indeed awful, but, unfortunately, this is what actually happens.

As soon as we started working with the non-governmental organisation (NGO) involved on the case, we became aware of the abandoned children's total lack of legal assistance.

Back to Manuel's story. By just acting on his behalf and of the NGO, we could solve Manuel's situation and the judge finally gave the baby to a family for adoption.

After Manuel's case, we started solving the judicial challenges of many of the children encountered by that NGO. Some of them had spent three, four, five and even more years in shelters and in only five months their judicial files were completed and they were adopted by families who give them love, care and nurturing. As you can see, it was only a matter of working on their cases. Their lives were changed because we used the power of our profession.

Since that NGO had lots of children and we saw that the situation needed more 'helping hands' if we wanted to help not only that NGO but others, so we talked with friends and colleagues from Marval, O'Farrel & Mairal as well as Beccar Varela and both law firms joined us on the project. So far, over 300 lawyers have been involved and have been working on more than 2,000 cases.

Let me share something personal. What do you think the most moving part of my pro bono story was? It was the day I visited the shelter for the first time and an abandoned child, no older than four asked me, 'Would you like to be my father?'

That was the moment when I realised that working for them was not an option, it was my duty. The project has taught me so much about the pro bono tool we all have. Argentina is a wonderful country but with lots of unaddressed necessities. I can't use my profession only to make money.

Helping is our duty. Pro bono work is our duty. It is a moral imperative. As lawyers, we have a tool to put to the service of the community. Once we do it and once we work as part of a useful project where we can see that we really are helping people, then we feel that being a lawyer is really worth it.

Luciano's case: contributing to happiness and inclusion

Julia Anabel Sainz⁴

I remember, as if it were yesterday. One morning in July 2014, I met a couple and their son Luciano,⁵ who was only ten years old. This was the case of a health provider denying medical attention to a patient. I was used to other kinds of cases but this was the first case of this nature I'd ever worked on. Since working on this case I knew I couldn't overlook such injustices again.

Luciano experienced birth trauma where his left shoulder was detached. The trauma

⁴ Julia Anabel Sainz is an associated in the law firm of Marval, O'Farrell & Mairal, Buenos Aires.

⁵ The author has changed the name to protect this person's privacy.

included the rupture of muscles and the nerves supplying his arm. This injury caused him permanent disability, unable to move his arm and even impaired his ability to grab something with his hand, as three of his fingers were rigid.

From the first days of his life, Luciano underwent various surgical operation in an attempt to reverse his condition, although none were successful. Owing to this and with the aim to provide him with the best possible state of health and development, medical doctors recommended physical therapy for life.

Luciano and his family started the physical therapy treatment as soon as it was possible and undertook all the therapies and treatments exactly as the doctors suggested. That is, until their medical insurance stopped paying for the physical therapy sessions. By law, these must be paid in full by the medical insurance.⁶

As is well known, any interruption of physical therapy treatment advised for motor rehabilitation in a child can have irreversible consequences for their future development as an adult. This is why we had to act quickly, as the family did not have the means to cover the costs of further treatment.

Luciano's family was a typical lower middle class family. Both parents worked: his father was an administrative employee at a club, his mother an employee at the national public university. It was clear that they couldn't afford the treatment, so the only way out was to demand that their medical insurance complied with its legal obligations.

His parents had filed all the claims possible with their insurance. They had even filed a claim with the Superintendence of Health Services (the agency which regulates health providers) and addressed a complaint to the National Institute against Discrimination, Xenophobia and Racism (Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo or INADI), all without success.

Defenceless as they were, exhausted after months of filing claims but obtaining no solutions and helpless for not being able to give their son the rehabilitation treatment he badly needed, they came to our offices.

I remember listening to Luciano's parents. They were emotionally exhausted after all the distance travelled without a favourable outcome and so they let it all out and told me everything they had been through as a family since Luciano's birth: the malpractice suffered at the time of delivery, the countless sleepless nights during the first days of their son's life because of all the operations. They also told me nice things about Luciano too. They said he was an excellent student, a good friend and they also told me about all the efforts he made to complete the physical therapy treatment, which had helped him regain some of the motor functions in his arm.

As with all the cases I work on, the conversation reached the topic that had summoned us, that is, the lack of payments by the insurance for Luciano's treatment. They explained all the dejection they had gone through for months: from phone calls, personal meetings and emails, to the claim filed with the Superintendence of Health Services and the complaint filed with INADI.

⁶ Law No 24,901 on Basic Integral Habilitation and Rehabilitation System for People with Disabilities.

Without any doubt, the only path left was to file an *amparo* action directly with the federal courts as soon as viable. This would be for the protection of constitutional rights other than those protected by the writ of habeas corpus. I specified all the basic documents we needed to initiate legal proceedings: national identity documents, medical insurance registration number, single certificate of disability according to Law 24,901, summary of clinical records, diagnosis and medical prescription.

Just like in any *amparo* action filed due to the failure by a person or a public authority to act, it is necessary to have proof of their failure, so on the day of the meeting I drafted the legal effects registered letter (*carta documento*) that Luciano's parents had to send to the insurance company, if possible, that same day.

As the defendant never answered the registered letter, we included it with our case documentation and filed the *amparo* action. Due to the urgency of the case, we requested that the judge provisionally order the defendant to cover the full costs of the physical therapy treatment already prescribed by the doctor in charge, until a final ruling was rendered in the case with the force of *res judicata*.

The judge upheld the precautionary measure we requested and ordered that the defendant provide full cover, in due time and manner, of the physical therapy rehabilitation treatment within three days, under the penalty of forwarding the process and papers to a Criminal Court for consideration of whether the official responsible was involved in the crime of failure to comply with the lawful order of a court.

At last, the defendant complied with the court order as it was rendered. I specifically remember the joy I heard in Luciano's mother voice when she called to say that she had just been into the insurance office and had the cheques in her hand. I also remember what I felt that day and I always relive it when I receive phone calls from parents telling me that their medical insurance finally started providing treatment for their child.

Since it is a lifelong treatment in which the number and type of sessions may vary, I also requested the judge in the *amparo* action to order that the defendant covers the full costs of the rehabilitation treatment indicated by the doctor in charge and of those to be prescribed in future, to prevent the parents from having to file an *amparo* action in each case of non-compliance by the insurance company.

The judge permitted our petition in broad terms as we had requested and let me tell you that this worked and still works today. In the years since, Luciano's parents have got in touch and asked me to send them the judgment once again because the defendant was again trying to avoid fulfilling its legal obligation.

After intervening in many judicial *amparo* actions, I believe that the same applies in all cases. On one side is a child or teenager who had: been born disabled; with an autoimmune disease; with an organ transplant or with cancer. On the other, a health provider failing to comply with their legal obligations, which is harmful to health and sometimes endangers life.

At the firm, we have filed many *amparo* actions for health issues for very varied and sad matters, from medical services for a child with autism to treatments against child cancer abroad, always in the knowledge that, with our pro bono work, we help children and teenagers

gain access to treatment and medical services for their full development as human beings.

This first case, Luciano's case, was referred to our firm by the Pro Bono and Public Interest Work Committee of the Bar Association of the City of Buenos Aires, but as I said at the beginning, a concern arose in me and since then, we have received dozens of cases where an individual's right to health is impaired.

The benefit of networking is always a breakthrough. Sometimes as lawyers, we are unable to handle a case because of a conflict of interest and that's when we lean on this network, where lawyers work pro bono to refer cases in which we can't participate. At the same time, we share knowledge and experience on the topic, to facilitate the wider pro bono work and to promote professionals to experience working pro bono.

Today, Luciano is 16 and has overcome every hurdle: those which life put in his way and those presented by an unjust society. He is an excellent competitive swimmer and has won several medals.

In 2019, he participated in the 28th Province of Buenos Aires Games, organised by the Ministry of Social Development of the Province of Buenos Aires annually in September and October. Luciano competed against more than 22,000 young people and reached the Provincial Final of those games, achieving a silver medal in breaststroke.

Personally, I feel a great satisfaction for having contributed and done my bit so that Luciano can be happy doing what he loves and feeling more included in society.

Sonia's story: a femicide criminal process from the victim's family's perspective

Florencia Maciel⁷

Our pro bono work in criminal law may vary from representing a defendant to providing legal assistance to victims of crimes.

Regarding the legal assistance of victims, there are certain important rights during the criminal procedure established by Argentine laws. For example, victims have the right to be treated respectfully, to be heard and informed about the steps and results during an investigation and to be asked their opinion before adopting any judicial decision which may affect them.⁸ Yet, in a considerable number of cases, victims do not have access to adequate and full justice due to several reasons. The court's location, as well as the limited or deficient attention paid to those who are poor or in a situation of vulnerability (especially when they are women), are two examples.

For instance, our justice system is comprised primarily of lawyers and officers who belong to a specific group of privileged people (white, educated, upper-middle class). They (we) often fail to adapt our conduct to the external difficulties that vulnerable groups may suffer.

I would like to mention a successful pro bono case related to criminal law and gender violence that we worked on. In particular, we made substantial efforts to turn over the

⁷ Florencia Maciel is an associate in the law firm of Durrieu Abogados, Buenos Aires.

⁸ Law No 27,372.

structural obstacles that previously described and provide our pro bono clients with the legal assistance needed. Despite the sadness that a criminal procedure entails, we can say that they do finally have adequate access to justice. In this case, we worked with the family of a woman who had been murdered by her former partner.

When we talk about women who suffer gender violence, the victims' rights became essential. The level of crimes against women because of their gender and LGTBQI⁹ individuals because of their identity reads like an historic and lethal pandemic. There were 258 women killed in Argentina because of gender violence in 2016,¹⁰ there were 251 in 2017,¹¹ 255 in 2018,¹² and 252 in 2019;¹³ and the numbers (which represent lives) did not decrease in 2020.

Since 2012, 'femicide' has been regulated as an independent and aggravated charge of murder in the Argentine Criminal Code.¹⁴ It occurs when a man kills a woman (defined in Argentina as any person who identifies herself as a woman)¹⁵ in the context of previous gender violence against her.¹⁶ Despite criminal law, femicide is also a political concept that refers to a crime motivated by hatred of a woman because of her gender.

From the first #NiUnaMenos¹⁷ massive protest on 3 June 2015 onwards, awareness of gender violence has increased markedly in Argentina. Public policies on this matter and intersectional feminist movements¹⁸ have won recognition. Members of these pressure groups campaign for equality, political representation and adequate government and judicial responses. As lawyers, such action encourages a deep commitment to help women victims in gender violence cases; to work to attain respect for their rights during the process.

Ana,¹⁹ was murdered on 29 December 2016 in an impoverished neighbourhood of Buenos Aires. Her ex-partner, a 19-year-old man, shot at her in her bedroom when she came back from work at in the early hours of the morning. They had been staying together for a week and had been trying to mend their relationship. The gunshot killed Ana immediately as the

9 This acronym includes, but is not necessarily restricted to, people who self-identify as lesbian, gay, transgender, bisexual, or 'queer'.

10 Argentine Supreme Court of Justice, *Annual Report made by the Argentine Registry of Femicides from de Argentine Judicial Branch*, 2016.

11 Argentine Registry of Femicides, *Annual Report*, 2017.

12 Argentine Registry of Femicides, *Annual Report*, 2018.

13 Argentine Registry of Femicides, *Annual Report*, 2019.

14 Law No 26,791.

15 S 2, Law No 26,743.

16 This may include a current or former relationship between a couple, or within a family, or in one's employment.

17 *Ni una menos*, frequently identified by its hashtag #NiUnaMenos 'Not one [woman] less', is a Latin American fourth-wave grassroots feminist movement, which began in Argentina and has spread across several South American countries, which campaigns against gender-based violence. See *Ni una menos*, Wikipedia, https://en.wikipedia.org/wiki/Ni_una_menos accessed 7 November 2020; see also the organisation's website at <https://niunamenos.org.ar> accessed 2 January 2021.

18 Intersectionality as defined by Kimberlé Crenshaw refers to a specific kind of discrimination and vulnerability, resulting from the combination of gender, race, class, sexual identity as well as nationality or ethnic or indigenous origins. It is also a tool from social sciences for a better understanding of such minorities or vulnerable groups' situation and needs. See more in Kimberlé Crenshaw, *The Margins: Intersectionality, Identity Politics and Violence against Women of Color*, vol 43, (1991) *Stanford Law Review* 1241–1299,

19 The real names of the individuals involved have been changed to protect their privacy.

bullet entered through her right eye. The assailant left the premises quickly. He argued that he was going to look for an ambulance, but he never came back. After a couple of weeks, in January 2017, he was found and charged for Ana's femicide and other two charges of aggravated murder.

The trial began in October 2017. After a year of several hearings, a three-judge court found the defendant guilty of the charges of femicide (by two votes to one) and two charges of aggravated murder, based on the existence of a couple's relationship and the use of a weapon. The usual sentence in this type of case is life imprisonment. Since March 2019, the ruling has been under the jurisdiction of a superior court because the defence appealed.²⁰

At this point, we must highlight the terrific work of the Public Prosecutor during the trial. A Unit of the Public General Attorney Office Specialised in Violence against Women (Unidad Fiscal Especializada de Violencia contra las Mujeres or UFEM) intervened to monitor the hearings. Both agencies worked thoroughly with the witness testimony and material evidence, giving respectful treatment to the victim and her family. They also demonstrated other previous violent acts by the defendant against Ana that were relevant in support of the conviction.

However, when one of Ana's sisters, Sonia,²¹ asked for information during the preliminary stage of the investigation, she did not receive satisfactory responses. Despite her having visited the courts, the court officials generally did not pay proper attention to her, or she received only formal and technical explanations that she could not understand. It would have been impossible for Sonia to understand and to be kept up to date on every detail without a lawyer's help.

