How and Why Is Pro Bono Flourishing
A Comparison of Recent Developments in Sweden and China

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The pro bono activity of the private legal profession in a given society can best be understood as part of a partnership between the profession and government. The purpose of that partnership is for the profession, together with government, to take responsibility to try to ensure that, in theory, all citizens are equal before the law. The precise nature of that partnership varies widely between societies. Regan examines recent pro bono developments in Sweden and China. In the former country pro bono work by the profession had, until recently, disappeared but recent restrictions upon legal aid prompted the profession to re-establish a basic scheme. In China the recently established national legal aid scheme relies heavily upon the pro bono efforts of the emerging private profession.

Introduction

The pro bono legal work organised and undertaken by members of national legal professions is experiencing a resurgence around the globe. The fact that pro bono is flourishing does not, however, mean that it is occurring in the same way or for similar reasons in different societies. Indeed, it is likely that pro bono will vary depending upon whether, for example, the legal profession is large and well established or not. In addition, and perhaps more importantly, pro bono developments will depend on whether the society is rich or poor and whether, as a result, governments have and are willing to commit significant resources to public legal aid schemes.

In order to explore these issues, I examine how and why pro bono is flourishing in two very different societies, China and Sweden. I demonstrate that there are indeed very different patterns to, as well as reasons for, pro bono developments in the two societies. In Sweden, the nascent pro bono scheme is closely linked to the decline of publicly

funded legal aid. Meanwhile, in China, the pro bono developments are more diffuse, partly because the legal profession is now growing so rapidly. More importantly, the Chinese state recently established a legal aid scheme that places a legal duty upon the expanding profession to undertake pro bono work.

Despite these differences, I argue that the resurgence is a healthy development in both societies, if we recognise pro bono as part of the partnership between the profession and government to promote citizens' equality before the law. The rise of pro bono is, for different reasons, good for the citizens of the society, the legal profession itself and governments in the two societies. Furthermore, the developments in the two societies remind us that the respective roles of the profession and government in promoting equality before the law are constantly being re-negotiated – in different ways in different societies (Paterson, 1996).

In the first section of the article, I examine the recent re-emergence of pro bono in Sweden. Then I explain the importance of pro bono for the recently developed Chinese legal aid scheme. Finally, I consider the significance of these developments and highlight some of their implications for future research of a comparative nature.

**Recent Pro Bono Developments in Sweden**

**Background**

Sweden has a long tradition of professional and government initiatives to try to ensure that equality before the law is a right, not merely in theory but also in practice, for all citizens.\(^3\) While members of the legal profession, specifically the advocats of the Swedish Bar Association, established the first legal assistance schemes early in the 20th century, governments at municipal and national levels also became involved. Early in the century, for example, advocats began to establish schemes to assist the poor in court (League of Nations, 1927). While the advocats continued to undertake court cases on a pro bono basis over the next half century, governments took responsibility for legal assistance to low income citizens in particular. Government action was prompted by the inadequate assistance offered by the professional schemes, which was in turn at least partly the result of the small size of the Swedish profession at the time. In the early 1920s, for example, municipal governments began to establish legal aid bureaux that offered legal services to the
poor as well as the middle classes. Partly funded by the national government, the bureaux employed salaried lawyers to offer advice and assistance as well as represent people in court cases.4

The combination of the pro bono work of the advocats and the municipal bureaux continued until the early 1970s when the piecemeal legal aid scheme was overhauled (Bruzelius and Bolding, 1975). Established in 1972, the new scheme became what in many respects the most advanced legal aid scheme in the rich industrialised world. In brief, the scheme was remarkably ‘comprehensive’ and ‘generous’.5 That is, legal assistance was comprehensive – legal advice and minor assistance was offered for most legal problems, and representation was offered in most courts and tribunals. Assistance was also generous – services were offered to the majority of the population depending on the cost of the case. In other words, everyone but the rich was eligible for at least some legal assistance. Furthermore, the services could be obtained from two sources. First, from private lawyers who were funded by the state. Second, in order to overcome the small size and concentration of the advocats in the cities, the government established a network of Public Law Offices (PLO) around the country. The PLO employed salaried lawyers who offered advice, minor assistance and legal representation services. The PLO also competed with the private profession for non-legally aided work.

