A REVIEW OF THE MLAS AND CLAS RULES: ADVANCING LEGAL AID IN THE PHILIPPINES

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ABSTRACT

We review the core provisions of the Supreme Court MLAS and CLAS rules for mandatory free or pro bono legal aid service for private practitioners. These rules are currently suspended, but they are now being re-examined for harmonization and re-issuance. With all due respect, we find such rules devoid of proper constitutional, legal, factual, and historical basis.

Thus, we offer an alternative proposal of basic guiding principles, drawing from the constitution, international human rights law, and, since justice has no country, comparative insights from best practices in forty-nine countries and leading jurisdictions like the United Kingdom, Spain, and Austria. We submit that following the mandate of the constitution, we can advance legal aid through a combined system of state-handled assistance and adequately state-funded legal aid service by private practitioners or other providers on a contractual basis in parallel with purely voluntary work.

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To ensure resource optimization, effectiveness, and sustainability, we may restructure this program on the four established pillars: the Commission on Human Rights (CHR), Public Attorney's Office (PAO), Integrated Bar of the Philippines (IBP), and the Legal Aid Clinics (LACs) of our law schools.

The generous feelings which prompt acts of charity are admirable and ennobling to our nature. But even charity itself almost ceases to be a virtue, when they, whose duty it is to provide for the poor, make private charity a pretext for public neglect.[1]

INTRODUCTION

Legal aid in the Philippines is a fundamental constitutional right enshrined in the Bill of Rights. It is intertwined with the broader right of access to justice. "Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty."[2] In criminal proceedings, legal aid is expressly guaranteed by the Bill of Rights as well to any person under investigation for an offense who could not afford the services of counsel.[3]

To this end, the constitution created an independent office, the Commission on Human Rights (CHR), to provide "legal aid services to the underprivileged whose human rights have been violated or need protection."[4] Additionally, Congress established the Public Attorney's Office (PAO) as "the principal law office of the Government in extending free legal assistance to indigent persons in criminal, civil, labor, administrative and other quasi-judicial cases."[5]

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[1] *Webb v. Baird*, 6 Ind. 13 (Supreme Court of Indiana, 1854).

[2] CONST., art. III, sec. 11.

[3] CONST., art. III, sec. 12.

[4] CONST., art. XIII, sec. 18, para. (3).

[5] Republic Act No. 9406, sec. 12, amending E.O. No. 292, sec. 14, chap. 5, title III, bk. IV.

For its part, the Supreme Court (SC) issued the rule on Mandatory Legal Aid Service for Practicing Lawyers (MLAS)[6] in 2009, but its implementation was suspended. Thereafter, in 2017, the SC issued the Community Legal Aid Service (CLAS)[7] rule providing for the same mandatory free or pro bono legal aid service but only for newly admitted lawyers in 2018 and 2019. However, this program was suspended as well in September 2019, following the court's issuance of the Revised Law Student Practice Rule.[8]

In support of MLAS, Congress passed the Free Legal Assistance Act of 2010.[9] However, this law remains suspended for lack of implementing rules.

Now, the Supreme Court has renewed its efforts for legal aid, and "requested the IBP Community to prepare and submit a written proposal for the establishment of a legal aid program that covers all lawyers, instead of only new lawyers, including harmonization of MLAS and CLAS."[10]

I am a member of the IBP Camarines Sur Chapter. And upon *Facebook* request of our officers for comments and suggestions, I researched the matter and came up with this pro bono contribution from the perspective of a private practitioner.

In essence, the MLAS and CLAS rules requiring mandatory free or pro bono legal aid service are, with all due respect, devoid of constitutional, legal, factual, and historical basis. Rather, to advance legal aid in the Philippines, we should go back to the basic mandate of our constitution, that is, as an overriding state obligation and duty following a human rights approach.

In Part A, I review the core provisions of the MLAS and CLAS rules. In Part B, I cover the constitutional mandate for legal aid and layout the real duty-holders therefor. Then in Part C, I raise the constitutional infirmities of mandatory free or pro bono legal aid service: (1) involuntary servitude, and (2) illegal taking by the government coupled with undue taxation, both of which also constitute a breach of international human rights. Thereafter in Part D, I offer comparative insights from international law and best practices from leading jurisdictions like the United Kingdom, Spain, and Austria. In Part E, I offer an alternative proposal of guiding principles for building a legal aid program that is legally in order and just.

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[6] B.M. No. 2012, February 10, 2009. (Hereinafter, MLAS rule)

[7] A.M. No. 17-03-09-SC, October 22, 2017. (Hereinafter, CLAS rule)

[8] A.M. No. 17-03-09-SC, September 3, 2019.

[9] Republic Act No. 9999, February 23, 2010.

[10] IBP Memorandum to Chapter Officers, September 13, 2021.

Conclusion follows. I close with a Reflection on my own legal aid experience.

I. THE MLAS and CLAS Rules

The 2009 Rule on Mandatory Legal Aid Service (MLAS) required every practicing lawyer to provide 60 hours of free legal aid services in a year, thus:

> Every practicing lawyer is required to render a minimum of sixty (60) hours of free legal aid services to indigent litigants in a year. Said 60 hours shall be spread within a period of twelve (12) months, with a minimum of five (5) hours of free legal aid services each month. However, where it is necessary for the practicing lawyer to render legal aid service for more than five (5) hours in one month, the excess hours may be credited to the said lawyer for the succeeding periods.[11]

In turn, the 2017 Rule on Community Legal Aid Service (CLAS) for newly admitted lawyers doubled the time required for *pro bono* work to 120 hours:

> Covered lawyers, as defined under Section 4 (a), are required to render one hundred twenty (120) hours of pro bono legal aid services to qualified parties enumerated in Section 4 (b), within the first year of the covered lawyers' admission to the Bar, counted from the time they signed the Roll of Attorneys.[12]

Building on the MLAS rule, the Free Legal Assistance Act of 2010, provided for a similar time-measured form of legal aid service for work beyond the 60-hour MLAS requirement for which a tax deduction of up to 10% from gross income could be availed of by the concerned lawyer or partnership.[13] But as mentioned earlier, this law has not been implemented.

The MLAS rule was based on the "duty of lawyers to society as agents of social change and to the courts as officers thereof by helping improve access to justice by the less privileged members of society and expedite the resolution of cases involving them."[14] "Mandatory free legal service by members of the bar and their active support thereof will aid the efficient and effective

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[11] Sec. 5 (a).
[12] Sec. 5 (a).
[13] R.A. No. 9999, sec. 5.
[14] MLAS rule, sec. 2.

administration of justice especially in cases involving indigent and pauper litigants."[15]

With all due respect, however, the notion that lawyers are "officers of the court" is strictly limited in Philippine jurisprudence and used only in reference to maintaining respect due to the courts and judicial officers as well as for upright conduct in the practice of law in accordance with the Lawyer's Oath and the Code of Professional Responsibility.[16] Such mere ascription cannot be unduly stretched to include private practitioners being compelled to work for free through mandatory free or pro bono legal aid service without running afoul of the constitutional proscription against illegal taking without just compensation, especially given that our constitution commands that rules of court "shall not diminish, increase, or modify substantive rights."[17]

It may please be recalled that an obligation is the "juridical necessity to give, to do or not to do."[18] And the sources of demandable obligations are the following, and the following only: (1) law; (2) contracts; (3) quasi-contracts; (4) acts or omissions punished by law; and (5) quasi-delicts.[19] Out of these five sources, it is only law, which can possibly support MLAS. However, the Civil Code further provides that "[o]bligations derived from law are not presumed."[20] "Only those expressly determined in this Code or in special laws are demandable, and shall be regulated by the precepts of the law which establishes them; and as to what has not been foreseen, by the provisions of this Book."[21] This basic provision obviously does not include the rules of court umbrella under which MLAS has been required. In effect, the MLAS rule is unfortunately a form of judicial legislation as to render it unconstitutional.

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[15] *Id.*

[16] See, e.g. *Pesto v. Millo*, Adm. Case No. 9612, March 13, 2013 (suspending a lawyer for "conduct unbecoming of an officer of the court"); *Kara-an v. Atty. Pineda*, A.C. No. 4306, March 28, 2007 (explaining disbarment only for "clear cases of misconduct affecting the standing and moral character of the lawyer as an officer of the court and member of the bar."); *Rafols v. Atty. Barrios*, A.C. No. 4973, March 15, 2010, citing *Rivera v. Corral*, A.C. No. 3548, July 4, 2002 ("A lawyer may be disbarred or suspended for misconduct, whether in his professional or private capacity, which shows him to be xxx unworthy to continue as an officer of the court.); *Igoy v. Atty. Soriano*, A.M. No. 2001-9-SC, October 11, 2001 (holding that "[a]s an officer of the court, it is the duty of a lawyer to uphold the dignity and authority of the court to which he owes fidelity according to the oath he has taken.")

[17] CONST., art. VIII, sec. 5, para. (5).

[18] CIVIL CODE, art. 1156.

[19] CIVIL CODE, art. 1157.

[20] CIVIL CODE, art. 1158.