Our work therefore mainly consisted of looking for missing answers and information. The case was assigned to us around July 2017, months before the trial began. First, we needed to listen attentively to Sonia and her family about how they felt and what their expectations were on the case. We then met the prosecutor in charge of the trial, who explained to us how he worked. Once we gathered all the available information, we spoke to Sonia in clear and understandable terms. We discussed the shape we anticipated the trial would take (the steps, the parties, the formalities, her rights and obligations with the process, etc) and the work required in terms of gender violence evidence. Finally, we provided Sonia with legal assistance during the 14-month trial.

Sonia only attended the hearing in which she testified, not the others. She lived in an impoverished neighbourhood quite far from the court. She had a new-born baby and another little daughter who were under her care. The victim's family members were immigrants and unemployed, living in very vulnerable economic and social conditions.

What did we learn from the case? We confirmed that we can notably help our clients by communicating in clear terms and by explaining the laws of justice in simple language. People who have been constantly discriminated against by the justice system, as well as by society, change their feelings entirely when they receive assistance from a pro bono lawyer

²⁰ As of 4 February 2021, the case is still under review at the Chamber of Appeals.

²¹ The author has changed the name to protect this person's privacy.

who is aware of their difficulties and vulnerability.

Unfortunately, this case is not an exception to our daily experience in court.

On the one hand, the justice system has a severe problem with society in terms of communication. It fails to communicate clearly with the individuals involved in cases in an uncomplicated language that they understand. Justice is not for all if some citizens are unable to understand it, particularly for those mistreated because of their race, gender, or economic circumstances. On the other hand, workers in the justice system, as well as lawyers in general, do not share the same culture, perspective and origins of those whose cases are going through the courts. A system that treats people differently depending on where they came from and what they look like is not imparting justice, but rather perpetuating discrimination.

Furthermore, when they infringe the victim's – or her family's – rights, it implies more violence against women, violence that is produced by the state when its officials do not respond appropriately in a gender violence case. This problem is a particular aspect which we repeatedly find in similar situations, but pro bono lawyers can work actively for its prevention.

Finally, our pro bono clients come from the most poor and vulnerable margins of society and our work as lawyers goes beyond the legal assistance. We urged the court to hear Ana's family and help her sister Sonia comprehend the terms of a judicial ruling adopted in her sister's case. It required bridge-building between those women and the legal activity in their case. In the end we discovered that we can generate positive change in their lives. After all, that's where we can obtain meaningful success, through our expertise.

Establishing an identity at 54

Giuliana Miller²² and Francisco Bereciartúa²³

We first met Pablo in 2017, through one of the Access to Justice Offices. Since then we became involved in his story with a particular sensitivity. Pablo's case was rare: he had lived 54 years without being registered before the Civil Registry, consequently, without an ID.

Since he had no birth certificate or ID, Pablo could not gain access basic rights which the state to grants any individual.

As lawyers, we know that someone becomes 'a specific person' and not another one before the state and society at the moment when a birth certificate is issued and, at the other end of a lifetime, they cease to be a person on the drafting of a death certificate. In turn, each time citizenship constitutes a legal link which binds them to the state. Acknowledgement from the state is necessary for a person to become a 'citizen' and, as such, to acquire political rights and obligations, such as the right to vote and others which allow participation in public affairs.

²² Giuliana Miller is solo practitioner in Buenos Aires, who collaborated with the law firm of Zang, Bergel & Viñes Abogados on this case.

²³ Francisco Bereciartúa was an associate in the law firm of Zang, Bergel & Viñes Abogados, Buenos Aires, Argentina, at the time of this case. He is currently pursuing advanced studies in Europe.

This is from where the great relevance of registered birth and acknowledgment of identity stem, considered as fundamental human rights.

Therefore, we became involved in Pablo's story and initiated a summary judicial procedure to obtain his birth registration and, later, a national identity document.

Pablo's life had not been easy, but his resilience and strength of will allowed him to overcome many obstacles and continue along his path. He was born in the Province of Misiones, located 800 kilometres (500 miles) from Buenos Aires. He travelled to Buenos Aires with his aunt at the age of eight. He lived there for many years, on the streets, sleeping in parks and seeking jobs at bars. He washed the dishes, peeled potatoes and swept shop floors, until he started working in construction in exchange for food and a roof over his head. If inspectors appeared, his work colleagues would whistle and he'd hide, because being a minor, he was an unreported worker. During his childhood, he could not access basic human rights such as going to school or being cared for in a public hospital. As an adult he had no access to formal employment, voting, or getting married. Years on, he was sleeping at a construction site until he could afford to rent a room thanks to his job. Pablo was always convinced that he needed an ID but he 'didn't know where to start' going about the process.

As the years went by, he met different people who promised to help him file for a national identity document, but, for various reasons, could not fulfil their commitment. The issue was that, not having been registered at birth, in the eyes of the state, Pablo did not exist. He was a 'nobody'. Without a birth certificate, no ID can be issued. Despite all these obstacles and his precarious and vulnerable situation, he never gave up the fight to establish his official identity.

A year later, he met his girlfriend and sometime later, their daughter Jazmín (now 12 years old) was born.

Time passed and Pablo eventually met a lawyer, Silvio, through one of the Access to Justice Offices. Silvio first contacted the Buenos Aires Bar Association's Pro Bono Work and Public Interest Commission. The commission received the case and sought a law firm interested in taking it on. That firm was Zang Bergel & Viñes and this is how we met Pablo and worked to assist his case.

The judicial proceeding was slow. First of all, we needed to conduct an investigation and submit witnesses to determine Pablo's age, time and place of birth, as he did not know exactly where or when he had been born. Our second challenge was that birth registration had to be filed in the province of Misiones and, given the distance between Misiones and Buenos Aires, we needed a lawyer to manage these distant proceedings.

Through the Federal Pro Bono Network and help from Gonzalo Vayo, a lawyer from the Pro Bono Commission, we met Manuel Giménez, a lawyer from Misiones. As soon as he learnt about the case, Manuel immediately offered to handle the proceeding locally. Soon after, Manuel reported that the birth certificate had been issued in the province of Misiones.

In 2018, although Giuliana ceased working for Zang Bergel & Viñes, her commitment

to Pablo remained and she continued working on the case even though she was no longer part of the law firm.

After we managed to get a judge to issue a birth certificate and for the state to comply, the only matter remaining was for Pablo to obtain a national identity document. To this end, we assisted him in making an appointment for the issuing of an ID and, after waiting 15 days, on 11 March 2019, he obtained his national identity document. Two years had passed since our first contact with him, we could not believe it.

His joy and excitement was infectious. He even told us that the night before he had not been able to sleep due to all the excited anticipation.

Even though the process took two years, Pablo had spent 54 years without an official identity. The result came about due to the teamwork of the Access to Justice Office in Zavaleta neighbourhood, the City of Buenos Aires Lawyers' Pro Bono Commission, the Federal Network and every lawyer who got involved in the case.

Our client taught us many lessons: the importance of fighting for what one needs, overcoming hardships and moving forward, refusing to give up. Of course, on this journey, we also learnt about how to initiate a summary judicial procedure for birth registration, a proceeding which we were not familiar with at the time we met our client; but we learnt a lot more about the relevance of teamwork, access to justice, the reality many people like Pablo experience where the state cannot reach them, the role that lawyers can play in society and how valuable and fundamental our work can be. Pablo taught us humility, kindness and strength of will, even in the face of hardship. His experience is clear proof that the law can be a tool for social change if we learn how to use and apply it.

As lawyers, we are faced with great social responsibility. We must work on every story with special awareness, knowing that our commitment has the potential to change the lives of many who are in extremely vulnerable situations. Therefore, we are willing to continue adding volunteers to broaden our network, so that everyone can access exercise of their rights.

Class action case against the National Social Security Institute for its failure to pay benefits

Joaquín Ceballos²⁴

On 31 March 2020, through the Pro Bono Federal Network and with the legal assistance of Joaquín Ceballos (member of Pro Bono Federal Network and Beccar Varela lawyer), we filed a class action against Argentina's National Social Security Institute Administración Nacional de la Seguridad Social or ANSES, for the non-payment of certain social security benefits. The missing payments affected many women and children belonging to socially vulnerable groups throughout Argentina.

The importance of this class action is measured by the fact that in Argentina almost the 58 per cent of the urban population is considered part of socially vulnerable groups and 36.6 per cent are in poverty. In effect, the incomes of these people and their families equate to

²⁴ Joaquín Ceballos is a lawyer in the law firm of Beccar Varela, Buenos Aires.

just 1.5 times the cost of the basic market basket.²⁵ Consequently, these people are severely exposed to become even poorer due to the minimum of economic changes the country may face.

Such poverty means these families are unable to afford such basic necessities as food, clothing, health provision and decent living conditions. Most must live in slum towns, which also puts them into a position of being more susceptible to crimes such as robbery and murder.

In the context of the Covid-19 pandemic, Sara Barni (president of Red Viva, an NGO which protects women who have been victims of gender violence) got in touch with Pro Bono Federal Network to inform them that many women and children throughout Argentina were not receiving social security benefits to which they were entitled. On one hand, the class action was filed in representation of women and children since the ultimate beneficiaries are the children in charge of women. Due to the provisions of Argentinian civil and procedural law the children must be represented by their adults in charge. On the other hand, the statute of Red Viva enables the association to act in representation of women and children in this type of actions. The lawsuit was filed this way in order to help the children to perceive this social security benefits.

For the sake of clarity and, taking into consideration the severe effects of the pandemic, many people had been dismissed from their jobs and were having to rely on the payment of the social security benefits which were intermittent until they stopped receiving them altogether, thereby depriving them their only source of income.

Once we got to work on the case, we noticed that the lack of payment resulted from the application of section 3 of Necessary and Urgent Decree (NUD) No 593/16 ('NUD 593/16'), which had fixed a standard tax provision. Consequently, if those in receipt of social security benefits were not up to date with payments of their contributions to the tax authorities, ANSES could withhold and stop the paying out social security benefits.

As the pandemic spread through Argentina, many people were dismissed from their jobs, relying only on their social security but, logically, without any income, they were unable to settle debts with the tax authorities. By applying the provision of section 3 of NUD 593/16, ANSES stopped payments of social security benefits to thousands of women and children.

The lack of payment of these social security benefits has worsened the vulnerable situation in which these families, women and children were immersed and they needed an urgent solution to avoid the violation of their most basic human rights such as access to food, clothes and housing.

The Pro Bono Federal Network's work involved finding a solution for this social problem, relying on the experience of the network in strategic disputes which have a track record of finding solutions which have a social impact in Argentina. When making the case and considering the peculiar provisions of section 3 of NUD 593/16, we concluded that there were only three ways to solve the problem affecting thousands of socially vulnerable. These were that:

- Congress could pass a new law modifying section 3 of NUD 593/16;

²⁵ The basic market basket is generally defined as the set of foods sufficient to satisfy the needs of an average household.

- President Alberto Fernandez could issue a new NUD to modify section 3; or
- we could file a class action pursuing a resolution in which a federal judge declares this provision unconstitutional, expanding the effect of this decision to the whole gamut of women and children affected.

After several days of scrutinising these cases we decided to base the petition of unconstitutionality on the fact that section 3 of NUD 593/16 infringes several laws and international instruments of human rights that are part of Argentinian National Constitution. The provision which had been legislated on tax law, is prohibited by Argentina's Constitution as among matters which cannot be regulated by NUDs.

As part of the class action, as a precautionary measure, we also asked the judge to order ANSES to immediately start paying all the social security benefits that had suddenly stopped being paid to these women and, in consequence, their children.

To date, the judicial procedure is in probationary stage and we hope the court will issue a resolution that recognises the basic arguments of the class action lawsuit in order to change the delicate situation in which thousands of women and children in Argentina find themselves.

Final appreciation: what pro bono success actually means

Fernanda Mierez,²⁶ Carolina Zang²⁷ and Delfina Balestra²⁸

Getting involved in pro bono matters results in the end in a transformative experience and we believe it is there where the real success stands. It requires the duly involvement in the way the aforementioned lawyers have shared by leaving aside their 'comfort zone' of the well-known daily legal work, to engage in new cases that also require them from time to time to work in collaboration with the network for the most neglected causes.

In each of the stories described in this chapter, we can conclude that three powerful things happen when getting involved in pro bono work:

- the impact that we can have as lawyers in changing the lives of many people who go through unjust situations;
- the certainty that our work helps hidden issues in order to make them known and understood by others who are also working on the same issues; and
- finally, the evidence that working together hand in hand with other colleagues provides a sense of real hope and success.

These stories are only a small portion out of the numerous ones that the 1,640 lawyers who are a part of the Pro Bono Commission have experienced. It is through each of the described cases that we want to evidence our commitment to continue providing access to justice, to promote the rule of law as a way to solve individual and community problems and to further the equality of all persons and institutions under the law.

²⁶ Fernanda Mierez is a partner in the law firm of Beccar Varela, Buenos Aires.

²⁷ Carolina Zang is a partner in the law firm of Zang, Bergel & Viñes Abogados, Buenos Aires.

²⁸ Delfina Balestra is the executive director of the Red Federal Pro Bono – Comisión Pro Bono, Buenos Aires.

To conclude, there is no doubt that pro bono work is our best option as lawyers to contribute for a much better society and to generate social impact for current and future generations.

Pro bono as a means of eradicating poverty in Colombia

Paula Samper and María Alejandra Salazar

Synopsis

The increase in poverty in Colombia in recent years reveals how challenging it is for public institutions to take effective action towards its eradication, in spite of international commitments made to the United Nations Sustainable Development Goals. With this in mind, civil society can support the public sector by taking action in the struggle against poverty and destitution using their wide breadth of professional abilities and knowledge. Lawyers have an important role in society, which consists not only in applying the rule of law but also in upholding justice for those who need it most. Through legal pro bono work, law firms and lawyers can help fight different forms of discrimination, and provide and support access to both justice and legal information. This chapter explains how pro bono work, focused especially on legal education for people living in poverty, is the best tool that lawyers can use to empower and educate citizens to help them overcome the challenges and struggles of poverty.