One of the curious consequences of the generous and comprehensive public legal aid scheme was, however, that the private profession no longer saw the need to organise pro bono work. As a result, they ceased offering any assistance in the form of advice and referral, minor assistance, or representation. In other words, organised pro bono schemes disappeared in Sweden because the public legal aid was so highly developed. This is not to say that individual acts of pro bono disappeared. On the contrary, individual advocats almost certainly continued to do some work for free for family, friends and other close contacts. But it is likely that even the number of these individual pro bono cases declined in view of the remarkably comprehensive and generous legal aid.

Contemporary pro bono

Pressure to reduce public expenditure on legal aid in the early 1990s meant that substantial reforms were introduced to the scheme at the end
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of 1997 (Regan, 2000). In brief, the reforms dramatically reduced the schemes' generosity and comprehensiveness for civil and matrimonial legal problems. For example, charges were substantially increased for legal advice and representation, aid was effectively abolished for all family law cases, and a number of other restrictions were introduced. In addition, due to reductions in financial eligibility limits, most Swedes are no longer eligible for legal aid but are instead expected to call upon their Legal Expense Insurance (LEI) for legal assistance before they apply for legal aid. In other words, rather than a generous and comprehensive scheme, legal aid in Sweden is now targeted to the deserving poor and made available for a narrow range of cases.

At the same time, major changes in administration were also introduced. First, the government closed the PLOs in 1999. The government gave two reasons for the decision: because it allowed the legal aid budget to be reduced; and because the legal profession had grown and was more widely dispersed than in the 1960s. Plans also currently exist to close the National Legal Aid Authority, the main administration office. In the future, legal aid applications will most likely be processed by the courts, even though this will probably lead to inconsistent decisions, and despite concerns raised by judges about the extra work and the threat to judicial decision-making. In sum, the result of the changes is that most Swedes are now expected to direct all requests for legal services to the private profession and either pay market prices or use their LEI policy. Such an outcome was not, however, welcomed by the Swedish Bar Association.

One consequence of the 1997 reforms was that the Swedish Bar Association was prompted into action. Not only did it lobby the government against the severity of the cuts, the profession also underwent a remarkable change of heart toward pro bono legal assistance. Instead of continuing to regard pro bono as unnecessary, it established a 'free first interview' scheme across the country in the middle of 1998. Following the practice in many other societies, members of the profession arranged to participate in a roster where they offer a diagnosis of citizens' legal problems in a short, free interview. Instead of giving legal advice, they advise the citizens as to whether they have a legal problem for which assistance from an advocate could help.

The scheme has flourished. Currently, approximately 700 members of the Swedish profession are involved in the free first interview scheme.
They offer assistance in a total of 75 locations in towns and cities across the country. As a result, more than 10,000 Swedes have been assisted since 1998. This is a significant volume of assistance in a society of approximately eight million people. The high level of demand reflects the changes to the public legal aid scheme. In particular, the increase in charges for legal advice means that many people can no longer use legal aid to explore their options if they experience common legal problems. Instead, the data suggests that many now explore their options in the pro bono free first interviews.

Swedes seek assistance from the pro bono scheme in the common areas of law affecting daily life. While the types of law for which assistance is sought vary widely, the heaviest demand relates to financial matters. The most common areas are, according to the Swedish Bar Association, inheritance law (24 per cent) and real estate law (9 per cent). The third highest demand is for assistance in torts (6 per cent). The free first interviews provide a conduit to more detailed legal assistance from advocates. The Bar Association estimates, for example, that approximately 40 per cent of people who receive assistance under the free first interview scheme are referred to a private lawyer for further advice, or to other forms of legal services.

Finally, while the profession in Sweden has embraced this minimal but important form of pro bono scheme, it has not yet attempted to fill other parts of the vacuum created by the cuts to the public legal aid scheme. In particular, the Bar Association reports that to date it has not established a pro bono scheme offering assistance for litigation in courts. It will be interesting to see, however, if in the future the profession feels obliged to offer pro bono litigation services to the community. One reason that they might be prompted to respond is the dramatic decline in the number of people who receive legal aid. The number of grants of aid in non-criminal matters made by the National Legal Aid Authority quite literally collapsed over the past five years, falling from 20,505 in 1995 to 1849 grants in 1999.\(^9\) The scale of decline suggests that there is a strong chance that the Bar Association will come under pressure in the future to expand its pro bono work to include legal representation. The pressure will be, in particular, to offer assistance in litigation to the deserving poor in those kinds of case in which neither legal aid nor LEI policies will assist.
Recent Pro Bono Developments in China

Background

Pro bono is also flourishing in China. However, the reasons why it is flourishing are very different from the reasons for its expansion in western societies such as Sweden. While in many western societies it fills a vacuum created by declining public legal aid, in China by contrast, pro bono forms an essential part of the national public legal aid scheme established in the mid-1990s.