[21] *Id.*

The Civil Code likewise provides that "a custom must be proved as a fact, according to the rules of evidence."[22] The "officer of the court" tradition or custom as a source of obligation for MLAS should then be specifically set forth by competent evidence. But research shows that such a supposition from English common law that found its way in our country during the American era is bereft of factual and historical basis. And, it has long been debunked in the United States for "[a]s early as 1794, the Supreme Court of Pennsylvania recognized that American attorneys during the colonial period did not enjoy the privileges and exemptions of their English counterparts."[23] Thereafter, "[i]n 1810, for similar reasons, the Virginia Supreme Court questioned the appropriateness of applying this doctrine in America."[24] More importantly "in 1854, the Indiana Supreme Court held that an attorney had no obligation to serve gratuitously, since the idea of an attorney having special privileges was obsolete."[25]

Over 130 years later, in 1985, the Supreme Court of Missouri abandoned this officer of the court anachronism by clarifying that the practice of English courts appointing for legal aid the elite lawyers called serjeants-at-law of the Order of the Coif was only because they were appointed public officials with special privileges like exemption from arrest or militia duty who shared no common role with American attorneys.[26] The Court, citing the work of Professor Shapiro, pointed out that: "We next examine the validity of the officer of the court doctrine. Professor Shapiro explains that '[T]o justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there.'"[27] The Court explained that: "It seems apparent, therefore, that we cannot transplant the English experience onto American soil, nor can we merely claim that lawyers are 'officers of the court' based upon English precedent. Attempts to do so overlook the ambiguity surrounding the use of 'appointed' counsel in English practice, and such attempts fail to recognize that America departed from the traditional English model for the legal profession."[28] The Court added that "[u]nfortunately, the oft-repeated doctrine

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[22] CIVIL CODE, art. 12.

[23] Stafford Henderson Byers, *Delivering Indigents' Right to Counsel While Respecting Lawyers' Right to Their Profession: A System "Between a Rock and a Hard Place"*, 13 Journal of Civil Rights and Economic Development 491, 502 (1999). Available at: https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1301&context=jcred.

[24] *Id.*

[25] *Id.*

[26] See *id.* at 502-503, citing *State v. Roper*, 688 S.W.2d 757, 767 (Mo. 1985).

[27] *State v. Roper*, 688 S.W.2d 757, 767-768 (Mo. 1985). (citations omitted)

[28] *Id.*

that lawyers are officers of the court and as such may have conditions imposed by the court on their privilege to practice law has been 'used as an incantation with little or no analysis of what the title means or why a particular result should flow from it.'"[29] Consequently, the Court then declared that "the time has come to abandon invoking the doctrine that lawyers are officers of the court or, as some courts suggest, public officers and lay to rest this anachronism from English legal history. In lieu of the doctrine, decisions should rest upon sound reasoning and analysis."[30] And as a practical matter, the Missouri Court highlighted the fact that times have changed and that the practice of law has changed dramatically:

> Literally thousands of our lawyers, sad to relate, never see the inside of the court room at all. Not only has the bar itself been divided into specialties but of the very **small percentage of lawyers who can be said to be trial lawyers an even smaller percentage of them have developed skills in the practice of criminal prosecution and defence. It is unjust that this comparative handful of individuals should alone bear the burdens which are rightly those of all of the bar and indeed of the community and the taxpayers.**[31] (Emphasis ours)

In sum, "reliance by many courts on the long history of court appointment thus appears to be misplaced."[32] "Although mandatory court appointment indeed burdened some especially privileged members of the legal profession, the claim is unwarranted that this isolated occurrence supports an obligation by all attorneys today."[33]

We need not belabor here that private practitioners in the Philippines are not public officers even if our profession is "imbued with public interest" in the sense akin to public utilities that serve the general populace. We do not enjoy special privileges by reason of our membership in the Bar. Unlike public utilities, we enjoy no tax perks or subsidies or exemptions in law whatsoever such as income tax holidays. We have no discounts for the purchase of consumer goods and services, food, office supplies and computers, and medicines or hospitalization, especially with our ranks more prone to serious diseases like hypertension and heart ailments arising from the pressures of litigation.

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[29] *Id.*

[30] *Id.*, at 768.

[31] *Id.*

[32] Christopher D. Atwell, *Comment, Constitutional Challenges to Court Appointment: Increasing Recognition of an Unfair Burden*, 44 SW L.J. 1229, 1236 (1990). Available at: https://scholar.smu.edu/smulr/vol44/iss3/6.

[33] *Id.*

What the Missouri Court held in 1985 about the practice of law having become specialized with fewer lawyers handling cases in court is all the more our present reality now. Less and less lawyers engage in trial work, especially with its burdensome load such as the submission of all evidence and judicial affidavits at the filing of a civil complaint or answer, which may even turn out to be a waste of time and effort if the parties settle the case anyway before trial.

Thus, the "officer of the court" reliance of the MLAS rule has no factual and historical basis and is not a valid legal foundation for imposing an enforceable obligation on private practitioners to render such "forced donation" or "compelled charity." As Professor Shapiro put it: "Responsibility implies an element of choice, of freedom not only to choose membership in the profession but to chart one's course after membership is attained. To turn an aspiration of public service into an enforceable obligation, then, would be to deprive the professional of an element of choice that may be an important part of self-fulfillment. Compelled altruism is not much of a virtue."[34]

The CLAS rule, in turn, was based on the premise that "the legal profession is imbued with public interest."[35] Consequently, "lawyers are charged with the duty to give meaning to the guarantee of access to adequate legal assistance under Article III, Section 11 of the 1987 Constitution by making their legal services available to the public in an efficient and convenient manner compatible with the independence, integrity and effectiveness of the profession."[36] Accordingly, by this recast or new formulation of a "constitutional duty to give meaning," "lawyers are obliged to render *pro bono* services to those who otherwise would be denied access to adequate legal services."[37]

However, it is elementary that the constitution is a document that provides for what we, the people, by way of social contract, have imposed on the government that we established thereby. Specifically, as Tañada and Fernando explained, citing Malcolm and Laurel, it is "the written instrument by which the fundamental powers of the government are established, limited, and defined, and by which those powers are distributed among the several

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[34] David L Shapiro, *"The Enigma of the Lawyer's Duty to Serve"* (1980) 55(5) New York University Law Review 735 , 788.

[35] CLAS rule, sec. 2.

[36] *Id.*

[37] *Id.*

departments for their safe and useful exercise for the benefit of the body politic."[38]

Hence, the "rationale" for CLAS that practicing lawyers or private citizens now have a "constitutional duty to give meaning" to the guarantee of access to adequate legal assistance because the legal profession is "imbued with public interest" is, with all due respect, fundamentally flawed. If we were to follow that arbitrary line of argument, then all the members of other professions should be required to render mandatory free service in their respective work.

For example, private doctors should be required to save lives for free or treat poor patients for free as a "constitutional duty to give meaning" to the people's right to life and health. Civil engineers should be required to provide free engineering or building services for housing projects for the homeless as a "constitutional duty to give meaning" to their right to shelter. Even professional plumbers should be required to give free service to indigents whose kitchen sinks may have gotten clogged as a "constitutional duty to give meaning" to the state mandate to instill health consciousness among the people through proper sanitation in the home.

As well, airlines, buses, taxis, jeepneys, UVs, Grab or Angkas rides, as public utilities imbued with public interest, should be required to give free transportation to all the underprivileged as a "constitutional duty to give meaning" to their freedom of movement in support of their rights to life especially in case of medical emergencies or even for work to earn some money for food in these Covid-19 pandemic times.

The entire constitution as a social contract imposes obligations and mandates for action on the state or the government—not on private citizens like private law practitioners. The one and only exception is the defense of the state for which all able private citizens may be required to render military service or alternative personal or civil service.[39] For this is about the very survival of our nation itself that is every citizen's duty and not something imposed on a targeted class.

Even then, defense service is paid work where everything we need for battle or alternative support for war efforts would be at the expense of the state, that is, we will be supplied with all the necessary arms, weaponry, and equipment, clothing and food, combat boots, helmets, body armor, and accessories, transportation, medical treatment and rehabilitation or disability

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[38] 1 LORENZO M. TAÑADA & ENRIQUE M. FERNANDO, CONSTITUTION OF THE PHILIPPINES 12 (4th ed., 1952).

[39] CONST., art. II, sec. 4.

benefits, other necessities as well as funeral honors and expenses and a sacred resting place for our remains plus pension and other support for our families left behind in the event we make the ultimate sacrifice.

Compare all that with mandatory free or pro bono legal aid service under the MLAS and CLAS rules where we private practitioners would be left to shoulder everything that we would need: our time, competences, efforts, training, and office resources for handling a case for an indigent or underprivileged, including out-of-pocket expenses for transportation, photocopying of documents, or mail.

That a profession, trade, calling or industry is imbued with public interest does not mean that private citizens who render their services therein can already be required by the government to engage in charity or pro bono work. It only means that the government can make reasonable regulations through the police power of the state to ensure the general welfare of everyone who may avail of the services thus offered to the public in order to protect life and limb, guard against fraud, curtail exorbitant fees or unreasonable pricing, and check on substandard service, or temper corporate or individual greed. Thus, it has been held for our profession that: "The practice of law is a privilege burdened with conditions and is reserved only for those who meet the twin standards of legal proficiency and morality. It is so delicately imbued with public interest that it is both a power and a duty of this Court to control and regulate it in order to protect and promote the public welfare."[40] As expressly recognized in Rule 138, sec. 24, a lawyer is entitled to compensation as a matter of right for services rendered to a client subject only to the standard that it be reasonable upon consideration of the importance of the subject matter of the controversy, the extent of the services rendered, and the professional standing of the attorney.

Otherwise, with bare "public interest" as an expedient motherhood mantra for new government impositions on private citizens not found at all in the constitution or statute, we will end up in a totalitarian state or dictatorship in the same way that Marcos used the "national interest" and his self-proclaimed "covenant with the Filipino people" incantations to justify his tyrannical regime back then.

More importantly, a plain meaning or *verba legis* reading of section 11 of article III shows nothing in it that it is the private practitioners who have been charged with the guarantee of access to adequate legal assistance. For clarity's sake, it reads: "Section 11. Free access to the courts and quasi-judicial

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[40] *Judge Pantanosas Jr. v. Atty. Pamatong*, A.C. No. 7330, June 14, 2016. (Per J. Caguioa)

bodies and adequate legal assistance shall not be denied to any person by reason of poverty."