End poverty in all its forms everywhere

In 2015, UN Member States adopted the 2030 Agenda for Sustainable Development which provides a plan for peace and prosperity for people, including future generations and the planet. There are 17 Sustainable Development Goals (SDGs) which represent a call to action by countries participating in a global partnership.¹

The first goal is to ‘[e]nd poverty in all its forms everywhere’. To achieve this, it is important to establish ‘strategies that improve health and education, reduce inequality and spur economic growth – all while tackling climate change and working to preserve our oceans and forests’.² Although globally, extreme poverty has been declining, this does not prove to be the case in Colombia.

According to the information provided by the Colombian National Department of Statistics (*Departamento Administrativo Nacional de Estadística* or DANE, in 2018, poverty in Colombia reached 27 per cent, which represents 13,073,000 people living in poor conditions, 0.1 per cent more than in 2016. Extreme poverty reached 19.6 per cent (1.8 per cent more than in 2016). This means that in just two years, 1,107,000 more people reached this level

1 UN, *Sustainable Development Goals* (25 September 2015), <https://sdgs.un.org/goals> accessed 2 January 2021. See also Appendix I.

2 *Ibid.*

of poverty. Today, approximately nine million people live in these conditions in Colombia.³

Taking this into account, government intervention for the effective eradication of poverty and extreme poverty remains urgent. However, this cannot be left exclusively as a responsibility that pertains to public institutions. Civil society is equally responsible for addressing such an enormous challenge. Lawyers have their part to play in taking action to eradicate all forms of poverty by sharing their professional knowledge, providing aid for those who need it and reducing accessibility barriers to justice and legal advice which are often associated with lower social and economic status.

Human rights and legal needs

The international system of human rights has established several measures to eradicate poverty and extreme poverty with different actions, such as removing barriers concerning the accessibility to legal education. Access to justice is a guiding principle within the rule of law that has been recognised as a human right as well as a means of protecting additional rights.

Without access to justice, people are unable to exercise their rights, have their voices heard, overcome discrimination and seek to resolve their legal issues. Lack of access to justice is a problem mainly encountered by people living in poverty or extreme poverty conditions, as well as most socially or economically marginalised groups.

While access to justice is inscribed within Colombia's Constitution as a fundamental right, its enforcement is weak and intermittent. This poor implementation leaves citizens unprotected, increasing inequalities. It is therefore important to talk not only about access to justice but also about legal needs.

In Colombia, a survey taken in 2016 by the National Planning Department (*Departamento Nacional de Planeación* or DNP) regarding legal needs, showed that ten per cent of the Colombian population declared that they had at least one legal need, while 60 per cent had stated that this need had not been addressed or solved. The main categories of legal needs are health (23.4 per cent), family issues (19.4 per cent) and serious crime (13.9 per cent). These categories account for almost 60 per cent of citizens' legal needs in Colombia. Other categories include public services, armed conflict, environment, education, employment, land and discrimination.⁴

Legal actions that can be taken to solve these legal needs depend on the financial capacity of each person. According to the results of the survey, low-income people are more likely not to be able to deal with their legal issues. Additionally, people living under extreme poverty have greater legal needs than people living under other circumstances.⁵ This is a portrait of the close relationship between access to justice and poverty: if the state fails to guarantee effective access to justice, a vicious cycle will emerge, affecting those living in the poorest conditions the most.

This problem is even more important, if we consider that people living under these circumstances have less knowledge about their rights and how they can protect them through the legal system. This relates directly to the level of education to which they have access,

people with less access to education also have less access to legal assistance. Therefore, one of the means to provide a solution for this problem is to educate people about their rights and the mechanisms they can use to protect them, both individually and collectively, for example, the right of having public services.⁶

Pro bono work to support access to justice

Colombia's Constitution incorporates legal, administrative and political participation mechanisms that allow citizens to engage in government decision-making process. Through these mechanisms, they can protect their rights without the need for a lawyer. These mechanisms are known as constitutional actions and in exercising them, it is possible to obtain the recognition and protection of fundamental and collective rights. But once again, lack of empowerment and knowledge play a role against the effective implementation of this legal framework.

In this context, legal pro bono work can be understood as a means to support the state's mandate to guarantee all citizens access to justice. Legal pro bono work aims mainly to: (1) reduce barriers to access justice for people on low-incomes; (2) support the development of transparent institutions at all levels; and (3) ensure public access to information and protect fundamental freedoms. In this sense, pro bono work contributes to poverty reduction by providing legal services without fees so that those on low-incomes gain access to justice.

More specifically, pro bono work includes providing legal education allowing legal knowledge to be shared without needing the intervention of many lawyers. Promoting access to justice in the main urban centres, but also secondary cities and rural districts in Colombia, helps ensure general access to legal information. Educating people and informing them about their rights and how they can act to protect them without the need for a lawyer is a way of positively changing their lives.

Free legal education classes are spaces where lawyers can talk with communities. It is possible for groups of people to express their problems and through these discussions with legal experts, they can ascertain whether their rights are being breached and how they can demand their protection.

Colombia requires civil society organisations to support its public institutions in the implementation of the 2030 UN Agenda for Sustainable Development. Consequently, having

lawyers share their knowledge with people living in poverty empowers them in a way which can help transform the country.

Poverty and extreme poverty in Colombia

The concept of poverty has been defined as 'the state of one who lacks a usual or socially acceptable amount of money or material possessions. Poverty is said to exist when people

⁶ M E Rota, S L Odóñez, S S Mora and R U Yepes, *Ante la Justicia: Necesidades Jurídicas y Acceso a la Justicia en Colombia* (Colección Dejusticia 2014).

lack the means to satisfy their basic needs'.⁷ In turn, the UN has defined poverty as 'the lack of income and productive resources to ensure sustainable livelihoods. Its manifestation includes hunger and malnutrition, limited access to education and other basic services.'⁸

It is important to note that there are different dimensions of poverty. There is poverty and extreme poverty (also known as abject poverty, absolute poverty, deep poverty or destitution). The World Bank defines extreme poverty as living on \$1.25 or less a day. Extreme poverty was defined by the UN in the *World Summit for the Social Development Report* of 1995 as 'a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to services.'⁹

Overall, the keyword for describing poverty is 'necessities' and how they cannot be satisfied by individuals. Poverty is measured by economic criteria, while abject poverty is generally measured by an extensive criterion that includes accessibility to some guaranties and its concept is also related to the context and the reality of each analysed group.¹⁰

As previously indicated, ending poverty is the first of the UN's 17 SDGs. It is a top priority in the UN 2030 Agenda for Sustainable Development, because according to the UN in 2015, more than 736 million people were living below the international poverty line and ten per cent of the world's population living in extreme poverty, struggling to fulfil the most basic needs.

Ending poverty has a set of seven targets:

1. By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.
2. By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions.
3. Implement nationally appropriate social protection systems and measures for all and by 2030 achieve substantial coverage of the poor and the vulnerable.
4. By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.
5. By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other

7 *Poverty*, Encyclopaedia Britannica (15 June 2020), www.britannica.com/topic/poverty accessed 2 January 2021.

8 UN Department of Economic and Social Affairs, *Poverty Eradication* (2020), www.un.org/development/desa/socialperspectiveondevelopment/issues/poverty-eradication.html accessed 2 January 2021.

9 UN Department of Economic and Social Affairs, *World Summit for the Social Development Report*, Chapter 2 (1995) www.un.org/development/desa/dspd/world-summit-for-social-development-1995/wssd-1995-agreements/pawssd-chapter-2.html accessed 2 January 2021.

10 See generally Institute for Research on Poverty, University of Wisconsin – Madison, www.irp.wisc.edu accessed 2 January 2021.

economic, social and environmental shocks and disasters.

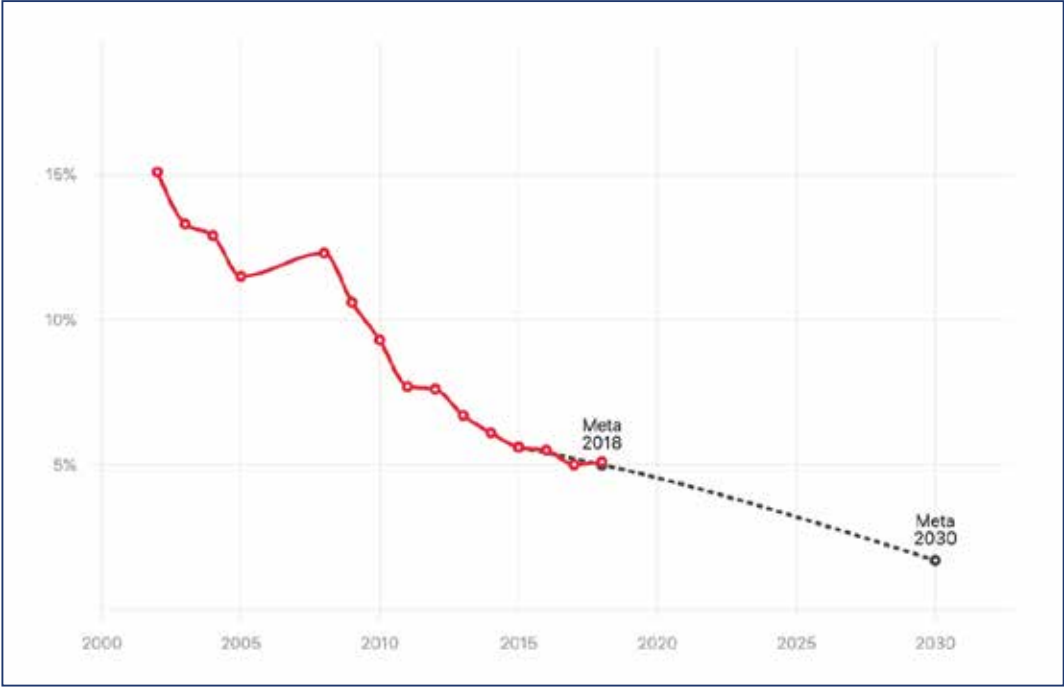
6. Ensure significant mobilisation of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions.
7. Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions.

To meet these targets, each Member State should take all necessary actions to set effective policies in place. There is a support network composed of the UN systems, NGOs, aid agencies, development banks and philanthropists, among others, that facilitate economic and technical resources to carry out these actions. However, there are countries where this institutional effort fell short and support from local stakeholders is also needed to guarantee success.

Colombia is one such example. In the country, according to information provided by DANE, the multidimensional poverty index (MPI) for 2018 was 19.6 per cent, compared to 17.8 per cent in 2016. This means that the MPI increased by 1.8 per cent or, in other words, 1,107,000 people entered multidimensional poverty. In terms of poverty for 2018, 27 per cent of the total population were living under poverty conditions and 7.2 per cent were living under extreme poverty conditions. In other words, 190,000 people entered the poverty line and 26,000 came out of extreme poverty.

If these numbers are looked at in light of Colombia's goal to reach the seven targets of the SDGs, it is evident how, over the last few years, the effectiveness of the policies and actions has diminished. Figure 1, taken from the official government portal to report on SDGs achievements, shows an increase in the percentage of people living in conditions of extreme poverty. Similarly, Figure 2 shows the increase in the percentage of people living under multidimensional poverty.

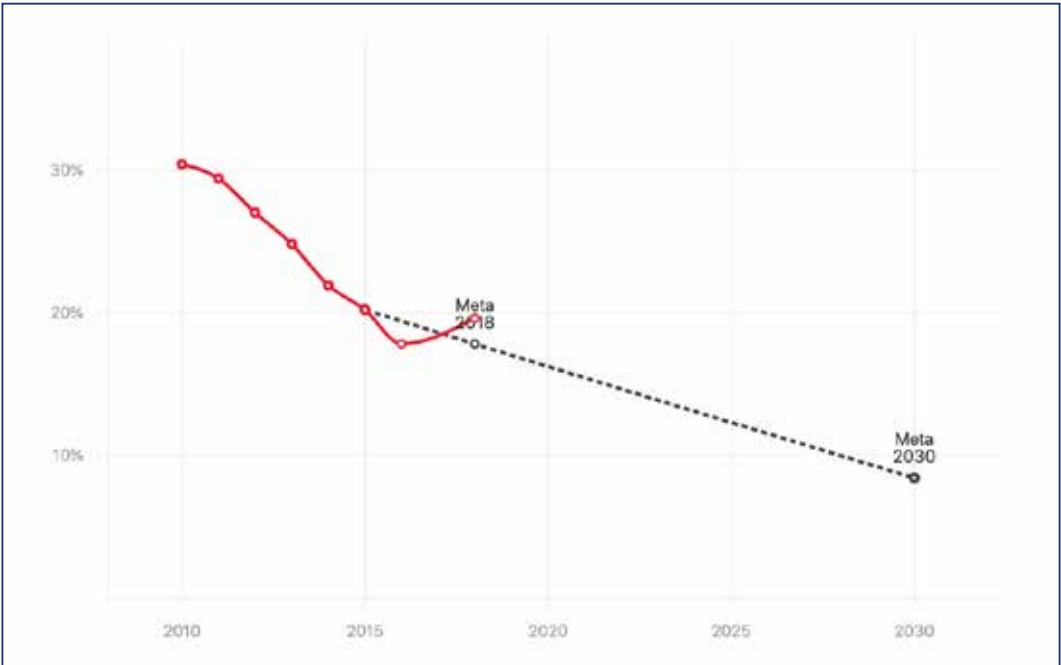
Figure 1: people living in extreme poverty conditions – goal versus reality



Source: SDGs Colombian Report¹¹

11 The 2030 Agenda in Colombia, www.ods.gov.co/es accessed 2 January 2021.

Figure 2: people living in multidimensional poverty conditions – goal versus reality



Source: SDGs Colombian Report¹²

When it comes to effective action, the UN international human rights system argues that states must adopt strategies to reduce poverty and social exclusion, and ensure public policies for people who are living in extreme poverty based on a human rights approach.¹³

Furthermore, the International Human Rights Systems accepted that poverty is linked to human rights. According to the Office of the UN High Commissioner for Human Rights, poverty can be defined either as the failure of basic freedoms (from a capability perspective) or the non-fulfilment of rights to those freedoms (from a human rights perspective). A human rights approach to poverty reduction includes: empowerment and participation; recognition of the national and international human rights framework; accountability; non-discrimination and equality, and progressive realisation. Different dimensions of poverty can be addressed more effectively in Poverty Reduction Strategies (PRSs) by taking a human rights approach. Poverty reduction and human rights are two mutually reinforcing approaches to the same project.¹⁴

Taking into account that Colombia signed and approved the American Convention on Human Rights, which is also known as the Pact of San José, the Inter-American Rights System is enforced in Colombia. This means that these rights are included in Colombia's

¹² *Ibid.*

¹³ UN, Guiding Principles on Extreme Poverty and Human Rights (2012).