In order to explain why pro bono and public legal aid have flourished simultaneously in China, a number of contextual changes must be understood. In particular, the government has introduced major reforms to the Chinese legal system that are designed to facilitate China's integration into the global economy (Lubman, 1999). In order to facilitate trade, laws were reformed or established to regulate many areas of life including finance, legal procedure and crime. The Criminal Procedure Law of the People's Republic of China, for example, was passed in March 1996. One of the much praised features of the law was to remove the right of a court to refer criminal cases back to the prosecutor for additional investigation if the judges decided there was insufficient evidence to convict the defendant. Not surprisingly, this particular aspect of the previous criminal legislation resulted in extremely high conviction rates, which in turn meant that it was widely criticised in the post Cultural Revolution era.10

In addition, new laws were also passed in order to promote the rapid development of the private legal profession. A major law was passed in May 1996, the Law of the People’s Republic of China on Lawyers and Legal Representation. The Law is an important step in the process of establishing a legal profession that is at least semi-independent of the state. The profession was decimated during the Cultural Revolution so that by the end of the 1970s there were approximately 3000 lawyers in China. Since that time the government has expanded the number of law schools in order rapidly to increase the supply of lawyers. As a result, the number of lawyers in China increased from 5500 to 50,000 between 1981 and 1991, then to more than 100,000 by 1996 and 114,000 in 1997. Furthermore, 127,000 people were to sit the Bar exam in 1997, though only a small percentage was passed.12 Together, these figures reflect China’s dramatic expansion of legal education fuelled by the perceived need for lawyers to assist in developing the economy.
At the same time, the government also reconsidered the role of lawyers in China. While lawyers were until recently officially designated as state workers rather than private professionals, the State Council Ministry of Justice approved a significant change in regulations in 1993. The effects of the change are very important for the future of a profession that is independent of the state. In particular, lawyers no longer work solely for the state. Instead, they can work on their own, establish private firms and earn their income from providing private legal services to members of the public and to private enterprise. Furthermore, the law established a legal profession body, the All-China National Lawyers' Association, that may in time strive for an independent professional identity for legal workers. As I explain in more detail below, the government also established principles to ensure that the emerging legal profession accepted responsibilities to assist the indigent. Articles 41 and 42 of the *Law on Lawyers and Legal Representation* require lawyers to assist those who cannot afford counsel fees in criminal or civil litigation.

Finally, laws were passed to promote the rule of law and improve human rights in China in response to international pressure. The Legal Aid Centre in the Ministry of Justice argues that `[t]he amended Constitution of the People's Republic of China, adopted at the Second Session of the Ninth National People's Congress (NPC) in March 1999, stresses the strategy of the rule of law in order to build a socialist country governed by law' (Legal Aid Centre, 1999a: 6). One expression of the support for the rule of law and human rights was the decision to establish the legal aid scheme discussed in the next section.

*Origins of Chinese legal aid*

The proposal that forms the basis of the current Chinese legal aid scheme was formally approved by the Ministry of Justice in 1994. The first step involved pilot projects in major cities but a nationwide scheme began to be established in 1996. The speed with which the scheme grew is staggering. By 1999, for example, 900 legal aid centres existed, of these 29 were at the provincial level, 15 at semi-provincial level, 211 in cities and nearly 700 in the counties. More than 3000 legal aid staff were employed including paralegals, lawyers and administrators. Meanwhile, private lawyers, notaries and grassroots community legal workers also undertake legal aid work. Other institutions and organisations have also
established legal aid offices, including women's groups, university law schools, and the All China Trade Union.