And this provision is an integral part of the Bill of Rights, which under our system of constitutional government is precisely a "bill", that is, "an itemized list or a statement of particulars"[41] or a "to-do list" chargeable to or demandable from the state. In other words, every provision therein is the duty and obligation of the government, and not the citizenry, or in our case, private practitioners. Father Joaquin Bernas, our eminent authority and member of the 1986 Constitutional Commission, explained in his sponsorship remarks for article III that: "The Bill of Rights governs the relationship of the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder."[42]

On section 11, he specified that "the matter of giving adequate legal assistance, is something which is not self-executory."[43] "It needs legislation,"[44] he added. And law-making is the exclusive province of the legislature as conferred by our constitution, excepting only the provision for direct legislation by the people through initiative and referendum.[45]

Thus, the CLAS rule is regrettably unconstitutional and a form of unwarranted judicial legislation.

In sum, both the MLAS and CLAS rules are, with all due respect, devoid of a proper constitutional, legal, factual, and historical basis. And upon closer examination, they even run counter to the legal aid mandate of the constitution as well as the overriding proscriptions—traditionally rooted in the very *Magna Carta* of England,[46] against involuntary servitude and illegal taking coupled with undue taxation, both of which are also a breach of international human rights

II. Constitutional Mandate for Legal Aid

[41] Merriam-Webster, https://www.merriam-webster.com/dictionary/bill.

[42] JOAQUIN G. BERNAS, SJ, THE INTENT OF THE 1986 CONSTITUTION WRITERS, 164 (1995).

[43] *Id.* at 191.

[44] *Id.*

[45] CONST., art. VI, sec. 1.

[46] Clauses 39 and 40: 39. No free-man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. 40. To no one will we sell, to no one deny or delay right or justice.

The Bill of Rights, no less, commands that: "Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty."[47]

Specifically for criminal cases, the constitution guarantees any person under investigation for the commission of an offense the right to have competent and independent counsel preferably of his own choice, and "[i]f the person cannot afford the services of counsel, he must be provided with one."[48]

For these ends, the constitution vested the Supreme Court with the task of promulgating the necessary rules.[49]

Significantly, the constitution purposefully reposed in the Commission on Human Rights (CHR) the express power and function to provide "legal aid services to the underprivileged whose human rights have been violated or need protection."[50] This duty tallies with the state obligation under article 8 of the Universal Declaration of Human Rights to ensure "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to [everyone] by the constitution or by law." It bears stressing, too, that human rights are universal, inalienable, interrelated, indivisible, and interdependent.

No other agency created in the constitution has been given this noble responsibility. The CHR then is the primary duty-holder and government agency for the provision of legal aid.

And vis-à-vis the private practitioners, the deliberations of the constitutional commission reveal that "Father Bernas pointed out that the legal aid contemplated need not always be free legal aid."[51] "Those who could afford legal fees could be referred to private practitioners," he added.[52] Mandatory free or pro bono legal aid service by private practitioners was never contemplated in the drafting and later promulgation of our constitution.

Furthermore, we point out that in the general scheme of government in line with the above-mentioned constitutional mandate and for the rationalization of functions and maximization of resources, the existing Public Attorney's Office (PAO) attached to the Department of Justice (DOJ) should rather be placed under the CHR. By this, we could avoid the conflict of interest

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[47] CONST., art. III, sec. 11.

[48] CONST., art. III, sec. 12, para. (1).

[49] CONST., art. VIII, sec. 5, para. (5).

[50] CONST., art. XIII, sec. 18, para. (3).

[51] BERNAS, *supra* note 42, at 1026.

[52] *Id.*

between the DOJ prosecution service vis-à-vis the PAO where both offices are under the control and supervision of the president.[53]

As an attached agency to the DOJ for policy and program coordination, the PAO remains under presidential control or resolution and direction in case of an unresolved disagreement with the secretary of justice following the unitary executive doctrine and the Administrative Code.[54] Thus, PAO's independence and autonomy,[55] especially for its own budget and services such as legal assistance to victims of extra-judicial killings resulting from the government's "war on drugs" could be solidified under the CHR since the CHR is not under executive control as an independent constitutional body.[56]

For sure, the great wisdom and foresight of the esteemed writers of our constitution are manifested in the stark reality that most people who need legal aid now are criminal defendants, victims of violent crimes, and victims of martial law-like abuses by state agents or law enforcement authorities as in the case of extra-judicial killings resulting from the government's "war on drugs."

The CHR's 2020 accomplishment report shows that the commission provided protection services for the year 2020 to a total of 4,889 cases covering 2,988 for legal assistance, 1,072 complaints for human rights violations, and 829 motu proprio action.[57] For the period May 10, 2016, to December 31, 2020, the CHR resolved 3,273 cases of drug-related extra-judicial killings out of which 1,893 were killed in law enforcement operations and 1,379 were killed by unidentified assailants.[58]

PAO, in turn, in its 2020 accomplishment report, prides itself as a human rights agency through which "the fundamental human right of every individual to free access to justice, guaranteed by our Constitution, is given life."[59] Precisely, its "mandate is to independently render, free of charge, legal representation, assistance, and counselling to indigent and other qualified persons in criminal, civil, labor, administrative, and other quasi-judicial

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[53] CONST., art. VII, sec. 17.

[54] E.O. No. 292, Bk. IV, chap. 7, sec. 38 (3)(b).

[55] R.A. 9406, sec. 2.

[56] CONST., art. XIII, sec. 17, para. (1).

[57] CHR 2020 Annual Report, 6, https://chr.gov.ph/wp-content/uploads/2021/08/CHR-2020-ANNUAL-ACCOMPLISHMENT-REPORT.pdf.

[58] *Id.*, at 17-18..

[59] Public Attorney's Office, 2020 PAO Accomplishment Report (Narrative), 1, https://pao.gov.ph/UserFiles/Public_Attorney's_Office/file/2020%20PAO%20Accomplishment%20Report%20(Narrative).pdf.

cases."[60] PAO reports that in 2020, it served 6,687,630 clients and handled 752,196 cases, which included 57,002 persons deprived of liberty who were released from detention.[61] The bulk of cases PAO handled were criminal cases that totaled 586,438 cases for 572,497 clients served.[62]

Relevantly, on September 15, 2021, the International Criminal Court Pre-Trial Chamber I has released its "Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute" concerning the situation in the Philippines, that is, the extra-judicial killings that have resulted from the administration's "war on drugs." The Chamber thus:

> AUTHORISES the commencement of the investigation into the Situation in the Philippines, in relation to crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called 'war on drugs' campaign; and
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> INSTRUCTS the Registrar to provide notice of the present decision to the victims who have made representations.

For sure, legal aid by the CHR and PAO working as one team at this time is even more necessary for at least the 204 victims' representations to help ensure that the ICC investigation is fully carried out so that justice may be truly served despite the strong opposition and non-cooperation by the current administration. There are other victims of extrajudicial killings whose families have chosen to lay low for now out of fear of the police and other law enforcement agents, but who certainly need the support of CHR and PAO in due time.

Legal aid is a right in itself under international human rights law that is binding on the Philippine government as an international obligation or duty to provide:

> 20. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access

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[60] *Id.*

[61] *Id.* at 2.

[62] Public Attorney's Office, 2020 Case Handled and Clients Served, 1, https://pao.gov.ph/UserFiles/Public_Attorney's_Office/file/2020%20Cases%20Handled%20and%20Clients%20Served.pdf.

> to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.[63]

It is recognized in international and regional human rights treaties:

> 21. Several international and regional human rights treaties recognize access to free legal assistance as an essential component of the right to a fair trial. Article 14 (3) (d) of the International Covenant on Civil and Political Rights lists, among the procedural guarantees available to persons charged with a criminal offence, the right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[64]

It is but unfortunate, however, that the CHR's budget for FY 2021, despite its "commission" rank and being directly created by the constitution, has been severely limited by Congress to a minuscule sum of Php883,097,000 only.[65] There was even an attempt in 2017 to defund and effectively abolish CHR through a Php1,000 budget for 2018. Compare that allocation with the executive's multi-billion budget for PAO in the total amount of Php4,203,056,000[66] and a complement staff of 2,287 public attorneys.[67]

We emphasize the constitutional mandate once again for the "primacy of human rights"[68] and guarantee of "full respect for human rights."[69] Surely, if several billions of pesos of our people's money have been lost through the ill-gotten wealth of then president Marcos and his family[70] or wasted in congressional pork barrel projects,[71] there is no reason why Congress now cannot provide or find ways to allocate—in obedience to the constitution—even just a few billions more for human rights promotion and protection through legal aid. For starters, Congress has yet to meet its own prescribed 1:1

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[63] Report of the U.N. Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Human Rights Council, March 15, 2013, A/HRC/23/43, 5. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement.

[64] *Id.*

[65] General Appropriations Act, FY 2021, 116 (No. 2) O.G. 689, 689-691.

[66] General Appropriations Act, FY 2021, 116 (No. 1) O.G. 1096, 1096-1098.

[67] 2020 PAO Accomplishment Report (Narrative), *supra* note 59, at 2.

[68] CONST., art. XIII, sec. 17, para. (5).

[69] CONST., art. II, sec. 11.

[70] See *Republic v. Sandiganbayan*, G.R. No. 152154, July 15, 2003; Marcos, Jr. v. Republic, G.R. No. 189434, April 25, 2012.

[71] See generally *Belgica v. Executive Secretary*, G.R. No. 208566, November 19, 2013.

ratio of public attorney with an organized sala. As PAO reports, "[t]here are only 2,427 authorized positions for public attorney vis-à-vis 2,465 organized courts" thus leaving 38 uncreated positions.[72] But still, PAO avers that more plantilla positions are needed for the handling of legal aid cases in the appellate courts, Sandiganbayan, and in quasi-judicial agencies.[73] And, of course, the CHR should be adequately funded.