¹⁴ UN High Commissioner for Human Rights, Human Rights and Poverty Reduction: A Conceptual Framework (2003) www.ohchr.org/Documents/Publications/PovertyReductionen.pdf accessed 2 January 2021

Constitution and must be protected by all state entities and individuals.

As stated by the Inter-American Commission on Human Rights¹⁵ (Humanos, 2016), human rights have three basic characteristics. Human rights are:

- inalienable, because they cannot be denied, taken away or transferred by any means, (after all, they are linked to human existence);
- inseparable, because they are intrinsically connected and cannot be isolated from other rights; and
- universal because they apply equally to all people around the world and do not have a time limit.

DANE uses different methods to measure each of the poverty classifications to reach an accurate estimate of the number of people who are in unfavourable conditions in Colombia. It is important to highlight the different variables that are taken into consideration to understand their relationship with the human rights approach to fighting poverty:

- *direct measure* – the satisfaction that individuals get from some vital necessities including health and education;
- *indirect measure* – the capacity of acquiring goods and services;
- *education conditions of the family* – reflecting the education level of all household members, including the possible social mobilisation this represents; and
- *socio-economic conditions* – including health, labour, access to public services and housing conditions.

This broad approach to poverty, which considers several variables that transcend the monetary spectrum, provides a full range of possibilities where further actions can be developed. Therefore, including different stakeholders both in the policy discussion process but also in its implementation can improve the country's performance for achieving the SDGs targets.

According to the *Sustainable Development Report*,¹⁶ Colombia's performance in eradicating poverty has moderately improved, but this trend is insufficient to attain the goal. However, significant challenges remain and they should be addressed so that the goal can be achieved. As mentioned, some international organisations have accepted that there is a bond between human rights enforcement and the effects of poverty, specifically, in the ways that this phenomenon reduces those rights because of the indivisibility and the independence of human rights.¹⁷ Generally, access to education, acknowledgment of rights, empowerment and active participation provide enough tools to individuals so that they can influence their realities.

15 Inter-American Commission on Human Rights, Informe Preliminar Sobre Pobreza, Pobreza Extrema y Derechos Humanos en las Américas (2016).

16 UN, *Sustainable Development Report: Colombia* (2020), <https://dashboards.sdindex.org/profiles/COL> accessed 2 January 2021.

17 *Ibid.*

Access to justice in Colombia

Access to justice is a basic principle of the rule of law that has been recognised as a human right and as a means to uphold and protect other human rights. Without access to justice people are unable to exercise their rights, have their voices heard, fight discrimination and seek for the resolution of their judicial problems. Lacking access to justice is a problem mainly suffered by those who live in conditions of poverty or extreme poverty and in general, all marginalised groups.

In Colombia, the Constitution¹⁸ provides for justice administration as a public service. Colombia's legal framework states the right to access justice in equal conditions for all citizens, while in parallel, it incorporates legal, administrative and political participation mechanisms that allow active participation in government decision-making processes.

It is interesting to note how, for exercising participatory rights, there is not always the need to have a lawyer. For instance, the participation mechanisms that were incorporated in Colombia's Political Constitution, known as constitutional actions, aimed to protect and guarantee the rights of each individual and their community do not need lawyers to be filed.¹⁹ The fact that these rights can be exercised by individuals or communities, proves the importance of legal education as a way of recognising rights and empowering the means to claim them.

In addition to its constitution, Colombia approved Law 270 of 1996, which is the statutory law for administration of justice. This law reinforces the rule that administration of justice is a public service but also introduces the concept that it is a basic function of the state. Consequently, in order to guarantee rights, obligations and freedoms of citizens, a robust system for the administration of justice must be set in place. Moreover, the state should ensure access to justice to everyone in equal conditions, so that individuals can exercise their rights.

With this information, it will be safe to say that the Colombian state recognises access to justice as a human right protected by the Constitution. Unfortunately, this is a right that exists on paper, but the enforcement of this principle is weak. This leads to the recognition of yet another challenge, which is unattended legal needs. This phenomenon increases directly proportional to the barriers to accessing justice. If people cannot access justice, they will not be able to solve their legal needs.

In this regard, the DNP survey of legal needs in 2016²⁰ aimed at understanding challenges around access to justice and legal needs and at promoting the creation of the Access to Justice Index in order to understand the effective access to justice in different regions of the country. The survey showed that ten per cent of the Colombian population has at least one legal need and that 60 per cent of the people that declared having a legal need also stated their problem remained unsolved. It is important to state that the DNP considers that the ratio of declared legal needs versus the estimated legal needs is one-in-six. Therefore, with

18 Political Constitution of Colombia (1991), Arts 2, 228–229.

19 *Ibid*, Arts 40, 86–88.

20 Departamento Nacional de Planeación, see n 4 above.

currently legal needs in Colombia at around 60 per cent, this speaks poorly about access to justice and the reliability of institutions.

Referring back to the results of the declared legal need study and the three main categories which make up for almost 60 per cent of legal needs in Colombia. The main reason the poor are unlikely to do anything to alleviate their legal problems is that it takes too much time and economic resources to solve. In addition, variables such as unawareness of the process, fear of the consequences and lack of confidence in the authorities play an important role when it comes to alienating people from the justice system.²¹

If we also consider that they do not solve their problems with direct agreements and they rarely go to a third party to solve their problems, they are exposed to situations of continuous abuse. For people living below the poverty line, decisions made in their favours are achieved at a lower rate.²²

Access to justice is a multi dimensional process which allows citizens to solve their legal needs effectively, promote inclusive growth and have effective access to justice. A sustained effort is needed to achieve this. Any solution must involve geographic accessibility, legal education, reduced costs and fees, legal assistance, the presence of authority in all the territory (judicial and administrative authorities), efficiency and successful completion of the judicial determination.²³

As mentioned above, achieving general access to justice that will have a positive impact on people living in conditions of poverty requires an effort that cannot solely rest on public institutions. A complementary effort from the private sector can help change specific but strategic realities and help overall in attaining the UN 2030 Agenda for Sustainable Development. We therefore believe that through pro bono work it is possible to achieve the objectives set by the international system to eradicate poverty and abject poverty, by working towards universal access to justice and specifically, access to legal education which will contribute to eradicating access barriers.

Pro bono legal work in Colombia

Pro bono is currently undertaken to designate free and voluntary legal work to support low-income populations, who have difficulty in accessing justice, by providing specialised legal advice seeking to guarantee justice for all.²⁴

Pro bono work in the US has been provided by law firms, bars associations, public interest organisations and law schools for several decades. However, in Latin America, despite having a low rate of access to justice, it was not until as recently as 2008, with the launch in Mexico of the *Pro Bono Declaration for the Americas*,²⁵ that pro bono work in the region significantly

²¹ *Ibid.*

²² *Ibid.*

²³ See n 4 above.

²⁴ Declaración de Trabajo Pro Bono para el Continente Americano (2008), www.urosario.edu.co/Facultad-de-Jurisprudencia-1/Documentos/Declaracion_Probono_2012.pdf accessed 2 January 2021.

²⁵ *Ibid.*

took off. The declaration's signatories undertook, inter alia, the following commitments for all lawyers to:

- provide legal services without a fee because of their moral responsibility to promote a fair legal system as the respect of human and constitutional rights;
- carry out tangible actions to improve legal representation and legal assistance for marginalised individuals and communities;
- provide at least 20 hours or three days per year pro bono legal services per lawyer; and
- promote among lawyers the knowledge of pro bono legal services as an ethical duty of the profession.

According to the *Latin Lawyer* and the Vance Center's 2019 survey of all the firms that are signatories to the *Pro Bono Declaration for the Americas*:²⁶

- 83 per cent of the firms are members of a foundation or clearinghouse;
- 67 per cent of the firms provide funding to clearinghouses;
- 25 per cent of the firms did in excess of 1,000 hours of pro bono work in the year; and
- in 30 per cent of the firms, associates do at least 20 hours' pro bono work per year.

Despite there being a considerable amount of work ahead for Latin America to guarantee access to justice over the entire region, the growth of pro bono work is indisputable. More law firms are seeing the benefits of such work and, consequently, they are dedicating even more time to pro bono activities. This, in turn, has resulted in more firms becoming parties to the Declaration.

Subsequently, in Colombia, Fundación Pro Bono Colombia (FPBC), a non-profit-making body, was created by 14 firms in 2009, with the aim of institutionalising and publicising pro bono work. The FPBC promotes a pro bono culture by providing both firms and independent lawyers with pro bono work opportunities to assist communities and individuals. But unlike the survey carried out by *Latin Lawyer* and The Vance Center, there is currently no data to assess the impact of pro bono work undertaken in Colombia.

Each year, the FPBC does, however, measure the pro bono work of its member firms, which gives us an indication of pro bono culture in Colombia. From the creation of the FPBC, the pro bono culture has been consolidating. Today, the foundation has 84 members among law firms, legal groups, universities and independent lawyers, in the major cities of Bogotá, DC, Medellín and Cali, therefore taking pro bono work to 13 regions.²⁷ FPBC members attended 596 cases in 2019, with 114 of these including legal advice to legal entities, 331 to individuals and 151 cases with direct impact on the communities.²⁸

The FPBC has as its strategic framework approach to cases which have a personal impact and cases with a collective impact. The first group includes legal consultations with individuals and institutional consultations for legal entities, such as non-profit organisations,

26 Frederick Karlson, *Latin Lawyer and The Vance Center's 2019 Pro Bono Survey* (9 June 2020), www.vancecenter.org/wp-content/uploads/2020/01/2019Pro-Bono-Survey-FINAL.pdf accessed 2 January 2021.

27 The Departments of Magdalena, Atlántico, Antioquia, César, Norte de Santander, Santander, Boyacá, Cundinamarca, Tolima, Chocó, Valle del Cauca, Cauca and Nariño.

28 Fundación Pro Bono Colombia, *Informe de Gestión* (2019).

micro-entrepreneurships and social entrepreneurship. The second group includes free legal education, general legal advice sessions, strategic litigation, legal investigations and communitarian projects.

The FPBC and its active members do an impressive job not only in Bogotá, DC, where the head office is located, but across the whole of Colombia, serving as an organisation that provides access to justice to disadvantaged individuals, communities and organisations. The FPBC reported that, in 2017, the services provided in Colombia grew by about 36 per cent. It is important to highlight the work undertaken by the FPBC in the field of free legal education classes. Since 2010, the FPBC has provided 271 sessions of free legal education, including:

- In the district of Río Quito (Department of Chocó) the FPBC and law firm Gómez-Pinzón have worked with the Community Council and the community in general, providing them with a legal education on how to protect their environmental and human rights. Lawyers have also produced a handbook on constitutional mechanisms for the community to help protect their rights.
- The FPBC and Gómez-Pinzón, among other law firms²⁹, have worked with Venezuelan immigrants to give 26 free legal education classes. In these classes, lawyers explained the general regulations in Colombia applicable health, employment, education and migrant status. Lawyers also produced an immigrants' rights handbook for the group.
- The FPBC and Gómez-Pinzón worked with three peasant farmer organisations in the Department of Cauca, which seek to overcome internal armed conflict and build peace within their territory. The project's aim was not only to help these organisations, but to educate peasant farmers about applicable laws, empowering them with knowledge about their rights.
- The FPBC worked with a group of women community leaders and victims of sexual violence in the armed conflict, giving them free legal education classes on family law³⁰ and class actions.
- The FPBC and Gómez-Pinzón worked with children and teenagers in free legal education classes on educational rights. To make this easier to understand, the lawyers produced a handbook to support the sessions.
- FPBC and the National Business Association of Colombia (Asociación Nacional de Empresarios de Colombia or ANDI) cooperated in the programme Vamos Colombia, a corporate volunteer project that focused on helping vulnerable people in four different regions: Cucuta, Guajira, Villa del Rosario and Urabá. During this programme, lawyers held a regional legal aid clinic to serve vulnerable people and give useful information to the community members on their rights.

Despite these efforts, a pro bono culture has not yet been adopted yet by all lawyers, due to many factors. For example: that doing pro bono work is not a requirement for obtaining

²⁹ Brigard & Urrutia, Posse Herrera Ruiz and Baker McKenzie.

³⁰ The free legal education classes covered parental authority, custody, personal care of minors and alimony.

the professional lawyer's card; pro bono work is not established as an ethical obligation; and law firms do not promote this work enough or incentivise their lawyers to take on pro bono cases.³¹

Considering that Colombia ranks second in the world in terms of its number of lawyers per inhabitant, the level of pro bono work should be much higher. In Colombia, there are 355 lawyers per 100,000 inhabitants, or a total of approximately 420,000 lawyers. Unfortunately, lawyers are not taught about ethical values which would encourage them to improve the wellbeing of others through their own professional life. Despite this outlook, pro bono work is a nevertheless growing culture in Colombia and its positive effects are more noticeable each day.

Pro bono to reform legislation

As the FPBC directs pro bono cases to promote this type of work to different law firms or independent lawyers, it is also important that pro bono work aims to develop strategic lawsuits, also known as strategic litigation. This is the selection of cases to be brought before courts with the purpose of creating broader changes in society. Generally, these cases are concerned with the effects that they will have on larger populations and governments.³²

As this kind of litigation may represent different changes in Colombian legislation and the reality of different groups in the society, we must pursue social justice to achieve social changes for many communities, including: the LGBTI community, the Afro-Colombian community, indigenous communities, people living in poverty conditions and the elderly.