To qualify for legal aid, a person has to have reasonable grounds to request assistance, and must also demonstrate that they are on a low income and will have difficulty paying for legal assistance. In criminal proceedings defendants charged with sentences where death is a penalty are entitled to legal aid, as are the blind, deaf, dumb and minors. The assistance is comprehensive and includes legal advice, mediation, representation of parties in court in civil and criminal cases, and notary services (Legal Aid Centre, 1999b: 7).

The evidence demonstrates that the legal aid scheme has assisted large numbers of people. Since 1996, more than 220,000 court cases have been undertaken by the legal aid scheme. In addition, a further 1,850,00 people have received legal advice (Legal Aid Centre, 1999b: 7). While the volume is relatively low compared to the population of China, it is important to note that most of the people assisted would not previously have received any form of legal help to deal with either minor or complex legal problems. Nevertheless, it is important to recognise the China's legal aid is not yet able to offer the level of assistance that is required in what is certainly a poor country.

As explained in the next section, pro bono work undertaken by legal professionals is essential to the legal aid scheme.

Pro bono and legal aid

While the Chinese government has established the legal aid scheme, it does not have sufficient financial resources to bear the total cost of the scheme. As a result, legal aid in China relies heavily upon the pro bono efforts of private lawyers. The Legal Aid Centre (1999b: 1) in the Ministry of Justice in Beijing argues that:

China is a developing country with a comparatively large number of indigent people. It is not practical for the government to afford all the legal aid expenses. We have to combine the government budget, the donations from society and certain lawyers' free services.

The pro bono work of lawyers, or ‘practitioners sponsorship’ as it is referred to by the Ministry of Justice, takes two main forms. First, members of the profession are expected to provide free legal services, especially for litigation in criminal and civil cases. The work can involve
staffing legal aid offices on a rostered basis to provide advice, referral and minor assistance. It may also involve lawyers undertaking cases assigned by legal aid offices or cases assigned by the courts. In some cities, including Beijing, locally promulgated regulations require all private lawyers to undertake two cases on a pro bono basis per year. In addition, the lawyers in Beijing are required to provide at least two days of free legal consultation per month.15

Second, instead of undertaking the actual legal work themselves, practitioners can fulfil their obligation under the Law on Lawyers and Legal Representation by paying money to legal aid organisations to cover the cost of legal aid cases. This means that they donate the equivalent of the income they would otherwise have forgone if they had conducted legal aid cases. In other words, they are responsible for what is in effect a pro bono tax. While this might appear to be against the spirit of the Law, it makes sense in some circumstances. In Shanghai and other cities, for example, the legal profession's work often focuses on international trade. Practitioners in firms in these cities as a result often prefer to donate to legal aid organisations rather than undertake work with legal aid clients in criminal cases or other areas of law where they have little expertise.16

The Chinese government officials try to ensure the private lawyers meet the pro bono obligation which is enshrined in Articles 41 and 42 of the Law on Lawyers and Legal Representation. They do this in a number of ways. For example, the local legal aid offices organise rosters of private lawyers to ensure their involvement. While some local legal aid offices can afford a contribution to the cost of legal aid services conducted by private lawyers, it is often minimal. As a result, lawyers are sometimes reluctant to take cases because of the foregone income. The private lawyers are left in no doubt, however, about their obligation to participate in the schemes. There are clearly understood consequences faced by lawyers if they decline legal aid briefs sent to them by the local legal aid offices or the courts. The local government officials might tolerate lawyers refusing to take on one case. But, if they refuse another case the officials are likely to visit them and talk about the importance of accepting cases. If they still refuse to take cases, the officials can suspend their licence to practise law.

The system which is, in effect, ‘mandatory pro bono’ is not without its problems. There is evidence, for example, that officials often fail to act against lawyers who refuse pro bono cases assigned to them by courts or
legal aid offices. Even when legal firms do participate, the quality of work is often low because they send their least experienced lawyers (Lieban, 1999). This problem is by no means unique to China. It is common to pro bono schemes throughout history (Cappelletti and others, 1975).