In fine, legal aid for the poor or underprivileged is a constitutional right and governmental duty and international obligation for which both the CHR and the PAO have been tasked to provide. Public neglect or non-allocation of enough budget for legal aid cannot be an excuse to draft private practitioners and force them to work certain hours for free or pro bono legal aid service, and thus commandeer their precious time, hard-earned competences and experience, labor and resources no matter how noble this purpose is.

Too, for PAO's suggested consolidation with the CHR, we may consider U.N. Special Rapporteur Gabriela Knaul's 2013 report to the U.N. Human Rights Council that: "Whatever its organization and structure, public defenders' programmes should be autonomous and independent of the judiciary, the prosecutor's office and executive power. The Special Rapporteur considers that this kind of programme often constitutes one of the most effective ways of delivering legal aid, since public defenders have financial incentives to provide adequate, continuous and effective legal aid to those who cannot afford a lawyer and to other disadvantaged persons."[74]

Consequently, the legal aid program the Supreme Court and the IBP seek to advance must be pursued within this context and in coordination with Congress, the CHR and PAO following the whole-of-government approach. After all, the sovereign Filipino people established but ONE government tasked by our constitution to provide legal aid to whomsoever may be in need.

III. Constitutional Infirmities and Breach of Human Rights

For a law to be valid and binding, we must source its provenance in the constitution. Otherwise, it is void.[75] And, with all due respect, a Supreme Court

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[72] 2020 PAO Accomplishment Report (Narrative), *supra* note 59, at 2.

[73] *Id.*

[74] Report, *supra* note 63, at 13-14.

[75] CIVIL CODE, art. 7.

rule with the force of law is no exception. For no one is above the law, no matter how supreme one is.

Tañada and Fernando instruct that: "Public officials must justify whatever action they take by the existence of any law empowering official action or at least not prohibiting it. For the law is the only supreme power under constitutional government and every man who by accepting office participates in its function is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. The supreme law is the Constitution. It is the test of the legality of all government action. It provides the measure for its validity."[76] Simply put, the highest officials of the land must defer to the constitution and no act or rule shall be valid, however nobly intentioned, if it conflicts with the constitution since all must bow to its mandate.[77]

It is mandatory, in fact, that rules promulgated by the Supreme Court "shall not diminish, increase, or modify substantive rights."[78]

While legal services, including legal aid, are the monopoly of lawyers since only licensed attorneys can provide them under our present system, the constitution does not require mandatory free or pro bono legal aid service. There is nothing at all in the constitution that requires a private citizen who chooses and qualifies to be a member of the Bar to be compelled to render legal services without compensation. As Justice Harlan of the United States Supreme Court declared: "We do not hold that lawyers, because of their special status in society, can therefore be deprived of constitutional rights assured to others."[79]

The constitutional mandate under the Bill of Rights to ensure adequate legal assistance to the underprivileged is imposed on the state. Legal aid is a government, not a private, obligation and duty. For this reason, providing instead for mandatory free legal aid service or obligatory uncompensated pro bono legal work is subject to the built-in restraints in the constitution on governmental actions for which lawyers are equally entitled as sovereign citizens duly recognized with inherent personal and political freedoms and individual human rights.

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[76] TAÑADA & FERNANDO, *supra* note 38, at 16.

[77] See ISAGANI CRUZ, CONSTITUTIONAL LAW, 4 (1989 ed.).

[78] CONST., art. VIII, sec. 5, para. (5).

[79] *Cohen v. Hurley*, 366 U.S. at 129-30.

"Imposition of a duty by the state, whatever its support in history and tradition, raises substantial constitutional issues and is perhaps even more vulnerable on economic and other policy grounds."[80]

We, therefore, submit that mandatory free legal aid service is unconstitutional and a breach of international human rights on at least two grounds: (1) involuntary servitude, and (2) illegal taking of private property coupled with undue taxation.

Involuntary Servitude

Under the Bill of Rights, it is expressly commanded that: "No involuntary servitude <u>in any form</u> shall exist except as a punishment for a crime whereof the party shall have been duly convicted."[81] (Underlining ours) The Universal Declaration of Human Rights, a landmark international instrument constitutionally incorporated in and binding on the Republic of the Philippines,[82] equally provides that: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[83]

"Involuntary servitude denotes a condition of enforced, compulsory service of one to another (*Hodges vs. U.S.,* 203 U.S. 1; *Rubi vs. Provincial Board of Mindoro*, 39 Phil. 660, 708) or the condition of one who is compelled by force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not (Black's Law Dictionary, 4th Ed., p. 961)."[84]

Involuntary servitude is also known or includes under the International Covenant on Civil and Political Rights (ICCPR) of which the Philippine is a State Party, "forced or compulsory labour,"[85] excepting, as relevant for lawyers, "[a]ny work or service which forms part of normal civil obligations."[86] Such free service exception that is part of our normal civic duties usually happens when we are appointed counsel *de officio* in court while we are in a hearing for a case to assist an accused without counsel in another case for the sole or limited purpose of arraignment or other incident at hand pursuant to sections 31 and 32 of Rule 138, with discretionary provision for compensation subject to availability of funds. For this rare or one-time service appointment, we

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[80] Shapiro, *supra* note 34, at 738-739.

[81] CONST., art. III, sec. 18, para. (2).

[82] *Mejoff v. Director of Prisons*, G.R. No. L-4254, September 26, 1951.

[83] Art. 4.

[84] *In re Aclaracion v. Hon. Gatmaitan*, G.R. No. L-39115, May 26, 1975.

[85] ICCPR, art. 8, sec. 3, para. (a).

[86] *Id.* art. 8, sec. 3, para. (a)(iv).

willingly lend pro bono assistance in much the same way that a doctor called to assist in a medical emergency gives first aid for free. Surely, first aid for a case, as it were, is oceans apart from treatment for complete healing or the handling of a case towards its just conclusion or proper disposition.

The purposes of the Integrated Bar of the Philippines (IBP), the official organization or association of all the country's lawyers of which every lawyer automatically becomes a member upon signing the Roll of Attorneys do not include providing compulsory free legal aid.[87] Thus, a lawyer cannot be presumed by that signature to have consented specifically to rendering unpaid legal aid.

Free legal aid under our Code of Professional Responsibility, to which we agree when we become lawyers, is hortatory at most. We are only exhorted to accommodate any such "request" from the IBP and refuse only for serious and sufficient cause.[88] The operative term "request" in the code bespeaks of an intent not to authorize mandatory appointments of counsel for free legal aid who is then confronted with an important ethical decision but who can nevertheless rightly refuse to serve for any valid reason.[89]

Ethical aspiration or professional responsibility is different from and should not be confused with a legally demandable and enforceable obligation.

In a trailblazing international case, *Gussenbauer v. Austria*, an Austrian practicing lawyer's two human rights applications or complaints about uncompensated mandatory legal aid service under article 4 of the European Convention on Human Rights (ECHR) prohibiting forced labour or work beyond one's normal civic obligations were held admissible in 1972, by the European Human Rights Commission and which resulted in a friendly settlement.[90]

Dr. Heinrich Gussenbauer was a practicing lawyer based in Vienna who was appointed ex officio counsel for defendants in two different criminal proceedings. In both cases, his requests to be released from these obligations were rejected by the Austrian Judges Chamber of the Regional Court. At that time, under the Austrian legal aid system, lawyers are obliged to act for

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[87] Rule 139-A, secs. 1-2.

[88] Canon 14, rule 14.02.

[89] *Mallard v. District Court*, 490 U.S. 296, 301 (1989) ("In everyday speech, the closest synonyms of the verb 'request' are 'ask,' 'petition,' and 'entreat.' *See, e.g.,* Webster's New International Dictionary 1929 (3d ed.1981); Black's Law Dictionary 1172 (5th ed.1979). The verbs 'require' and 'demand' are not usually interchangeable with it.").

[90] *Gussenbauer v. Austria*, Application Nos. 4897/71 and 5219/71, European Commission of Human Rights, March 22, 1972, and July 14, 1972.

defendants if so appointed by the court, and they are subject to severe disciplinary sanctions and liable to pay damages if their refusal to act causes prejudice to the defendant, or to the State. However, the lawyer is not entitled to any fees from the State, nor to the reimbursement of out-of-pocket expenses, except travelling expenses. Nevertheless, the Bar Associations get an annual sum for charitable purposes in respect of lawyers or their relatives and which is paid by the State to support the Bar Associations' pension fund for needy members or their widows or their orphans. Dr. Gussenbauer "alleged that his appointment as ex officio counsel violated Art. 4 by itself, and also in conjunction with Art. 14 of the Convention, and Art. 1 of Protocol No. 1. In his opinion, the Austrian legal aid system constituted forced labour and did not form a 'part of normal civic obligations' within the meaning of Art. 4. (3)(e) of the Convention. As regards Art. 4 in conjunction with Art. 14, he alleged that other comparable legal professions, such as notaries, court experts etc., had no such obligation to work without remuneration. Furthermore, he alleged a violation of his property rights under Art. 1 of Protocol No. 1 by the fact that he had to work without remuneration and without even compensation for the actual costs which he incurred."[91]

These facts are quite similar to the MLAS and CLAS regime of compulsory service without pay under pain of sanctions and penalties on non-compliant lawyers tantamount to suspension from the practice of law with a fine to boot. Section 7 of the MLAS rule provides in part, thus:

> SECTION 7. *Penalties*.
>
> (a) At the end of every calendar year, any practicing lawyer who fails to meet the minimum prescribed 60 hours of legal aid service each year shall be required by the IBP, through the NCLA, to explain why he was unable to render the minimum prescribed number of hours. If no explanation has been given or if the NCLA finds the explanation unsatisfactory, the NCLA shall make a report and recommendation to the IBP Board of Governors that the erring lawyer be declared a member of the IBP who is not in good standing. Upon approval of the NCLA's recommendation, the IBP Board of Governors shall declare the erring lawyer as a member not in good standing. Notice thereof shall be furnished the erring lawyer and the IBP Chapter which submitted the lawyer's compliance report or the IBP Chapter where the lawyer is registered, in case he did not submit a compliance report. The notice to the lawyer shall include a directive to pay Four Thousand Pesos (P4,000) penalty which shall accrue to the special fund for the legal aid program of the IBP.