These lawsuit cases may change diverse aspects of the society and confer different rights and guarantees to the members of the above groups or communities, for example, marriage equality for the LGBTI community. Pro bono work therefore allows citizens to enjoy their rights and encourages the government to develop policies to reduce poverty and improve access to education and legal education

Pro bono and legal education

The UN SDGs promote the conclusion that fighting poverty demands that Member States promote peaceful and inclusive societies. This involves upholding the rule of law and ensuring equal access to justice for all.³³

As mentioned before, pro bono work aims to reduce those barriers and allow access to justice to those on low-incomes. It also aims to develop transparent institutions at all levels,

31 An example of the lack of commitment of law firms in Colombia is that only one firm in the country, Gómez-Pinzón, has a full-time pro bono coordinator.

32 Child Rights International Network, *What is Strategic Litigation?* (2018), <https://archive.crin.org/en/guides/legal/guide-strategic-litigation/what-strategic-litigation.html> accessed 2 January 2021.

33 UN Department of Economic and Social Affairs, #Envision2030 Goal 16: Peace, Justice and Strong Institutions (2020) www.un.org/development/desa/disabilities/envision2030-goal16.html#:~:text=Goal%2016%3A%20Promote%20peaceful%20and,inclusive%20institutions%20at%20all%20levels&text=Significantly%20reduce%20all%20forms%20of%20violence%20and%20related%20death%20rate accessed 2 January 2021.

ensuring public access to information and the protection of fundamental freedoms. For these reasons, giving legal services without fees represents an effort by lawyers to help those on low-incomes attain access to justice.

The FBPC, for example, has developed different media to explain relevant topics to communities and individuals. Topics include legal actions, human and constitutional rights, employment rights, civil rights, immigrant rights, senior citizens' rights and environmental law.

Lack of access to justice has been recognised by international courts as an important matter that affects the sphere of other fundamental rights such as education, the right to freedom and especially the right to pursue constitutional remedies. As Colombia's Constitutional Court stated, civil and social rights must be progressively developed by the state. Due to this obligation, states must develop:

- public policies to guarantee the use of the aforementioned rights in tangible ways;
- greater public participation in political decisions; and
- ways to report rights violations.³⁴

It is important to develop public policies that promote a general knowledge about legal remedies, legal actions and constitutional actions. The International Court on Human Rights mentioned the importance of the existence of accurate procedures without unreasonable costs that limit access to justice and implicitly promote the criticised harms.

As an effective policy, the state could produce and deliver legal education to citizens to help reduce their lack of access to justice. This is also because in some cases, there are administrative procedures which citizens can access without a lawyer, but they nonetheless need to know how to meet such requirements as filing regulations and exercise their rights to appeal administrative decisions.

As an example, public services in Colombia are provided by different sorts of authorities, which in turn have different administrative stages and procedures to respond to consumer requirements. Frequently, citizens do not know all the mechanisms and stages by which can be used to solve their problems. For instance, they do not know or ignore that the Superintendence of Public Services is the second stage for filing claims regarding public utilities. Pro bono work can give citizens knowledge about these concerns through legal education:

- the structure of the Colombian state and its different competent authorities;
- authorities that provide legal services at no cost;
- relevant authorities for the filing of claims; and
- definition and scope of public services.

Citizens would therefore improve their knowledge about the different authorities, remedies and available legal actions to solve their legal matters, without unreasonable fees and in some cases, even without the intervention of third parties. Additionally, people in Colombia

34 Óscar Parra Vera, *Notas sobre acceso a la justicia y derechos sociales en el Sistema Interamericano de Derechos Humanos*, 50 Revista IIDH 131 (2009), <http://www.corteidh.or.cr/tablas/r25531.pdf> accessed 2 January 2021.

do not know about the existence of the office of the ombudsman Defensoría del Pueblo or its functions. This office aims to promote the respect for human rights. It represents any citizen who needs its services without fees.

Similarly, Colombia's Constitution incorporates legal, administrative and political participation mechanisms. These mechanisms are known as constitutional actions and in exercising them, it is possible to protect and guarantee individual and collective rights without the need of a lawyer.³⁵

The exercise of these actions allows for the recognition of an individual's rights. In other words, these actions benefit each person as an individual and at the same time each person as a member of a community. Unfortunately, people do not have this information about this as clearly as they should and the lack of knowledge plays a negative role in the effective implementation of this legal framework.

We believe there is a lack of information and education regarding legal and judicial matters and that people are not making use of all the elements offered by the legal system to protect and guarantee their rights. We also consider that the lack of access to justice primarily affects those on low income, the LGBTI community, indigenous communities and the elderly, among other vulnerable communities. This is why we regard pro bono work as a tool to avoid the negative consequences of a lack of justice.

As mentioned earlier in this chapter, one of the most important topics regarding extreme poverty is the gap between urban and rural areas, as rural areas usually suffer the most as a consequence of poverty. This means that pro bono work should try to reach out to as many people as possible and as far as possible into all regions of Colombia.

This represents a challenge as the pro bono culture has not been adopted by all lawyers and law firms nationwide and therefore, there are not enough people available to take on pro bono cases. This is why free legal education classes are the vehicle through which pro bono work can be achieved, bringing it closer to people and their communities throughout the regions.

Promoting access to justice in communities in the most remote areas of Colombia, who badly need it to improve their living conditions, is an important responsibility for lawyers. Teaching citizens about their rights and how they can defend them without having to resort to lawyers, is a way of enabling the marginalised to improve their lives.

Education is a mechanism through which cultural exchanges help to incentivise lawyers to undertake this type of work when encountering other day-to-day challenges and allowing them to see the impact their work could have in influencing the lives of vulnerable people and communities. Consequently, this work benefits both the community and the lawyer involved. At the same time, this type of activity encourages pro bono work among more lawyers, helping to expand the pro bono service culture in Colombia's legal community.

In practice, pro bono work faces many obstacles and challenges. Addressing these issues means being active and not waiting for clients to come to lawyers to seek help. Rather we, the lawyers, should be going out to identify people, communities and realities to which

35 Political Constitution of Colombia (1991), Arts 40, 86–88.

to contribute. The everyday reality of Colombia often fills us with feelings of helplessness, making us believe that we cannot change the status quo, but we do have the abilities and skills to share our knowledge. In this way, we can help to produce significant changes in the lives of those who receive pro bono services.

The reality of the territory of Colombia requires us as lawyers to share our knowledge with the people who need it most. This means reducing existing geographic and social gaps among large cities, towns and the countryside. Covering the whole of Colombia is probably an impossible task, but educating and empowering people is the way to transformation.

Conclusion

A lawyer's profession incorporates an undeniable social commitment which no one should ignore. However, the lack of a pro bono work culture and, in many cases, the lack of knowledge about pro bono work results in many legal professionals not engaging in this type of work. This trend has also been contributed to by a lack of legislation which encourages and regulates pro bono work or the absence of a bar association requirement that their members undertake this type of work. These are the reasons why, unfortunately, pro bono work in Colombia is carried out by few lawyers.

The importance of pro bono work is that it has significant positive impacts on the lives of those who need it most. It can also contribute to the eradication of poverty by helping citizens to access legal education and reduce barriers to access to justice.

People living under conditions of extreme poverty have more and greater legal needs than those who live in other economic circumstances. This is a major problem when we consider that people living in these circumstances have less knowledge of their rights and how they can protect them through the justice system. This is directly related to their level of education, as people with less education receive less legal assistance. We therefore believe that pro bono work, focused on legal education, contributes to eradicating poverty and barriers to access to justice.

Access to justice for those on a low income can be achieved through pro bono work. However, the real challenge lies in how to reach a greater number of people, as the number of lawyers currently offering pro bono is insufficient to cover all marginalised citizens' needs. Free legal education is the way to achieve this. With free legal education classes, people and communities are empowered by knowing their rights and how to protect them. These classes are a way not only for pro bono lawyers to cover more territory but also to reach more people without having to meet each person face-to-face.

Pro bono work is among the tools to eradicate poverty and extreme poverty because it contributes to the fight for equal rights, access to basic human services, natural resources and economic services. It also reduces exposure to factors which affect their rights and hit disadvantaged people the hardest, such as social and economic issues and natural disasters.

Legal education gives a voice to those who have previously been left behind and have not yet had suitable opportunities to be heard. These educational spaces are not only for

them to speak and feel that they have been heard, but they are also places to learn how to participate. In other words, people will learn how to interact effectively with the state and with any private party which violates or threatens to violate their rights, as well as to help prevent them from being victimised in the future.

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Empowering communities: a case study on the role of one company's in-house counsel in sustainable social development

Evgeny Tulubensky, Polina Galperina and Andrei Naumov

Synopsis

In many countries, the mining industry has become the primary source of employment, driving local development and broader economic growth. While there have been some high-profile cases of mining companies negatively affecting local communities and environments, those that properly invest and take a responsible approach to people and the environment, based on best industry standards and guidelines, can drive positive change. When done responsibly, mining can deliver a number of direct and indirect positive contributions to promote lasting community development, particularly in emerging economies.

This chapter presents a case study of how leadership and coordination by the corporate law department of one mining company could help to produce sustainable economic benefits and community development during mining operations and long after.

The integration of legal and sustainable development functions

The importance of the integration of corporate legal services and sustainable development functions is demonstrated by Nordgold's two mines in Burkina Faso: Taparko and Bissa. Both mines are co-owned by Nordgold and the Government of Burkina Faso, with the latter controlling ten per cent of operations.¹ Taparko is in the Namantenga province in the northern part of the country, close to the Mali border, while Bissa is in the central part of the country in the Bam province. Both mines have provided considerable economic and social benefits to the local communities. For example, in both regions, the main source of income and revenue is farming,² but this had been seriously affected by severe dry seasons experienced 'in Sub-Saharan Africa/in the Sub-Saharan region'.³ Consequently, in 2012, Bissa constructed the Tiben reservoir,³ which has since provided a consistent water supply to farmers in the region, in turn allowing them to cultivate crops all year round.

Multinational corporations, especially those operating in Africa, are increasingly seeking to promote responsible mining as part of their corporate sustainability strategies. Environmental, social and corporate governance (ESG) represents the new guiding principle for mining companies. ESG initiatives are considered not only to be a means of managing reputational risks, but as an essential part of modern business, where workers and human rights protections, environmental standards and effective community development

are becoming increasingly vital.⁴ In this way, sound ESG principles can also result in lower costs and greater efficiency, in addition to making a material contribution to reducing emissions. An example of this and how new technologies are leading to an improvement in environmental performance, is how Bissa is currently assessing whether to install solar panels,⁵ as well as the Gross mine, in Russia and Lefa mine, in Guinea, upgrading their respective powerhouses.⁶

Throughout the life of a mine, a variety of opportunities are created for the local market. Local businesses supply the project with materials, goods and services, while thousands of local jobs are typically generated, further supported by social development programmes delivered by the operator. This is how international mining enterprises help stimulate the growth of local capabilities.

Providing fair remuneration for workers, as well as protecting their health and safety, is an essential commitment for responsible businesses. Such companies strive not only to attract the best employees, but also to ensure that their workforce stays with them long term, and is sufficiently motivated to work hard and prove themselves effective. This also ties into effective anti-corruption efforts. Today, eliminating corruption is not only an economic imperative; it ensures that business is done fairly and that opportunities are allocated fairly, creating better outcomes for all.

Ongoing development

Nordgold is an internationally diversified one-million-ounce gold producer with over 8,000 people operating a portfolio of ten mines (in Burkina Faso, Guinea, Russia and Kazakhstan) and a number of development and exploration projects in West Africa, Eurasia and the Americas.

Since its inception in 2007, Nordgold has always been a responsible mining company that has put ESG front and centre in every part of its investment decision process, as well as embedding it in its wider culture. In recent years, Nordgold has acted to strengthen this further through an increased focus on sustainability. The company has joined the United Nations Global Compact,⁷ further confirming its commitment to the UN's Sustainable Development Goals. Nordgold also continues to improve its policies and procedures, including integrating Scope 1, 2 and 3 emissions into its ESG reporting.

4 Rachel Fixsen, 'Denmark's P+ divests 12 stocks where influence attempts are "hopeless"' IPE Magazine www.ipe.com/news/denmarks-p-divests-12-stocks-where-influence-attempts-are-hopeless/10050622 accessed 10 February 2021; Neil Hume, 'Vale takes first steps to divest coal stocks' *Financial Times* www.ft.com/content/27fcd9bb2-922a-41e6-a043-26000ff93a1f (21 January 2021),

5 'Nordgold to Build Solar Power Station at Burkina Faso Mines,' <https://nordgold.com/investors-and-media/news/nordgold-to-build-solar-power-station-at-burkina-faso-mines/> (22 October 2019).

6 'Nordgold to Construct New Power Plant at its Lefa Mine in Guinea,' <https://nordgold.com/investors-and-media/news/nordgold-to-construct-new-power-plant-at-its-lefa-mine-in-guinea/> (20 April 2020).

7 'Nordgold, UN Global Compact' www.unglobalcompact.org/what-is-gc/participants/138338-Nordgold accessed 15 February 2021. Since 31 December 2019, Nordgold has been one of more than ten thousand companies that have participated in the Global Compact. See also 'Making Global Goals Local Business,' UN Global Compact www.unglobalcompact.org/sdgs accessed 15 February 2021.

Further, ESG criteria (including the EIA and Human Rights implications) is now fully integrated into all investment decision-making and therefore a new approach to the due diligence process is currently being implemented. While an active approach to ESG performance is encouragingly becoming more prevalent and a global trend, Nordgold has been continually ahead of the pack in this respect.