Despite the problems, there are also a number of reasons why members of the Chinese legal profession are willing to undertake pro bono work. First, as is the case in other societies, such work is likely to increase the business of the legal firms in the future if they can develop a good name in their local community. Second, it can contribute some income in the short term if reduced fees are available. Third, the stick probably matters. That is to say, lawyers are legally obliged to do pro bono work by the state and the officials can enforce that obligation. Fourth, similarly to lawyers involved in legal aid reforms in the USA, Australia and England in the 1960s and 1970s, many Chinese lawyers and legal aid workers are passionately committed to the ideals of the rule of law and equality before the law. Together these ideals are understood as promoting a sense of responsibility for lawyers to undertake pro bono work.

Finally, the lawyers also sense that pro bono work represents, in the long term, an important source of freedom for lawyers. 'Lawyers in China [are currently] positioned somewhere between a formal characterisation as state legal workers and members of an autonomous profession' (Lieban, 1999). That is to say, pro bono legal aid work is a vehicle that lawyers recognise may gradually weaken state control and allow an independent profession to slowly develop. If lawyers do not meet their end of the bargain by participating in pro bono work, they recognise that they will be less likely to achieve independence from the state.

Discussion

This article demonstrates that, while pro bono is flourishing in Sweden and China, it is occurring in different ways and for different reasons in the two societies. In general, the trend of popularity of pro bono in the two societies can be understood in terms of the ongoing efforts of governments and the legal profession to promote equality before the law. This means that the rise of pro bono is linked, although in very different ways in the two societies, to the fortunes of public legal aid on the one hand and the size of the legal profession on the other.
First, pro bono flourished in the two societies at least in part as a response by the legal profession to decisions by governments about legal aid. In the case of Sweden, pro bono flourished because government was no longer willing to pay for public legal aid. In China on the other hand, the government did not have the money to fund public legal aid. In addition, pro bono flourished in Sweden because the profession was large enough to undertake pro bono work, albeit in a limited form at this stage. In China by contrast, it flourished because the profession was small, government legal aid resources were limited and government was able to direct legal profession to undertake the work.

The article also highlights the sometimes mixed 'benefits' of pro bono in these and other societies. Perhaps the best way to understand the 'benefits' is to consider the recent developments from the sometimes conflicting perspectives of citizens, the profession and finally, government. First, the rise of pro bono is good from the perspective of citizens because it improved their opportunities to be treated equally before the law. In Sweden, pro bono filled the vacuum created by the retreating legal aid scheme, reinstating limited access to basic advice and referral for many citizens. In China, by contrast, it increased access to the full range of legal services for the poor and other marginalised groups.

Pro bono is also positive from the lawyers' perspective. First, apart from individual lawyers gaining often valuable experience, pro bono allows them to project the image of a profession that is genuinely at the service of the indigent and marginalised in the respective societies. In turn, such service may in the future also lead to increased private work and income for individual members of the profession. Pro bono can also create important political opportunities for the profession. That is to say, the fact that members of the profession undertake pro bono work allows the leadership of the profession to have a greater stake in public policy debates about legal aid and other related policy areas, including court reforms. Indeed, in China, it may be part of the means by which lawyers pursue their claim to become a profession that is independent of government.

Finally, pro bono is 'good' from the perspective of governments in the two societies. For example, it allows governments to have greater control over, even to reduce, legal aid budgets. In times when money is short, this may be a goal desired by governments – despite the fact that it undermines equality before the law. Pro bono is also useful from the
government point of view because it adds leverage when governments want to pressure the legal profession to negotiate about their role in the society and especially their obligations to the poor. By the same token, pro bono work can also be a thorn in the side of government. It can, for example, be used to remind governments that some things cannot be measured in terms of financial values alone. Other, less tangible, values are also important, including equality before the law.

The developments in these two very different societies also remind us of two dangers associated with pro bono. First, the recent Chinese developments remind us that the legal profession’s pro bono work must have limits. In particular, it cannot, and should not be allowed to, replace adequately funded public legal aid schemes. To do so places an impossible burden on the legal profession, which after all must be able to generate an income from their legal work. By contrast, the recent Swedish developments remind us that the tradition of the legal profession’s serving society is undermined if the pro bono duty is extinguished. If the pro bono commitment is extinguished in a society, the risk is that the legal profession will be reduced to yet another industry motivated primarily by financial self-interest. The ongoing challenge in these and other societies, therefore, is to regularly re-negotiate the balance between the profession’s responsibility for pro bono work and the government’s responsibility for legal aid – all in pursuit of that elusive goal of equality before the law.