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[91] European Commission of Human Rights, Application Nos. 4897/71 and 5219/71, Report of the Commission, 8 October 1974, 2.

> (b) The "not in good standing" declaration shall be effective for a period of three (3) months from the receipt of the erring lawyer of the notice from the IBP Board of Governors. During the said period, the lawyer cannot appear in court or any quasi-judicial body as counsel. Provided, however, that the "not in good standing" status shall subsist even after the lapse of the three-month period until and unless the penalty shall have been paid.
>
> (c) Any lawyer who fails to comply with his duties under this Rule for at least three (3) consecutive years shall be the subject of disciplinary proceedings to be instituted *motu proprio* by the CBD. The said proceedings shall afford the erring lawyer due process in accordance with the rules of the CBD and Rule 139-B of the Rules of Court. If found administratively liable, the penalty of suspension in the practice of law for one (1) year shall be imposed upon him.

We hasten to add here that this provision for "not in good standing" declaration that bars the concerned lawyer from appearing in court or any quasi-judicial body effectively grants the IBP disciplinary powers over lawyers, which is an undue delegation of the regulatory power of the Supreme Court, and, not to mention, a violation of due process.

In turn, the CLAS rule provides, thus:

> SECTION 14. Penalties. –
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> (a) A covered lawyer who fails to comply with the requirements of this Rule shall be required to show cause in writing within ten (10) days from receipt of notice why no disciplinary action should be taken against him/her. Should the OBC find the new lawyer's explanation insufficient to justify the non-compliance, it shall recommend to the Supreme Court that the lawyer be delisted as a "member in good standing" of the Bar. It may also recommend any appropriate disciplinary measures depending on the reasons for and the gravity of the non-compliance.

We also hasten to point out here that the effective penalty is too harsh and oppressive to the new lawyer: immediate disbarment under a different collar of being "delisted" as a "member in good standing" that prevents one from practicing law.

Going back to *Gussenbauer*, subsequent to the filing of the applications, the Constitutional Court of Austria declared "unconstitutional certain provisions of the Austrian law relating to the legal aid system" through a decision given on 19 December 1972.[92] New legislation was passed by the Austrian parliament, which became the basis of the friendly settlement of the consolidated applications. The Commission stated, thus:

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[92] *Id.* at 3.

> The representatives of the Government referred to the new Austrian acts which Parliament had adopted on 8 November 1973, and which had entered into force on 1 December 1973 (citations omitted).
>
> They mentioned in particular the following characteristic features of the measures concerned:
>
> Maintenance of the lump-sum system which was according to the wishes of the Bar Associations who had been consulted in this connection. This sum, however, was fixed so as to amount to the full equivalent of the annual sum which the lawyers were entitled to if the official tariff (Rechtsanwalttariff) would apply;
>
> This sum was paid into a pension fund for the provision of old-age and other pensions to members of the profession, their widows and orphans; members of the Bar would now have a statutory right to his pension, the details of which were fixed in delegated legislation by autonomous rules of the Bar Associations. These rules were applied under the control of both the administrative and constitutional courts;
>
> In order to correct any unequal distribution of work under the old system, radical new measures were provided so as to ensure that all members of the Bar would basically have to do the same amount of work under the legal aid systems. This includes a fairer grouping of local Bars;
>
> The principle idea under the new system was still to remunerate legal aid lawyers by the provision of an adequate pension and not to pay fees to individual lawyers in respect of each case undertaken by them. Such pensions would be the same for everybody and the work-load should also be the same for each member of the Bar.[93]

The ECHR and ICCPR provisions on forced labour are identical as to give this international human rights case great weight in our jurisdiction. Its domestic binding force even while pending, led the Constitutional Court of Austria to declare unconstitutional certain aspects of the legal aid system. Furthermore, the Austrian Parliament passed new measures for compliance with the European Convention on Human Rights. Hence, this case may equally be binding here as an international precedent for domestic application. As Justice Perfecto long averred about the importance of international law, especially with Philippine membership in the United Nations:

> Justice has no country. It is of all countries. The horizon of justice cannot be limited by the scene where our tribunals are functioning and moving. That horizon is boundless. That is why in our Constitution the bill of rights has been written not for Filipinos, but for all persons. They are rights that belong to men, not as Filipinos, Americans, Russians, Chinese, or Malayan, but as members of humanity. The international

[93] *Id*., at 4.

> character of our duty to administer justice has become more specific by the membership of our country in the United Nations.[94]

Summing up, being required to render free or pro bono legal aid services by the MLAS or CLAS rules constitutes involuntary servitude or forced or compulsory labour that violates the constitutional prohibition against any form thereof. This violation is a breach, too, of international human rights and Philippine treaty obligations under the International Covenant on Civil and Political Rights against forced labour beyond a private lawyer's normal civic obligations.

Illegal Taking and Undue Taxation

The practice of law in the Philippines is exclusively regulated by the Supreme Court pursuant to its constitutional rule-making power on admission to the bar and over the Integrated Bar of the Philippines.[95] Lawyers, especially private practitioners, are thus bound to comply with the Court's regulations if they want to continue in the profession or practice of law. Thus, we often take for granted the validity of a Supreme Court issuance. After all, the Court has the last word on what is constitutional or not or what the law is—even in error. And we submit.

But the Constitution provides plainly, without exception or distinction that "(p)rivate property shall not be taken for public use without just compensation."[96]

The concept of private property in our jurisdiction includes a person's work, which is that individual's means of livelihood essential to the enjoyment of the most basic and primordial right to life guaranteed by no less than the Bill of Rights.[97] "Today employment is no longer just an ordinary human activity. For most families, the main source of their livelihood, employment has now leveled off with property rights which no one may be deprived of without due process of law."[98] "A profession, trade or calling is a property right within the meaning of our constitutional guarantees. One cannot be deprived of the right to work and the right to make a living because these rights

[94] Perfecto, J. (Dissenting Opinion), *Cham v. Keh*, G.R. No. L-5, September 17, 1945.

[95] CONST., art. VIII, sec. 5, para. (5).

[96] CONST., art. III, sec. 9.

[97] CONST., art. III, sec. 1.

[98] *Alhambra Industries v. NLRC*, G.R. No. 106771, November 18, 1994.

are property rights, the arbitrary and unwarranted deprivation of which normally constitutes an actionable wrong."[99]

Thus, our profession or work as lawyers is property within the constitutional guarantee against taking without just compensation. Private lawyers' practice of law as employment or their very means of livelihood is constitutionally protected against taking by the government for public use or purpose without just compensation in the same way that other types of properties like lands are amply protected.

Under DUE PROCESS and EQUAL PROTECTION[100] a lawyer is no different in the eyes of the law from any other person seeking a living wage[101] and toiling long hours and sleepless nights for a higher standard of living and improved quality of life for all.[102] In *Schware v. Board of Bar Examiners*,[103] the United States Supreme Court has held that "(a) State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." It added that "[w]e need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."[104] As one's means of livelihood rooted in the fundamental right to work, a lawyer duly qualified and admitted enjoys the right to practice and to continue to do so under the mantle of our constitutional guarantees for property rights.

It must be borne in mind, too, that private law practice, especially for solo or small law firms in the country and those in far flung provincial towns is an arduous financial struggle. Mandatory free legal aid service could even impoverish a lawyer, particularly if unduly burdened by a case that demands more than the minimum hours required for which the ethics of the profession compel all necessary work to avoid prejudice to a client or miscarriage of justice. Lawyers are human beings, not time machines. In litigation, we go mostly by results or outputs if we want quality work to fulfill "effective" counsel. If it were only a matter of hours, that would readily be consumed by travel or time stuck in traffic or waiting time for our case to be called in court.

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[99] *JMM Promotion and Management Inc. v. Court of Appeals*, G.R. No. 120095, August 5, 1996.

[100] CONST., art. III. sec. 1.

[101] CONST. art. XIII, sec. 3.

[102] CONST., art. II, sec. 9.

[103] 353 U.S. 232, 239 (1957).

[104] *Id.* Footnote 5, citing *Ex parte Garland*, 4 Wall. 333, 379.

Added to that are the overhead expenses, administrative costs, and out-of-pocket expenses for litigation.

When by mandatory rule a lawyer is effectively deprived of such employment by being compelled to provide free legal aid, actual taking occurs in that respect. The lawyer is completely ousted of the beneficial enjoyment of the product of professional services rendered and restrained from devoting that time and effort for personal needs or enjoyment of the reasonable returns or fruits of one's labor, which are all private property. Hence, such taking that goes too far beyond mere regulation for competent legal service and upright conduct in law practice and personal life certainly warrants just compensation.

For the rule is: "a taking also could be found if government regulation of the use of property went 'too far.' When regulation reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to support the act. While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.[105]

As applied to lawyers' services, we can further borrow—since justice has no country and by our own Supreme Court's lead[106]—the "polestar" *Penn Central Test* of the U.S. Supreme Court, which outlined three elements for ad hoc analysis of whether taking occurs or not, thus:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.[107]

First, "economic impact"—taking where loss or harm is suffered. "Attorneys cannot perform two jobs at once. When appointed to represent an indigent client, the time spent on that case cannot be charged to a paying client."[108] A practicing attorney who commands, for example, the average amount of Php5,000.00 pesos per hour in billable time would in effect suffer the equivalent sum of Php300,000.00 pesos in lost revenues each year under the MLAS rule. For the newly admitted attorney with the minimum rate of

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[105] *Mosqueda v. Pilipino Banana Growers & Exporters Association, Inc*., G.R. No. 189185, August 16, 2016, citing *City of Manila v. Hon. Laguio*, Jr., G.R. No. 118127, April 12, 2005. See *Southern Luzon Drug Corporation v. DSWD*, G.R. No. 199669, April 25, 2017.