In Guinea and Burkina Faso, Nordgold is among the countries' top taxpayers and investors. The company is also an important employer, with its total staff reaching 3,000 employees. Of them, more than 95 per cent are nationals, which reflects the commitment of Nordgold to create opportunities for the local population. Nordgold contributes to the community empowerment, building new infrastructures and improving existing ones. The company has built over 100 schools, drilled hundreds of water boreholes, built dozens of places of worship for different religions and dozens of other structures, such as clinics, community centres and law enforcement posts.

Nordgold focuses on the integration of the UN's Sustainable Development Goals (SDGs) throughout its operations, with the elimination of poverty and hunger its primary target. By creating decent jobs and numerous career opportunities, the company is helping people to improve their living conditions and create better futures for their children. Another crucial focus for the company's SDG agenda is gender equality. It runs dedicated women empowerment programmes aimed at promoting the autonomy of women and creating better access to education.

Complementing job creation and training, Nordgold's societal programmes are always developed with the specific needs of the local community in mind. In order to ensure that a village will benefit from the new infrastructure or empowerment initiatives, the company's Community Relations Department, together with the legal team, develop special committees where local authorities, spiritual leaders and community members can share their visions of the community's needs. Without a strong legal framework, an efficient implementation of the community development projects would be impossible. For example, the role of the in-house legal counsel is changing. The legal department now plays a more active role in establishing strategies and corporate policies that should be aligned with international ESG standards and principles. Similarly, the legal team also plays a vital role in ensuring sustainability is established in corporate governance practices and proper ESG reporting is in place.

Once up and running, mining businesses such as Nordgold continue to create jobs and generate incomes for the state and local communities. Around 95 per cent of Nordgold's employees are nationals⁸, often in high-level roles in security, civil construction, or health and safety superintendents. Finance, supply chain, processing, surveying, geotechnical and metallurgy functions are also undertaken by nationals. National employees conduct metallurgy training, exploration drilling and benefit from promotion opportunities.

However, following a mine's eventual closure, the initiatives Nordgold puts in place from

8 Nordgold, *Corporate Social Responsibility and Sustainable Development Report 2019*, p. 36, <https://nordgold.com/upload/iblock/36c/Nordgold%202019%20Sustainable%20Development%20Report.pdf>.

day one help to ensure that communities remain as strong as during operations. Vocational training offered to the local communities helps them to secure roles – for example, welding and plumbing – that will continue to be required in the local area indefinitely. In this way, Nordgold invests heavily in training for its employees, particularly focusing on the development of local employees to improve career advancement opportunities. Specifically, Nordgold invests around \$5m a year providing new skills and leadership capabilities.⁹

Community empowerment and the UN SDGs

The implementation of most of Nordgold’s community empowerment programmes, including new infrastructure construction, provision of micro credits to the local population, resettlement of villages around new mines, all require a legal background, combined with regular and effective communication with local and state authorities. Therefore, the integration of legal and corporate social responsibility (CSR) activities is an important aspect of legal function in modern industrial corporations, and an essential condition for the achievement of the SDGs.

Micro-credit provision is recognized by the UN as an important social project, which helps to foster local entrepreneurship. By creating the right social conditions and improving the accessibility of credit, we can help local business to grow. Nevertheless, a strict legal management of such projects is required to avoid any potential misuse of funds. Again, legal expertise is as important as understanding the practicalities of the SDG principles, with a mine’s legal team required to develop a solid legal framework reflecting both specialisms.

Most of the projects seek to improve the quality of life for local communities, while some serve as an emergency response to a specific critical situation. As the Sub-Sahel climate is severe, crops are sometimes affected by the harsh drought periods or heavy rains causing flooding. When crops are ruined, cereal prices can drastically inflate, making food too expensive for local communities. To mitigate this issue, another legal mechanism was established: during normal seasons, Nordgold purchases the crops from local suppliers, creating food banks. In the event of a disaster, the food bank provides the communities with food and low prices. The legal team engages with the local authorities to ensure a fair use of the food bank’s resources.

Jobs at Nordgold mines are often oversubscribed, with workers travelling from dozens of villages. The company must therefore ensure a fair distribution of job quotas among all the communities. Such quotas are agreed with each community and corporate human resources management and legal/community relations services work to ensure that the quotas are respected.

The role of Nordgold’s in-house legal team in ESG initiatives

Throughout the lifecycle of a mine, ESG challenges represent an ongoing consideration

⁹ Ibid, at p. 80.

for legal teams both at a corporate headquarters and local level. The legal, government relations and community relations functions are efficiently integrated in Nordgold within one department led by the Chief Legal Officer who is also Head of Corporate and Regulatory Affairs. Legal Directors in both West African business units (in the Republic of Guinea and Burkina Faso) also lead community relations effort and some local African community relations employees are lawyers by education. Indeed, the management of community projects requires understanding legal regulations, local and international practices and adherence to often complicated procedures.

Nordgold's ESG Committee was recently formed to address the major climate, social and governance risks faced by almost every international mining company. A core objective was to develop key ESG initiatives and inform incorporate best practices throughout Nordgold's business strategy and integrate sustainable processes and projects across all its departments. The committee is headed by the Chief Legal Officer, lawyers, Health and Safety Executive (HSE), communications and community relations personnel. Procurement, human resources and finance functions are also involved in discussions to identify major areas of improvement and to ensure that personnel at all levels manage the impacts of their operations in a proper way. This makes it certain that the company conducts its businesses ethically and responsibly as a fundamental condition of its operations.

Challenges to navigate

First and foremost, there is no clear and comprehensive legal framework for CSR activities, meaning that Nordgold's projects are guided by general international standards, such as the Universal Declaration on Human Rights and conventions adopted by the International Labour Organization.¹⁰ The SDGs provide principles to build economic growth and address a range of social needs including education, health, social protection, job opportunities, climate change and environmental protection issues. The International Finance Corporation's (IFC) Performance Standards on Environmental and Social Sustainability are applied to all projects that have environmental and social risks and impacts, while the World Bank's Environmental and Social Framework sets out guidelines that help Nordgold design programmes to support borrowers' projects, combatting extreme poverty, among other challenges. As most of the international regulations are of a rather general nature, analyses of best industry practices and the examples of peers operating in the same regions help fill any gaps in normative standards.

Almost every community initiative requires a breadth of potential agreements between the stakeholders involved; there is no general approach to such contractual schemes. These interactions and relationships are mostly governed by local practices within a general international framework. In this respect, comprehensive analysis of the social, economic, cultural and educational environments of a certain area (eg, a village near the mine) are

10 Nordgold, Human Rights Policy <https://nordgold.com/upload/iblock/129/Human%20Rights%20Policy.pdf> (August 2020)

crucial for any project implementation.¹¹

Where a project requires state authorisations and licences, which is the case in all resettlement and construction projects, legal assistance and regular communication with state and local authorities become essential. It should be noted that community relations issues and security challenges in West African countries have some specific considerations. Unlike many other jurisdictions, in Burkina Faso and the Republic of Guinea where Nordgold operates, business can help to shape legislation before it reaches the legislative bodies. In this respect, by participating in meetings and discussions with state and local authorities, with the peers within the Chambers of Mines and other non-governmental fora, it is possible to bolster support for certain legislative initiatives. This requires additional expertise and skills from the in-house lawyers who usually lead this process.

It is worth noting that accessing pertinent legal information is not always easy as there are no unified databases, meaning any nonstandard legal issue often requires a team of in-house specialist lawyers working with local colleagues to mitigate potential legal and business risks. The level of uncertainty is also more pronounced in these markets and the opportunity to involve external legal counsel with deep expertise in a particular legal issue is considerably lower.

Generally and it is the same at Nordgold, communications between lawyers working in foreign holding companies and local legal and CSR teams are mostly coordinated online. Now more than ever, emails, conference calls and video conferences are crucial day-to-day tools. In this respect, managing projects remotely with teams consisting of people who are based in different locations, having deferent cultural backgrounds, different professional experiences and speaking different languages is a challenge that Nordgold had to address, long before the Covid-19 pandemic put this on the agenda worldwide.

In the meantime, communications with state authorities and officials are often less bureaucratic in some African countries than lawyers may be used to managing in other regions. Local legal personnel, well acquainted with local legislation and practices, play an essential role in this effort. However, the formation and training of local legal teams is another challenge that companies rarely face in other regions. Indeed, the legal market in Burkina Faso, for example, is rather young and it is challenging to find lawyers and legal firms with deep legal expertise both on national and international levels to implement projects that require understanding of the specifics of multinational corporations and international or foreign law implications. To address this issue, Nordgold seeks to recruit promising local personnel and to integrate them into its own corporate culture and the standards of work common for legal departments worldwide, bearing in mind multicultural, religious and other special considerations that are typical for that region.

11 International Finance Corporation – World Bank Group, ‘Guidance Note 1: Assessment and Management of Environmental and Social Risks and Impacts,’ Guidance Notes to Performance Standards on Environmental and Social Sustainability www.ifc.org/wps/wcm/connect/9fc3aaef-14c3-4489-acf1-a1c43d7f86ec/GN_English_2012_Full-Documents_updated_June-27-2019.pdf?MOD=AJPERES&CVID=mRQmrEJ (27 June 2019).

Nordgold sustainable projects

The following are examples of how Nordgold's legal team performs a central coordinating role in the company's sustainable projects.

Grievance and complaint management mechanisms

One important example of the legal team's involvement in the sustainability of operations is the grievance mechanism. This mechanism, which is managed by a lawyer within Nordgold, is an important tool to resolve potential issues and disputes and balance the interests of all interested parties concerned.¹² At Nordgold's West African mines, a special complaint handling procedure is implemented to ensure an amicable and constructive settlement of any complaints made against the company using a complaint management mechanism adapted to the local cultural context. This supports and promotes fundamental human rights and develops productive, respectful and mutually beneficial partnerships within communities affected by Nordgold's operations.

It deals with all verbal and written complaints filed by an individual or group against the company, its employees, subcontractors and service providers. This procedure is based on the principle of direct conversations or dialogue through mediation to find amicable solutions to any disputes and issues that were not subject to formal court proceedings.

Any member of the local community or group can file a complaint related to any area of operations that potentially affects the wellbeing of the community, whether that be health, environmental or security related, among other areas. If settlement of the claim requires the payment of compensation, payments are made within 24 hours following signature of the agreement between the relevant parties. Community relations officers and the General Manager of the company are responsible for the accessibility, transparency and efficiency of this procedure.

This grievance mechanism, which is a matter of community relations, requires legal input and judgement and therefore the Grievance Manager is a lawyer, who will have a master's degree in international law, a deep understanding of the national law and practices and knowledge of best international practices recommended by the IFC. The Grievance Manager records the claims and analyses them from both the community relations and legal points of view. The Grievance Manager then follows up with the investigation process, communicates with state authorities, if needed and ensures that a fair solution is found. In cases where such a dialogue is insufficient to reach a solution, the local legal team is called to act, together with the community relations department, to resolve the issue fairly.

12 International Finance Corporation – World Bank Group, 'Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts,' Performance Standards on Environmental and Social Sustainability www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=jiVQIfe (1 January 2012).

Resettlement programmes

Resettlement programmes implemented by mining companies represent another example of how operations can directly affect the wellbeing of local communities.¹³ In resettlement cases, the engagement of the legal team is especially important due to the sensitivity of the issues and the necessity to follow a number of complicated compliance procedures. The legal function must ensure the effective and efficient implementation of the legal framework throughout the entire process: from the impact study until residents are accommodated in new homes.

The Zandkom resettlement was an important and complex project, which affected the entire population of Zandkom village, a typical rural locality in Burkina Faso. It lies less than five kilometres from Bissa, Nordgold's major mine in the country. The Zandkom project's Environmental and Social Impact Assessment found that, due to the severe climate of the Sub-Sahel region and general economic situation in Burkina Faso, the local population could not afford decent homes with modern sanitary facilities. An average house in Zandkom is a modest building of seven square metres. Farming and livestock breeding are the key sources of income, but the average annual income of \$1,500 per household does not allow people to improve their conditions by extending their agricultural land or purchasing additional livestock. Some of the inhabitants, especially the young, are employed in dangerous artisanal mining, where mercury is used to recover gold.

When the potential of the Bissa deposit was confirmed, local inhabitants were given the opportunity to improve their living conditions considerably. Their houses were replaced with better ones and other properties were compensated in cash, all according to the well-recognised standards of the IFC and World Bank. This serves as an important source of revenue for the local population. Furthermore, the resettlement has created new social infrastructure, which has led to the creation of new opportunities, particularly for women.

The Zandkom resettlement has been undertaken in adherence to the IFC's Guiding Notes and more recent World Bank Environmental and Social Standards. From the early days of the project, an Environmental and Social Impact Assessment (ESIA) was prepared, together with the community engagement process. This project has been backed by the legal function to ensure full compliance with best international standards and national laws. To ensure the entire population has access to the necessary information about the project, a committee was established, where citizens, local authorities and the company's representatives could maintain a dialogue. The open and fair consultations guaranteed the equal participation of all stakeholders.

The compensation payments were an important step of the resettlement. On one hand, Nordgold worked to ensure that all the property was duly recorded, analysed and

13 International Finance Corporation – World Bank Group, 'Performance Standard International Finance Corporation – World Bank Group', 'Performance Standard 15: Land Acquisition and Involuntary Resettlement,' Performance Standards on Environmental and Social Sustainability, www.ifc.org/wps/wcm/connect/75de96d4-ed36-4bdb-8050-400be02bf2d9/PS5_English_2012.pdf?MOD=AJPERES&CVID=jqex59b (1 January 2012).

evaluated. The Resettlement Action Plan for the Zandkom project set a mission to apply fair market prices to the community's goods. Equally, the standards clearly state what kind of property is subject to compensation and at what stage. All the collected data is recorded in a Resettlement Action Plan (RAP), an integral part of the impact study. The legal and community relations team must verify the property list to create a legal framework for the compensation. The next step is the signing of the agreements, with legal expertise required to protect and balance the rights of both the communities and Nordgold. As part of its commitment to its partner communities, the company is committed to organising financial literacy education for the affected residents. This helps them to manage their newly-gained money properly and to avoid potential losses.