Finally, the article suggests a number of implications for future comparative pro bono research. First, the article highlights some of the challenges involved in conducting comparative pro bono research. In particular, it highlights the importance, for comparative research, of examining pro bono developments in their broader political context. Trends such as the rise of pro bono may be common to different societies, but comparative research needs to examine trends in their national context rather than attempt to construct universal theories. In other words, comparative research is both a search for international patterns and a search for national differences.

Second, the article highlights the need to conduct further comparative pro bono research that seeks to explain developments across other societies. Future research could, for example, compare schemes in the richer societies in order to understand how and why pro bono is flourishing in some of those societies but not to others. Development in
poor societies should also be researched in order, for example, to identify the ways in which pro bono can assist low-income citizens in societies where public legal aid is a distant mirage.

Third, future research could also examine whether the take-up of pro bono is affected by other variables, including different types of legal traditions and welfare state formations. For example, is pro bono flourishing more in common law or in continental European societies with their more inquisitorial traditions? Is pro bono most closely associated with relatively underdeveloped welfare states?

Finally, comparative research provides a fresh vantage point from which to identify a number of important elements of the social, legal and political context of pro bono in each society. The elements include the changing nature of the legal profession, the progress of public legal aid and the shifting role of government. For all these reasons, comparative pro bono research is an often overlooked – but nevertheless important – field of research for the future.

Notes
1. While organised pro bono work is the focus of the article, it needs to be remembered that individual members of legal professions also undertake free legal work in other ways, including ad hoc work for family, friends and community organisations. For studies of pro bono in the USA, see Katzman (1995), England and Wales, Boon and Abbey (1997) and Australia, the articles in this volume.
2. The research reported in this article is based in part on interviews with legal aid and legal profession colleagues in Sweden in November 1998, and in Fuzhou, China in December 1999. The responsibility for interpretation of events and data is mine alone.
3. This section draws upon the detailed discussion of Swedish legal aid in Regan (2000).
4. For a comparison of the Swedish bureau and a similar scheme in Milwaukee, USA in the 1930s, see Garrison (1940: 293).
5. For a description of the scheme in the early 1990s, see Ling (1994) and Regan (1994). For a recent overview of legal aid in Scandinavia, see Johnson (1994).
6. Changes to criminal legal aid were minimal, reflecting the international pattern of protecting legal aid where individual liberty may be at risk.
7. Needless to say, while the government did not publicly suggest that the Bar establish such a scheme, it would not have been displeased at the profession's move to fill this part of the vacuum created by the legal aid cuts.
8. The numerical data discussed below was provided in personal communication from Ragnar Palmkvist, General Counsel, Swedish Bar Association, Stockholm, November 2000.
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9. The numerical data relating to the impact of the legal aid changes was provided in personal communication from Judge Ola Ling, Sundsvall, Sweden, November 2000.

10. As recently as 1995, for example, 99.65 per cent of people tried in the criminal courts were convicted, according to official statistics; see Cooper (1999). For a recent overview of China's criminal justice system, see Seay (1998), also Lubman (1999: ch 6).

11. The concept of legal profession in China is also not directly comparable with many western societies. The length and quality of training lawyers receive, as well as judges, is not always adequate. The 'system of training, examination and registration of new lawyers is patchy, and variable' according to Cooper (1999: 79).

12. The data is drawn from the following sources: State Council of the People's Republic of China (1997); Liebman (1999); and Legal Aid Centre (1999a: 3). Also see recent press releases relating to reform of the legal system, such as: 'Li Peng Urges Improvement of Civil Law System', Xinhua News Agency, 1 September 1999.


14. The following summary draws on the recent exhaustive study of Chinese legal aid developments in the 1990s in Lieban (1999) and Legal Aid Centre (1999a), and on interviews with legal aid officials in Fuzhou in December 1999. Also see the press release: 'UNDP Helps China Strengthen Legal Aid System', Xinhua News Agency, 29 October 1999.

15. For a detailed discussion of different forms of legal aid in China, see Lieban (1999). Of course, lawyers in China also undertake individual pro bono cases apart from their legal obligations. These might include cases for family, friends or business colleagues. As is the case in other societies, it is difficult accurately to quantify the extent of this work.


17. Equality before the law is enshrined in art 33 of the PRC Constitution.

References