[106] *City of Manila v. Laguio*, G.R. No. 118127, April 12, 2005.

[107] *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

[108] Atwell, *supra* note 32, at 1258.

Php1,000.00 pesos per hour, the loss suffered would be the total sum of Php120,000.00 pesos for the year of service.

Second, "investment-backed expectations"—taking where the statute or regulation substantially furthers important public policies that frustrate distinct investment-backed expectations. "When compared to eminent domain law, court appointment clearly appears to constitute a taking. The Court accepts as a taking of property mere interferences with property interests when the imposition is direct. When an attorney receives an appointment, he is directly imposed upon because his property becomes the property of the state until the case or appointment terminates. When appointments sometimes last for intolerable periods, the appointed attorney suffers a direct burden which nullifies his earning power."[109] Quite obviously, mandatory free or pro bono legal aid service deprives the covered private lawyer of the expected fruits of legal work and the reasonable returns on his or her huge investments in four or more years of legal education, preparation for the Bar examinations, further training and specialization, and actual private law practice expenses for a respectable office, overhead costs, and other requirements including staff compensation plus MCLE expenses. Compare all that with public attorneys—and those who do the imposing, who are not only fully salaried, but well-provided with offices and equipment, vehicles or transportation services, allowances, further training, support staff, and a host of government benefits including retirement pension—all funded by taxpayers' money inclusive of private lawyers' income tax payments.

Third, "character of the regulation"—taking through "acquisitions of resources to permit or facilitate uniquely public functions."[110] Both the MLAS and CLAS rules effect a taking of our property rights in legal work to support the public function of legal aid as guaranteed and mandated by the constitution.

In an early case involving a lawyer appointed by the court to defend a pauper defendant in accordance with a statutory provision similar to our constitution, but whose attorney's fee was denied by the county government, it was held by the Iowa Supreme Court in 1850, that:

> The only question for decision here, is, as to the county of Washington being liable for the services of the attorney rendered in pursuance of the requirement of the statute in this case. The statute, *(Jfev. Stat.* 155, § 64,) provides that "The court shall assign counsel to defend the prisoner, in case he cannot procure counsel himself."

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[109] *Id.*

[110] *Pennsylvania Central*, *supra* note 107, at 128.

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> Where an act of service is performed in obedience to direct mandate of statutory law, under the direction of a tribunal, to which the enforcement of that law is committed, reasonable compensation to the person who performs that service is a necessary incident, otherwise the arm of the law will be too short to accomplish its designs. **If attorneys as officers of the court, have obligations under which they must act professionally, they also have rights to which they are entitled, and which they may justly claim in common with other men in the business of life. Among these rights, that of reasonable compensation for services rendered in their profession, is justly to be considered.**[111] (Emphasis ours)

The Iowa Supreme Court explained that:

> The exercise of judicial power, in order to effectuate the common and statute law, frequently becomes necessary, and must exist incidentally. By virtue of such power, auditors, commissioners, masters in chancery, i.e., are appointed and act; and proper compensation is awarded to them. All the officers of the court are recognized, as being on just consideration, entitled to fees for official services performed. All that has been done by the law, is merely to limit them in amount. **Why should the attorney at law be made an exception to this general principle? We see no good reason for it. His time, labor and professional skill are his own. He should not be required to bestow them gratuitously at the will of the court, any more than should any other officer.**[112] (Emphasis ours)

In justifying its holding, the Iowa Supreme Court further cited the U.S. Constitution, thus:

> We are of the opinion, that the act requiring the court to appoint counsel for the prisoner is quite sufficient for that purpose, as we have shown. If it were not, however, when the duty enjoined had been performed by the counsel, his right to his pay for it had accrued. The prisoner being a pauper, the liability attached to the county of which he was a citizen. The right of the attorney to compensation was complete, without further legislative enactment. This is not a case of voluntary services. **It is a fundamental rule of right, established by the constitution of the United States, "that private property shall not be taken for public use without just compensation." The service was required by competent legal authority, which having been rendered, the attorney is entitled to his pay for it.**[113] (Emphasis ours)

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[111] *Hall v. Washington Co.,* 2 Greene 473, 476 (Iowa Supreme Court, 1850).
[112] *Id.*, at 476-477.
[113] *Id.*, at 478.

For sure this decision could be applied to the mandatory free or pro bono legal aid service being required by "competent legal authority", that is, the Supreme Court, and upon such mandatory service being rendered entitles the lawyer to appropriate compensation. Otherwise, a violation of the constitution would clearly arise.

Equally persuasive or instructive against compulsory free legal aid service is the 1854 landmark case of *Webb v. Baird* decided by the Supreme Court of Indiana.[114] The Indiana Supreme Court held that:

> It will not be contended that the Court had the right to demand *Baird's* services as an attorney in defending *Wickens* as a pauper, without any reward. - **The 21st section, art. 1, of the constitution, provides, "that no man's particular services shall be demanded without just compensation."**[115] (Emphasis ours)

The Indiana Supreme Court explained that:

> The gratuitous defence of a pauper is placed upon two grounds, viz., as an honorary duty, even as far back as the civil law; and as a statutory requirement. Honorary duties are hardly susceptible of enforcement in a Court of law. Besides, in this state, the profession of the law was never much favored by special pecuniary emoluments, save, some years ago, in the case of docket-fees in certain contingencies. The reciprocal obligations of the profession to the body politic, are slender in proportion. **Under our present constitution, it is reduced to where it always should have been, a common level with all other professions and pursuits. Its practitioners have no specific fees taxed by law—no special privileges or odious discriminations in their favor. Every voter who can find business, may practice on such terms as he contracts for. The practitioner, therefore, owes no honorary services to any other citizen, or to the public.** The constitution and laws of the state go upon the just presumption that the public are discriminating enough in regard to qualifications. Every man having business in Court, is presumed to be as competent to select his legal adviser as he is to select his watchmaker or carpenter. **The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.**[116] (Emphases ours)

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[114] *Supra* note 1.
[115] *Id.*, at 15.
[116] *Id.*, at 16.

Going further, the Indiana Supreme Court highlighted the economic aspect of a lawyer's professional services and even considered gratuitous services exacted from a lawyer as a form of undue taxation in violation of the constitutional mandate for a uniform and equal rate of assessment for all citizens. Our own constitution similarly provides that "[t]he rule of taxation shall be uniform and equitable."[117] Thus:

> The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. **To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens.**[118] (Emphasis ours)

Finally, the Indiana Supreme Court stressed that the responsibility for legal aid rests on the state or the particular polity, and not on private lawyers:

> An attorney of the Court is under no obligation, honorary or otherwise, to volunteer his services. As a matter of private duty, it devolves as much on any other citizen of equal wealth to employ counsel in the defence, as on the attorney to render service gratuitously. Nor indeed is it the duty of any private citizen to incur the expense. It is precisely like providing for the wants of the poor in other respects. **The generous feelings which prompt acts of charity are admirable and ennobling to our nature. But even charity itself almost ceases to be a virtue, when they, whose duty it is to provide for the poor, make private charity a pretext for public neglect.** If the state has not made provision for the defence of poor prisoners, it has presumed and trespassed unjustly upon the rights and generous feelings of the bar; levying upon that class a discriminating and unconstitutional tax. *Blythe v. The State*, 4 Ind. R. 525. It is therefore not their duty, and, under the circumstances, if no constitutional provision is made by law, no very great virtue, to encourage public neglect by gratuitous service.
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> Whenever, therefore, the law makes provision for the one, at the public expense, the other, being within the reason of the law, is also embraced. It seems eminently proper and just, that **the treasury of the county, which**

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[117] CONST., art. VI, sec. 28, para. (1).

[118] *Webb*, *supra* note 1, at 17.

> **bears the expense of his support, imprisonment and trial, should also be chargeable, with his defence.**[119] (Emphases ours)

"*Webb* represents the first rejection by a state supreme court of the various theories advanced in support of compulsory legal assistance."[120]

So, too, the *Gussenbauer* international case may well control here since one of the grounds for admissibility of the applications therein was the similar "violation of [Gussenbauer's] property rights under Art. 1 of Protocol No. 1 by the fact that he had to work without remuneration and without even compensation for the actual costs he incurred."[121] Art. 1 of Protocol No. 1 to the European Convention on Human Rights provides in part:

> Article 1 of Protocol No. 1 – Right to property
>
> 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[122]

While we use the term "taking" as adopted from American law or the negative formulation of the "Takings Clause" of the 5th Amendment of the U.S. Constitution, under this provision, which is expressed in positive terms of entitlement, the term is "deprivation" that has been interpreted to mean as "interference with the right to peaceful enjoyment of possessions"[123] or one's "right to property" following *Marckx v. Belgium*.[124]

The "three rules" approach of the European Court of Human Rights in Art. 1 Protocol 1 analysis could enlighten us:

> 78. Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers only deprivation of "possessions" and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the Contracting

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[119] *Id.*, at 18-19.

[120] Atwell, *supra* note 32, at 1240.

[121] European Commission of Human Rights, *supra* note 91, at 2.

[122] European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property (updated 31 August 2021), 6. Available at: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.

[123] *Id.*, at 19, *et seq.*

[124] European Court of Human Rights, Application No. 6833/74, Judgment of 13 June 1979.