Another dimension of the legal support within the resettlement process is Nordgold's contribution to the development of urban property rights protection. A common issue in any village in Burkina Faso is the lack of the owner's rights certificates. The land and houses are not thoroughly protected by formal law, as no legal evidence of the property rights exists. After any resettlement carried out by Nordgold, a valid state-issued certificate is provided to all citizens of the newly-built village so that people are protected from potential future risks of involuntary resettlement, which unfortunately has happened before. As well as property rights, an appropriate urban plan of the new village is developed by Nordgold and approved by the relevant state authorities. This contributes to Burkina's urban development, creating well organised localities.

During the resettlement, not only must legal aspects be respected, but also the customs and traditions of the local communities. Before moving to their newly built homes, families traditionally hold a special ritual. With full respect for these local traditions, the legal and community relations team accompanied the communities and helped them to organise a suitable event.

Following the resettlement, Nordgold must ensure the people profit from the improved living conditions, while retaining access to traditional activities and customs. Local inhabitants are mostly farmers and mining activities disturb their fields. Although the resettled community is duly compensated, the company must ensure that it has access to even better farming opportunities. Here again, the efficient collaboration of the legal team and community engagement are important in ensuring the project's sustainability. Nordgold's legal, community relations and environmental teams also closely cooperate to ensure reforestation, which is a legal obligation established to compensate for the negative impact mining operations may have on the environment.

The Zandkom resettlement is one of many and the most recent example of a successful resettlement project which benefitted from the close collaboration of the company's legal and community relations functions. Participating in such projects all of the time means that lawyers continue to learn and develop new skills, implement existing practices while looking to introduce new ones. Nordgold continues to apply sustainability programmes, focusing on the projects, that create stable futures for local communities even after the mines' closures. Livestock breeding and micro-credits projects are other examples of how it

distributes money and trains local people, helping them to develop a healthy local economy.

About the authors

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Polina Galperina is the Head of the International Projects Department at Nordgold. She joined Nordgold as Senior Legal Counsel for International Projects in 2013. Galperina previously worked as Senior Legal Counsel at ILIM Group, a joint venture with International Paper (US) and leading pulp and paper producer in Russia, major international consulting companies including Ernst & Young and White & Case, and a prominent Russian law firm. Galperina holds master's degrees from St Petersburg State University (Law), Russian Presidential Academy of National Economy and Public Administration (Management) and an MBA from Grenoble Ecole de Management.

Andrei Naumov is the Head of Community Relations and Sustainable Development at Nordgold. Before joining Nordgold in 2017, he worked for communication agencies. Naumov coordinates Nordgold's mines interaction with local communities, including relocation projects and livelihood restoration programmes. He is also responsible for the Nordgold's CSR initiatives. In 2020, Naumov collaborated with local stakeholders in West Africa, Russia and Kazakhstan to fight the spread of Covid-19.

Appendix I

The UN Sustainable Development Goals

- Goal 1 – End poverty in all its forms everywhere.
- Goal 2 – End hunger, achieve food security and improved nutrition and promote sustainable agriculture.
- Goal 3 – Ensure healthy lives and promote well-being for all at all ages.
- Goal 4 – Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.
- Goal 5 – Achieve gender equality and empower all women and girls.
- Goal 6 – Ensure availability and sustainable management of water and sanitation for all.
- Goal 7 – Ensure access to affordable, reliable, sustainable and modern energy for all.
- Goal 8 – Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.
- Goal 9 – Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation.
- Goal 10 – Reduce inequality within and among countries.
- Goal 11 – Make cities and human settlements inclusive, safe, resilient and sustainable.
- Goal 12 – Ensure sustainable consumption and production patterns.
- Goal 13 – Take urgent action to combat climate change and its impacts.
- Goal 14 – Conserve and sustainably use the oceans, seas and marine resources for sustainable development.
- Goal 15 – Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.
- Goal 16 – Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.
- Goal 17 – Strengthen the means of implementation and revitalise the global partnership for sustainable development.

Full details are available at <https://sdgs.un.org/goals>.

Appendix II

Links to examples of law firms with social entrepreneurship practices

These lists are of links to law firms with advertised practice groups or teams focusing on social entrepreneurship, or who are closely related to activities in support of social development. They are not complete, covering all jurisdictions, but will be updated as part of the ongoing development and expansion of this book.

Law firms with social enterprise practice areas

AMP Avocat Law Firm: lawyers dedicated to socially responsible firms
www.ampavocat.fr

Anthony Collins Solicitors: social enterprise
www.anthonycollins.com/who-we-help/social-business/social-enterprises

Alder & Colvin: social enterprise
www.adlercolvin.com/social-enterprise

BDB Pitmans: charities and social enterprise
www.bdbpitmans.com/wp-content/uploads/20-07-Charities-and-social-enterprise.pdf

Bates Wells: social enterprise
<https://bateswells.co.uk/sectors/impact-economy/social-enterprise>

Bertrand Mariaux: social entrepreneurship law
<https://mariauxavocats.com/cabinet>

Brown & Streza: social enterprise
www.brownandstreza.com/PracticeAreas/CharitableSector/SocialEnterprise.aspx

Cenkus Law: social enterprise law and social entrepreneurship
<https://cenkuslaw.com/social-enterprise-law-social-entrepreneurship>

Clarity Legal Group: social entrepreneurship and business law
<https://claritylegalgroup.com/services/social-entrepreneurship-business-law>

Cornillier: supporting businesses in the social and solidarity economy
www.cornillier-avocats.com/site/expertise/ess.htm

Cullinane Law Group: legal counsel for non-profits

<https://cullinanelaw.com/services>

Cypress: non-profit and social enterprise

<http://cypressllp.com/practices/nonprofit-and-social-enterprise>

For Purpose Law Group: social enterprise practice

<https://forpurposelaw.com/social-enterprise-practice>

The FuGuan Law Firm: social enterprise and social impact investment

www.fuguanlaw.com/en/services/social-enterprise-and-social-impact-investment

Hanson Bridgett: sustainable business and impact investing

www.hansonbridgett.com/Practices-Industries/sustainable-business-and-impact-investing

Hempsons: charities and social enterprise

www.hempsons.co.uk/sectors/charities-and-social-enterprise

Herbert Smith Freehills: social entrepreneurs

www.herbertsmithfreehills.com/our-expertise/services/social-entrepreneurs

Hogan Lovells: social entrepreneurship and social financing practice

www.hoganlovells.com/~media/hogan-lovells/pdf/publication/socialentrepreneurshipandsocialfinancingpractice_pdf.pdf

Hogan Lovells: business and social enterprise (BaSE)

www.hoganlovellsbase.com

Impact Lawyers

<https://impactlawyers.fr>

I S Picard

<https://picard-avocats.com/#intro>

Izwan & Partners

www.izwanpartners.com/social-enterprise

Jeremy Chen

<https://jeremychenlaw.com/practice-areas>

Kickstart Law: social enterprise startup advice

www.kickstartlaw.com/bookings-checkout/social-enterprise-packages

Klavens Law Group: social enterprise

<https://klavenslawgroup.com/social-enterprise>

LABS-NS: innovation, CSR and the social and solidarity economy

<https://labs-ns.com>

Lane Powell: non-profit and social enterprise

<https://www.lanepowell.com/Our-Practices-Industries/Industries/Nonprofit-Social-Enterprise>

Lanyon Bowdler: charity law and social enterprise solicitors

<https://www.lblaw.co.uk/services-for-business/charity-and-social-enterprise>

Les Canaux: social and impact businesses

<http://lescanaux.com/les-canaux-initiatives/amp-avocats>

Lathrop GPM: social enterprises and social entrepreneurship

<https://www.lathropgpm.com/services-practices-Social-Enterprises-Social-Entrepreneurship.html>

LeQuid: social enterprises and business law

<https://lequid.es/en>

Lester Aldridge: charities and social enterprise

www.lesteraldridge.com/for-business/charities-social-enterprise

Ludwig Lawyers: charities, non-profits and social enterprises

<https://www.ludwiglawyers.com/charities.html>

Miller Thomson: social impact group

www.millerthomson.com/en/our-services/industries/social-impact

Mills Oakley: non-profit and social enterprise

www.millsOakley.com.au/expertise/not-for-profit-and-social-enterprise

Momentum: non-profit and social enterprise

<https://momentum.law/social-enterprise-notforprofit>

Morrison & Foerster: social enterprise and impact investing

www.mofo.com/capabilities/social-enterprise-impact-investing.html

NEO Law Group: an impact-driven firm for non-profits

<https://neolawgroup.com/our-work>

NFP Lawyers: legal support to the non-profit sector

www.nfplawyers.com.au

Olivier Ramoul: social enterprise

www.cabinet-ora.fr

Orrick: impact finance and investment

www.orrick.com/en/Practices/Impact-Finance

Parry Field Lawyers: social enterprise

www.parryfield.com/charities/social-enterprises

Penningtons Manches Cooper: charities

www.penningtonslaw.com/expertise/sectors/charities

Perkins Coie: social enterprises

www.perkinscoie.com/en/practices/corporate-law/emerging-companies-venture-capital-law/social-enterprises.html

Perlman & Perlman: socially responsible businesses

www.perlmanandperlman.com/practice-areas/socially-responsible-businesses

Pote Law: legal services for entrepreneurs, startups and small businesses

www.potelawfirm.com

SLG

www.slg.law

Senscot Legal: social enterprise

www.se-legal.net

Singer Law

<https://singerlawpllc.com/social-enterprise-law>

Stacks Law Firm: charities and social enterprise

www.stacklaw.com.au/service/business/industries/charities

Stone King: charity

www.stoneking.co.uk/services/charity-law/new-structures

VWV: social enterprise

www.vwv.co.uk/law-sector/charity-lawyers/social-enterprise

Wagenmaker & Oberly: social enterprise

<https://wagenmakerlaw.com/areas-of-practice/social-enterprises>

Westaway

<https://westaway.co/what>

Law firms with general start-ups and entrepreneurship practice areas

Avatic Abogados: entrepreneurs and startups

www.avaticabogados.com/emprendedores-y-startups

Delvy Law and Finance
<https://delvy.es/emprendedores>

El Referente: ranking of law firms specialising in startups 2019
<https://elreferente.es/tecnologicos/ranking-de-despachos-de-abogados-especializados-en-startups-2019>

Larios Tres Legal: entrepreneurship, IT and social media
<https://lariostreslegal.com/en/empreendedor-it-innovacion>

LetsLaw: startup advisory firm
<https://letslaw.es/asesoramiento-startups/>

López Cantal: new technologies, entrepreneurship and startups
<https://lopezcantal.es/sector-nuevas-tecnologias-emprendimiento-startups>

M&H
<https://mh-llp.com/clientele>

Garrido and Doñaque
www.garridoydonaque.com/asesoria-emprendedores-autonomos-abogados

GD Legal: startup
www.gdlegal.com/perfil-de-cliente/startup

Harper Macleod
www.harpermacleod.co.uk/sectors/entrepreneurs/

Hunter Business Law
www.hunterbusinesslaw.com

JL Casajuana: startup advisory firm
<https://www.jlcasajuanaabogados.com/asesoria-legal-startups>

Lewis Rice: entrepreneurship and startup law
www.lewisrice.com/entrepreneurship-startup-law

SPZ Legal
www.spzlegal.com/business-law-services

White Towers Legal: startup advisory firm
www.whitetowers.es/startups

Non-traditional law firms offering legal services in support of social development

Impact Lawyers

<https://impactlawyers.fr>

LGSS Law

<https://lgsslaw.co.uk>

NEO Law Group

<https://neolawgroup.com/our-work>

Novalex

www.dalamcgill.com/lawfullyuncommoninterviews/2020/1/20ryan-hillier-business-lawyer-and-social-entrepreneur-at-novalex

Kickstart Law

www.kickstartlaw.com/about

NFP Lawyers

www.nfplawyers.com.au

Stone King

www.stoneking.co.uk

Appendix III

The practical steps to help the poor, vulnerable and marginalised

Practical steps for action by law schools and others in the legal profession in helping poor, vulnerable and marginalised people achieve basic human rights and equal access to justice under the rule of law.

Poverty, injustice, inequality, and law

1. The IBA can and should build on its public stand on poverty's implication in various essential domains of law and justice, by explicitly endorsing the individual and collective responsibility of its members to contribute meaningfully to the end of poverty, inequality and injustice.
2. The IBA should require lawyers to declare an admission oath to address poverty and associated inequalities and injustices in order to become a member of the IBA.
3. The IBA should fund a research project to define the appropriate accountability mechanisms of law schools' (and other branches of the legal profession) systemic impacts on alleviating poverty.
4. The IBA should expressly include a commitment to alleviating poverty, inequality and injustice as part of its mission statement.
5. The IBA should include in its practical guidelines to lawyers the impact that certain areas of law have in exacerbating global poverty. This could be achieved in a similar way to the IBA's approach to recognising the impact that particular areas of law may have on human rights.
6. The IBA can and should solidify the connection between these concerns by explicitly recommending that such a poverty-sensitive focus and priority for legal and justice education and training is incorporated in requirements for the accreditation of law schools, admission of lawyers to legal practice, and ongoing entitlement to continue working as a lawyer in all areas of the legal profession.

The role of law schools in combatting poverty, injustice, and inequality

7. Law schools across the globe must do more than most of them currently do to address poverty and associated factors directly in their core mission of research, education and engagement with the legal profession and the outside world.

Systemic considerations

8. Law schools must embrace new ways of thinking about their place in contemporary governance, regulation and responsibility, and take active steps to embed them in the design, operations and evaluation of law schools by the various audiences who regulate or need them.

Law schools taking individual and collective action on poverty

9. Law schools can create social entrepreneurship clinics, working together with social enterprises, business advisers, philanthropic bodies and poor communities to develop sustainable businesses that address community needs.