> States are entitled, *inter alia*, to control the use of property in accordance with the general interest.
>
> 79. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.
>
> 80. To be deemed compatible with Article 1 of Protocol No. 1, the interference must fulfil certain criteria: it must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.
>
> 81. This approach structures the Court's method of examination of cases where it is satisfied that Article 1 of Protocol No. 1 is applicable. It consists of a number of successive steps whereby the following questions are addressed: **Has there been an interference with the applicant's right to the peaceful enjoyment of his/her "possessions"? If so, does the interference amount to a deprivation of property? If not, was control of use of property concerned?** If the measures which affected the applicant's rights cannot be qualified as either deprivation or control of use of property, can the facts of the case be interpreted by the Court in the light of the general principle of respect for the peaceful enjoyment of "possessions"?[125] (Citations omitted; emphasis ours)

If by the universality of human rights doctrine we apply to the MLAS and CLAS rules Article 1 of Protocol 1 to the European Convention on Human Rights given its derivation from the Universal Declaration of Human Rights and as "the first steps for the collective enforcement of certain of the rights stated [therein],"[126] we could readily make a positive answer to the first two questions above-mentioned. Indubitably, there is interference with a private practitioner's peaceful enjoyment of the right to one's work as a lawyer since one must set aside private time, that is, 60 hours a year or 120 hours for 12 months upon admission to the bar for free legal aid service. Secondly, such interference amounts to a deprivation of property for in the words of *Webb*: "To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic."[127]

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[125] European Court of Human Rights, Guide, *supra* note 122, 19.

[126] European Convention of Human Rights, Preamble: "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration." Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[127] *Webb*, *supra* note 1, at 112.

More importantly, our Supreme Court has consistently held that a profession is a property right within the meaning of the guarantees of our constitution. For sure, this includes the legal profession for lawyers, especially private practitioners, have the fundamental right to work or practice law and be gainfully employed to make a living or in these Covid-19 pandemic times, survive and make ends meet at the very least.

It is inescapable, therefore, that mandatory free or pro bono legal aid service is plainly a form of "compelled charity" or "forced donation." It is akin to a forced donation of subdivision land to the local government that has been declared unconstitutional. A private practitioner is like a real estate developer who invests resources and builds a subdivision, that is, his or her law practice, part of which cannot be the subject of a forced donation for legal aid to the poor, the needy or underprivileged.

As our Supreme Court explained in *Republic v. Llamas* on the provision of P.D. No. 957 requiring mandatory donation of subdivision roads, alleys, sidewalks and playgrounds by the owner or developer to the LGU:

> The last paragraph of Section 31 is oxymoronic. One cannot speak of a donation and compulsion in the same breath.
>
> A donation is, by definition, "an act of liberality."
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> xxx xxx xxx
>
> In jurisprudence, *animus donandi* (that is, the intent to do an act of liberality) is an indispensable element of a valid donation, along with the reduction of the donor's patrimony and the corresponding increase in the donee's patrimony.
>
> Section 31's compulsion to donate (and concomitant compulsion to accept) cannot be sustained as valid. Not only does it run afoul of basic legal concepts; it also fails to withstand the more elementary test of logic and common sense. As opposed to this, the position that not only is more reasonable and logical, but also maintains harmony between our laws, is that which maintains the subdivision owner's or developer's freedom to donate or not to donate. This is the position of the 1998 *White Plains* Decision. Moreover, as this 1998 Decision has emphasized, to force this donation—and to preclude any compensation—is to suffer an illegal taking.

In fine, mandatory free or pro bono legal aid service is untenable for being an unconstitutional regulatory taking, and even an undue tax imposition. It is

likewise an interference in the peaceful enjoyment of one's private property or work as a lawyer that constitutes a breach of international human rights. And following the words of the Supreme Court, commonsensical wisdom shows that as a "forced donation," mandatory free or pro bono legal aid service cannot be sustained as valid for being oxymoronic and if we want to maintain harmony between our laws and our basic freedoms as sovereign citizens of this republic—and if we want to keep it as a republic.

IV. Comparative Insights

It is quite ironic that the discredited "officer of the court" notion about private practitioners purportedly rooted in English custom and history has been used still to justify mandatory free or pro bono legal aid service.

On the contrary, however, the United Kingdom itself has long established for more than one hundred years a state-funded national program for legal aid where willing English solicitors and barristers, as a matter of policy, were compensated adequately for their services.

In fact, the landmark 1945 Report of the Committee on Legal Aid and Legal Advice in England and Wales, otherwise known as the Ruschliffe Committee Report,128 made no mention at all of the "officer of the court" so-called tradition in its comprehensive review of legal aid and legal advice in England and Wales. Instead, the Report found a voluntary and compensated system of court appointment for legal aid.

In the Supreme Court, for example, the Report revealed:

> 6. For probably more than 150 years there has existed, in many of the courts of whose jurisdiction the present Supreme Court is heir, and in the Supreme Court when it came into existence in 1876, a system whereby Poor Persons could sue or defend in forma pauperis. xxx
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> 7. The first regular scheme for the assistance of Poor Persons litigation in the Supreme Court xxx came into operation on 1st January, 1914.
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> 8. The general scheme of these Rules (which applied only litigation in the Supreme Court) was as follows:—
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> xxx xxx xxx

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[128] Available at: https://www.lawgazette.co.uk/download?ac=13526.

> (d) On receiving the report the court might admit the applicant as a Poor Person, and thereupon assign to him to conduct his case counsel and a solicitor taken from lists kept of members of the Bar and the Solicitors' profession who were **willing to act**.[129] (Emphasis ours)

These 1914 Rules provided that "nothing contained in this Rule shall preclude any solicitor or counsel from receiving remuneration out of any fund which may from time to time be created by the Treasury for the payment of the out-of-pocket expenses or other charges of solicitors or the fees of counsel as assigned."[130]

For criminal courts, the Report revealed the same system of voluntary and compensated counsel for legal aid, thus:

> 34. For many years, and perhaps from time immemorial, there has existed the practice of granting "dock briefs." That is to say a prisoner on indictment has been entitled to the service in his defence of any barrister ho happens to be in court at the time when he is in the dock **on tendering to counsel the sum of one guinea** without the intervention of a solicitor. A barrister so selected is under an obligation to accept the brief.
>
> 35. It has also long been the practice of Judges when about to try cases which present features of difficulty, either of fact or of law, if the prisoner is obviously not in a financial position to pay for counsel, **to ask** some member of the Bar to undertake the defence gratuitously.
>
> 36. In 1903 the Poor Prisoners' Defence Act of that year made provision for more substantial legal aid for prisoners tried on indictment, giving power to the committing Justices, or the Judge of the court of trial (including the Recorder or the Chairman of Quarter Sessions), to certify that he ought to have such aid, and that, in that event, a prisoner should be entitled to have a solicitor and counsel assigned to him. xxx **Where a certificate was given, the expenses of the defence, including fees of counsel and solicitor, and the expenses of witnesses, were to be paid out of public money, the rates and scales of payments being settled by Regulations made by the Home Secretary.** There Regulations provided for fees to counsel of £1 3S. 6d. which might be increased to £3 5S. 6d if the Judge certified that the case was one of exceptional length or difficulty, and to the solicitor a fee not exceeding two guineas, which might be increased in similar circumstances to £5.[131] (Emphases ours)

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[129] *Id.*, at 2.
[130] *Id.*
[131] *Id.*, at 6.

It was no surprise then that a key recommendation of the Ruschliffe Committee on the provision of legal aid in all courts, and whose cost should be borne by the state, was that "(6) Barristers and solicitors should receive adequate remuneration for their services."

For legal advice, the Committee recommended that:

> 176. We have come to the conclusion that there should be facilities for legal advice available all over the country. Further, as there are often times where advice is needed immediately, it is clear that we must provide a system that can meet this demand. Lastly, it is plain that we can only do this through the solicitors' branch of the legal profession, and **we must provide for remuneration for the services they render**.[132] (Emphasis ours)

In its concluding summary of recommendations, the Committee specified certain details for ensuring adequate remuneration by the state for lawyers willing to handle legal aid and legal advice with due regard to the amount of work involved in each case or matter.[133]

Additionally, as against the negative or pejorative connotation of a "poor person", the Committee recommended the use instead of the term "assisted person."[134]

Today, state-funded legal aid in the United Kingdom is an established special area of practice for willing lawyers or firms under a procurement system of tenders for legal aid service contracts run by the Legal Aid Agency.[135] A comprehensive review has been underway since December 2018, and recent data gathered for criminal legal aid (CLA) in 2019-2021 shows a total of 1,220 CLA firms which handled about 922,000 cases for a combined fee or income of £616.9 million.[136]

Spain has a similar state-funded legal aid program:

> The Spanish system of legal aid (Asistencia Jurídica Gratuita) is determined by law, financed by the State, organized and managed by the Spanish Bar and supervised by the CGAE. Additionally, the CGAE and the

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[132] *Id.*, at 36.
[133] *Id.*, at 41-43.
[134] *Id.*, at 23.
[135] See https://www.gov.uk/crime-justice-and-law/legal-aid-for-providers#guidance_and_regulation. See also https://www.gov.uk/government/organisations/legal-aid-agency. See further https://www.gov.uk/government/organisations/legal-aid-agency/about/procurement.
[136] Summary Information on Publicly Funded Criminal Legal Services (February 2021), 8. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf.

> Bar of each territory or province have gradually developed additional services that are financed by the Bars themselves, in conjunction with specific aid from regional or local administrations. These additional services are known as Specialized Legal Guidance Services (Servicios de Orientación Jurídica Especializados).
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> xxx xxx xxx
>
> The attorney undertaking a legal aid matter is appointed by the court which granted the aid at the aided person's request on the basis of lists of attorneys compiled and kept by local Bar Associations. The attorneys are included in these lists on a voluntary basis and, if chosen, are obliged to provide their legal services. **Legal aid lawyers receive payment in exchange for the services provided, according to a fees schedule set by the State.** This payment, however, is lower than the fees typically received by Spanish lawyers, in particular compared to the fees of large firms.[137] (Emphasis ours)

Additionally, to ensure competence of legal aid service providers, a minimum of three years' professional practice experience is required. Compare this with the CLAS rule that covered newly admitted lawyers only.