Recasting lawyerly responsibility to combat poverty under the rule of law

10. A balanced approach to education, research, and engagement by law schools must encompass a broader horizon of poverty-sensitive concerns, as part of meeting a law school's university mission, membership of the legal profession and socio-ethical responsibility.

Societal standing and expectations

11. Law schools should have a core mission of educating and training the next generation of legal and professional leaders with orientations, knowledge, and skills to do their part in ending poverty, injustice and inequality worldwide.
12. Institutional, governmental and philanthropic funding of law schools should be made conditional on prioritising poverty, injustice and inequality as core areas of academic focus.
13. The global legal profession should address ethics enhancement proactively for individual lawyers by recurring assessments of legal practitioners for their socio-ethical sophistication and integrity. This must be reinforced by requirements for admission to practice and law school accreditation.
14. The IBA and its member bar associations and law societies can encourage member law firms to move beyond a constrained focus on lawyerly work as work consisting of billable client work, business development and pro bono work, and to view relationships with law schools in various avenues of poverty-ending work as part of a richer account of lawyerly work in fidelity to access to justice and the rule of law.
15. Law schools and individual legal academics should participate in multi-stakeholder coalitions that develop or monitor standards from within and beyond the global legal profession, focusing on lawyerly action or inaction in meeting such standards.

16. Individual academics ought to make public submissions and other contributions to the public goods of policy-making, law-making and law reform that highlight poverty insights and solutions.

Jurisdictional regulation and accreditation

17. Governments must use sectoral policy settings, regulatory controls and funding arrangements with universities and law schools to achieve societal outcomes that contribute meaningfully to addressing poverty, injustice and inequality. These may include funding preconditions, public research priorities, social compacts with universities, legislated mandates for universities and government incentives for student equity and diversity.
18. A public agency or department of state might politically and financially support a legal academic focus on poverty in various ways, such as contributing funding to a relevant research centre or project that accords with publicly stated access to justice priorities, providing some publicly funded legal aid to a free legal clinic associated with a law school, or reframing incentives for law firm eligibility for government tenders and panels based on pro bono measures to encourage poverty-ending collaborations with law schools and others.
19. Associations of law schools must incorporate standards, expectations and measures relating to the social consciousness of students and academics and a commitment to values such as socio-economic equality, universal human rights, access to justice, ethical lawyering and the rule of law as a basic accreditation requirement for member law schools.
20. Law schools and their national and international associations need to develop self-assessment criteria and other tools to assist in demonstrating successful orientation and delivery of justice education for accreditation and other purposes. This must include templates for assessing matters, such as the adequacy of teaching of legal ethics and social responsibility, clinical and pro bono programmes, orientation and selection of academic staff and governance arrangements supportive of justice education.
21. The laws and court rules of a jurisdiction should provide for rights of appearance for appropriately supervised clinical students to assist self-represented clients who cannot afford a lawyer and who also do not qualify for publicly funded legal aid.
22. Where the interest on client funds held on trust by law firms for settlements and other purposes is officially quarantined and payable into a fund for public purposes with client consent, those purposes ought to be framed to include clinical and related support for people who cannot afford legal representation, through a combination of legal aid agencies, community legal centres and associated law school clinics.

Professional admission and employment

23. Admitting authorities must make a designated amount of poverty-related practical legal experience at university (eg, clinics, voluntary work or internships) or beyond (eg, practical legal training) an essential precondition for a law graduate being admitted to practise as a lawyer.
24. Accreditation authorities must develop and implement regulatory mandates to make a designated amount of poverty-related practical legal experience at university (eg, clinics, voluntary work or internships) an essential precondition for law school accreditation.
25. An individual law school ought, as a matter of choice and competitive differentiation, make it compulsory for students to complete a designated amount of study or work related to poverty, injustice and inequality as a condition of graduating with their law degree.
26. State or national associations of law schools must set their own accrediting requirements to include a poverty-related focus. This can be achieved in a variety of ways, including: staff orientations and capabilities, coverage of substantive areas of law, socio-ethical training of lawyers, clinical legal programmes, community outreach for law schools and demonstrated knowledge of lawyerly roles in poverty-alleviation.
27. For duly admitted lawyers, ongoing demonstrated understanding and experience after admission to legal practice in poverty-relevant law and work should be made a condition for individual lawyers of continuing to hold relevant accreditation as a legal practitioner, with individual law firms, law schools and bar associations and other professional bodies providing such continuing legal education and training.
28. Law firms can reinforce what law schools do to inculcate a lifetime professional commitment by aspiring lawyers to access to justice and the rule of law, by making career advancement and progression to partnership at least partially dependent on a demonstrated commitment to ending poverty, inequality and injustice in the communities served by those law firms.
29. National, regional, and local law societies and bar associations must include familiarisation with international and national standards for lawyers relating to poverty, inequality, and injustice – including relevant IBA standards – as a part of their continuing professional development programmes for their members.
30. Individual law firms must incorporate pro bono legal service generally or other poverty-alleviating community work in expectations or opportunities for their law graduates and other employees. This might occur through employment requirements, employee volunteering programmes, client-related secondments (including with legal clinics) and support for further education and training.

31. Law firms and other professional services firms should also include poverty-relevant education and training for both staff and clients as part of in-house continuing professional development programmes. This might also align with organisational benefits in meeting individual and organisational continuing professional development requirements, firm-organised pro bono activities, partnering with client and community organisations and general lawyerly awareness-raising and social consciousness.
32. Bar associations and law societies must waive fees for professional accreditation and membership for retired or other lawyers who only or mainly undertake pro bono legal work.
33. Bar associations and law societies must develop codes of conduct and other professional standards that reinforce poverty-alleviating employment initiatives.
34. Governments must include eligibility criteria for law firms to tender and serve on panels for delivery of governmental legal services that promote lawyerly commitment to the public interests in addressing poverty, injustice and inequality. Those criteria can cover a spectrum from conventional pro bono and legal aid contributions to meaningful and innovative engagement in work that assists governments in alleviating poverty, inequality and injustice.

Organisational partnering and collaboration

35. Law schools should develop or join partnering, sponsorship, philanthropic, and other collaborative arrangements to address poverty locally, nationally and globally, in fulfilment of the educational, research and external engagement activities of the legal academy.
36. Multi-stakeholder initiatives aimed at improving access to justice can attract state support and include representatives from various branches of the legal profession, thereby encouraging and facilitating the involvement of law schools and their constituencies in such initiatives.
37. A law school and its legal clinics ought to work hand in hand with the judiciary, legal profession, other community legal centres and community bodies to provide free legal information, advice and representation locally, bolstered by relationships between those parties that facilitate student court appearances, professional supervision and volunteering of expertise.
38. Beyond court-focused legal and information services, law schools and legal units across the public, private and NGO sectors should collaborate in the form of placements (including student internships, externships and voluntary work), clinics and partnered projects with a focus on providing support and services to people subjected to poverty, inequality and injustice.

39. The legal academy and other branches of the legal profession have crucial networking, collaborative, and influencing roles to play, alone or with others from multiple disciplinary and professional backgrounds beyond law, in the public reason, advocacy and thought leadership which influences policy-development, law-making and law reform to poverty-ending effect.
40. Governments, business and academics have roles to play in joining together to help the world to achieve results under the UN Sustainable Development Goals in both developed and developing countries. This can be through research, consultancy, and monitoring projects that flow from the innovative use of market mechanisms such as social bonds to achieve improvements in the conditions and opportunities for poor communities, aligned with goals and indicators under the UN Sustainable Development Goals.
41. Legal academics and students should join and contribute to a range of collaborative initiatives with others in the legal profession to achieve better equality and justice for society's most impoverished and disadvantaged members. Such activities can include professional body memberships, collaborative public submissions and NGO placements or secondments.

Institutional strategy and planning

42. Universities and other branches of the legal profession must ensure that they meaningfully support and do not take for granted the largely unfunded and impossible-to-fund academic research involved in research, advocacy and 'watchdog' activities that contribute to the public goods of law-making, law reform and legal policy development, with the empowerment of poor people and the ending of poverty as their objective.
43. Law schools must mainstream a focus on poverty holistically in their law school missions, strategies and course curricula requirements. This holistic approach can be embedded within experiential learning and volunteering opportunities, year-by-year knowledge and skills training, required graduate attributes, formative and summative assessment requirements, student research topic options, academic research projects and cross-disciplinary collaborations, academic workforce capability profiling and development, organisational and institutional (eg, university-to-university) partnering initiatives, sponsorship and philanthropic proposals and clinical legal education.

Academic orientation and capability

44. Law school management should equip the legal academy with the right balance of staff to substantially contribute to poverty and related issues of inequality and injustice. In practice, this translates into strategies and actions on workforce profiling and planning, academic workforce retention and recruitment, academic development

and career progression, institutional employment categories and roles, and two-way secondment and lateral career-change opportunities.

45. Law schools ought to attract and retain world-class academic experts in areas of poverty, injustice, and inequality through prestigious named professorial chairs, senior professorial and adjunct positions, research centres and programme areas, academic fellowships and visiting positions, and PhD scholarships.
46. Academics must teach fundamental legal skills to first-year law students more broadly to include orientations about access to justice and the broader socio-ethical dimensions of law (eg, basic legal problem-solving approaches that structure students' understanding through step-by-step templates).
47. Law schools should balance their overall academic workforce profiles to select and train academic staff with attributes that go beyond intellectual capacity and technical proficiency in particular disciplinary fields of knowledge, to include interest and proficiency in broader matters such as justice education and the socio-ethical roles and responsibilities of lawyers, reinforced by personal track records of pro bono activity.

Legal scholarship and advocacy

48. Public, professional, community and university mechanisms ought to be aligned to elevate attention to poverty and galvanise impactful research to bring it to an end, through mechanisms such as funded academic and PhD-based poverty research projects, sponsored professorial chairs, legal clinics dedicated to public interest research and advocacy on poverty and by encouraging cross-institutional networks of research excellence that make poverty research a key pillar of associated research and educational programmes.
49. Community legal centres and clinical programmes associated with law schools should engage in research-based advocacy in the interests of their poor, vulnerable and disadvantaged clients, including public submissions and reports to inform future policy and laws.
50. Law societies and bar associations must contribute to the public interest through their committees and members engaging in public submissions and advocacy to expose gaps and offer solutions on law's treatment of poverty, inequality, and injustice. Legal academics, students and alumni can become involved through such mechanisms in supporting and achieving those aims.

Legal engagement and impact

51. Law schools and their constituencies should translate their research-based expertise into meaningful mass action at scale on poverty, injustice, and inequality through

participation in national and global multi-stakeholder coalitions and standard-setting initiatives (eg, IBA and UN standards), either directly as participants within networks engaged in developing such initiatives, or indirectly through creating individual and collaborative research projects focused on them.

52. Law schools must collaborate with other organisations from the legal profession and elsewhere across public, private and community sectors in both developed and developing economies to combat poverty, injustice, and inequality, especially in pursuit of a number of the UN Sustainable Development Goals.
53. Legal clinics associated with law schools should conduct strategic litigation in attempts to compel remedial climate action, sometimes joining forces with relevant research centres and external partners, to advance the cause of poor communities and countries who are severely affected by climate inaction from government and industry.

Legal education and ethics

54. Law schools can and should expose law students to a wide range of careers and work-situated roles in those careers that involve doing something about poverty, as citizens, legal practitioners, community leaders, institutional advocates and partners in poverty-ending initiatives.
55. Law schools must expose law students to the structural inequalities and injustices that exacerbate poverty in foundation-year programmes about legal and justice systems, reinforced by capstone programmes in later years of study.
56. Law schools must include poverty-sensitive coverage and work-situated roles in study of substantive areas of law (eg, the non-neutral design and impact of taxation, property, corporate and criminal laws on poor people).
57. Law schools should introduce students to the panoply of ‘hard law’, ‘soft law’ and other regulatory mechanisms and standard-setting initiatives in the 21st century that relate to connections between law, poverty and both pro bono and client-related work.
58. Law schools must design and promote specific subjects with poverty, inequality, injustice and law as their direct focus.
59. Law schools should provide work-integrated, co-curricular and extra-curricular student experiences that demonstrate the realities and needs of marginalised and poor communities. This can involve partnership opportunities to empower those communities through legal clinics, placements, voluntary work, partnering programmes, sponsored or philanthropic initiatives, case studies, personal story-telling or otherwise.
60. Law schools must expose students to simulated conflicts between consequentialist, Kantian, virtue-based and Confucian approaches to resolving arguments around

policy priorities in transactional law, and as between the interests of capital and human rights, with the intention of developing a habituated lawyer conscience around alleviating poverty, inequality and injustice.

61. Law schools must regularly self-assess whether their own teaching programmes are delivering a balanced education on lawyerly ethics and social responsibility, having regard to a range of measurable criteria.
62. Whilst no single law school is simultaneously expert and experienced in all of the dimensions of legal theory, substantive law, clinical legal education, legal practice, personal qualities, cross-disciplinarity and socio-ethical awareness that are desirable in an academy of world-class legal educators as a whole, law schools can approach these targets by selecting for as many of these skills and attributes as possible in all new teaching staff.
63. A new level of consciousness needs to be reached in law schools' workforce profiling and recruitment planning, to prioritise selection of new academic staff with demonstrable socio-ethical awareness and capability to deliver justice education.
64. Law schools and universities should promote equal access to tertiary education by removing barriers to access and providing scholarships and other support targeting worthy candidates from poor local and overseas communities.

Legal clinics and placements

65. Diverse and innovative clinical legal education programmes, supported by reflective mentoring of all students, focused supervision and relevant assessment, are capable of turning around otherwise positivist, passive, and transactional 'technician' attitudes to law, and replacing them with an active determination to provide justice to those in poverty.
66. Legal and multi-disciplinary clinics can incorporate poverty-sensitivity directly or indirectly, and from a variety of work-situated standpoints across sectors and jurisdictions, such as specialised clinics tackling sexual assault, family violence, human rights, trade justice and capital punishment.



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