Another country with a long-established legal aid program that is subsidized by the state is Austria following the leading international human rights case of *Gussenbauer v. Austria* that was settled with, *inter alia*, a system of equal work with equal pay albeit in the form of pension rights.[138] In Austria, private lawyers who register with the local bar association may be called to render legal aid upon court request and can only refuse the mandate on serious grounds such as conflict of interest. "[T]he attorney is compensated by the opposing party if the applicant prevails in the litigation. Otherwise, the attorney is not entitled to fees. However, as legal aid has the character of a social security benefit, the federal states pay a certain contribution to the local bar as remuneration, thus providing for an indirect benefit to the attorneys registered with the bar. The funds are used to sponsor retirement pensions, occupational disability pensions and provision for dependents."[139]

A glimpse of European practice of compensation for legal aid lawyers or reimbursement procedure is related by the Council of Europe citing as

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[137] Latham & Watkins, Pro Bono Practices and Opportunities in Spain, 615-616, https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-spain.pdf.

[138] European Commission of Human Rights, *supra* note 91.

[139] Latham & Watkins, Pro Bono Practices and Opportunities in Austria. Available at : https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-austria.pdf.

examples, Austria, Lithuania, Luxembourg, Montenegro, Ukraine, and Switzerland, thus:

> 34. In Austria, private lawyers acting in the framework of the legal aid scheme are not paid unless the proceedings result in exceptional expenses. Instead, the government pays a lump sum to the pension fund of the bar association; this lump sum is calculated on the basis of the costs of all legal aid cases handled by lawyers during a given year. In Lithuania, lawyers providing legal aid on a regular basis receive a fixed monthly salary. Other lawyers are paid for each case based on the established rate for certain procedural actions, taking into account the complexity of the case. In the future, legal aid providers will be able to submit an application for reimbursement and provide supporting documents online via TEISIS. In Luxembourg, reimbursement is calculated by the bar association on the basis of the list of services provided. A legal aid provider can request advance payment for the work. In Montenegro, legal aid providers are entitled to 50% of the fee provided for in the Lawyer Tariffs and the reimbursement of necessary expenses linked to the provision of legal aid. In Switzerland, the level of remuneration is calculated by courts in accordance with cantonal law. In Ukraine, the procedure for calculating reimbursement is complex and takes into account a wide range of factors, such as the number of court hearings attended, the number of procedural actions carried out, the number of procedural documents drafted and the outcome of the proceedings. Legal aid providers forfeit their right to reimbursement if they do not make a claim within 120 days of the date on which the right to reimbursement arises.[140]

The 2016 global study on legal aid in 49 countries around the world conducted by the United Nations Office on Drugs and Crime revealed a common system of legal aid lawyers or providers being compensated through state-funding in various ways.[141] These countries include: Afghanistan, China, Japan, Nepal, Thailand, and Viet Nam in the Asia Pacific; Benin, Burkina Faso, Cabo Verde, Chad, Democratic Republic of Congo, Ghana, Kenya, Mauritania, Mauritius, South Africa in Sub-Saharan Africa; Argentina, Brazil, Dominican Republic, Ecuador, Guatemala, Haiti, Mexico, and Paraguay in Latin America & the Caribbean; Armenia, Belarus, Bulgaria, Czech Republic, Georgia, Kazakhstan, Lithuania, Moldova, Montenegro, Slovak Republic, Turkmenistan, and Ukraine in Eastern Europe & Central Asia; Australia, Austria, Canada, Cyprus, Finland, Greece, Israel, Italy, New Zealand, Portugal,

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[140] Committee of Ministers of the Council of Europe, Guidelines on the Efficiency and the Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law and Explanatory Memorandum, 31 March 2021, 28. Available at: https://rm.coe.int/guidelines-of-the-committee-of-ministers-of-the-council-of-europe-on-t/1680a39918.

[141] United Nations Office on Drugs and Crime, GLOBAL STUDY ON LEGAL AID: COUNTRY PROFILES (2016). Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA_-_Country_Profiles.pdf.

Spain, United Kingdom, and the United States of America in Western Europe & Others Group.[142]

Not one of these countries provides for mandatory free or pro bono legal aid for private practitioners.[143] The study even showed that "the assigned counsel model, wherein private lawyers are paid a fixed fee per case/action or on an hourly basis, is the most frequent form of payment."[144]

These leading lights of consistent state practice around the world for state-funded legal aid may well be posited to have attained the level of a general principle of international law and/or customary international law in that our government should likewise "ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons"[145] as a principle constitutionally incorporated in our legal system with direct and binding effect.[146]

Furthermore, it has come to light through the World Bank's cost benefit analyses of 50 past and present legal aid programs around the world that "the benefits of legal aid and related services significantly outweigh their costs."[147]

The World Bank asserts and exhorts governments that "legal aid can also be smart economics," thus:

> The price of failing to address the global justice gap is high. Not providing legal aid can be a false economy, as the costs of unresolved problems shift to other areas of government spending such as health care, housing, child protection, and incarceration. For example, a study for Canada estimates the cascading costs of unequal access to justice on public spending in other areas (e.g., employment insurance, social assistance, and health care costs) to be approximately 2.35 times more than the annual direct service expenditures on legal aid. In Australia, numerous studies show that there are net public benefits from legal assistance expenditures. Investments in legal aid can lead to significant government savings through avoided cost of arrest, conviction, incarceration, probation, and post-prison supervision. In addition, public investments in legal aid are also found to generate net savings in terms of avoided shelter/housing costs. Studies find

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[142] *Id.*

[143] *Id.*

[144] United Nations Office on Drugs and Crime, GLOBAL STUDY ON LEGAL AID: GLOBAL REPORT, 106 (2016). Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf.

[145] UN Basic Principles on the Role of Lawyers, sec. 3 (1990). Available at: https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx.

[146] CONST., art. II, sec. 2.

[147] World Bank, A TOOL FOR JUSTICE: THE COST BENEFIT ANALYSIS OF LEGAL AID, 2 (2019). Available at: https://documents1.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf.

> significant net economic benefits, even in the short term, including immediate benefits to clients and cost-savings to governments. Moreover, many studies may underestimate net benefits due to short time horizons and conservative assumptions.[148]

Finally, Professor Shapiro cautions that exaction of mandatory services could be counterproductive. "The draftee may well end up simply resenting the exaction. And certainly there is little to be said for imposing the service obligation solely to increase the satisfaction of those who are doing the imposing."[149] Not to mention the question of quality of the legal aid rendered, especially in respect of the international standard or obligation of a state to ensure or provide "effective" counsel in case of such need. Furthermore, private attorneys are not, strictly speaking, state agents by which a state obligation under international law can be deemed to be complied with. Hence, it is imperative that legal aid be primarily handled by the government as other countries do. It is simply a duty that cannot be passed on to the private sector.

To recap, comparative insights from around the world show the prevailing system of legal aid service that is state-funded compensated work done mainly by state attorneys and complemented by private lawyers on a voluntary or contractual basis constituting a specialized practice area in accordance with national legislation and international law.

In addition, as the World Bank has found, investing in legal aid is smart economics for the government since its benefits significantly far outweigh its costs.

V. Alternative Proposal

From all the foregoing, I respectfully propose these basic guiding principles to building an effective and sustainable legal aid program that is legally in order and equally just for private practitioners under the rule of law and *recta ratio*.

First Principle

Legal aid service should be adequately funded and primarily handled by the state as expressly mandated by the constitution and as a state duty and

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[148] *Id.*, at 8.

[149] Shapiro, *supra* note 34, at 782.

obligation under international law for effective counsel, which should not be passed on to the private sector as a matter of law and justice.

Second Principle

For private law practitioners, legal aid should be on a voluntary or contractual basis in consonance with every attorney's fundamental freedoms and individual rights under the constitution and international human rights.

Third Principle

Legal aid service should be adequately compensated through regular salaries and standardized benefits for public attorneys, and by way of graduated fees and payment schemes or equivalent forms of remuneration such as tax incentives, consumer discounts, scholarships, training support, travel and subsistence allowances especially for those in economically or socially disadvantaged areas or far-flung localities in the provinces, health plans, and pension support for participating private lawyers or other service providers.

Fourth Principle

State-funded legal aid should be jointly administered through the Commission on Human Rights, as the primary constitutional agency therefor, the Public Attorney's Office, and the Integrated Bar of the Philippines, together with the country's law schools being invited to participate in the program by way of national and local government subsidies or other incentives for their respective legal aid clinics.

Reference may be made, *mutatis mutandis*, to the United Nations Principles and Guidelines on Access to Justice in Criminal Justice Systems adopted by the UN General Assembly on December 20, 2012.[150] Guideline 12 suggests, thus:

> Guideline 12. Funding the nationwide legal aid system
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> 60. Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by

[150] United Nations Office on Drugs and Crime. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf.

> providing dedicated and sustainable funding mechanisms for the national legal aid system.
>
> 61. To this end, States could take measures:
>
> (a) To establish a legal aid fund to finance legal aid schemes, including public defender schemes, to support legal aid provision by legal or bar associations; to support university law clinics; and to sponsor non-governmental organizations and other organizations, including paralegal organizations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas;
>
> (b) To identify fiscal mechanisms for channelling funds to legal aid, such as: (i) Allocating a percentage of the State's criminal justice budget to legal aid services that are commensurate with the needs of effective legal aid provision; (ii) Using funds recovered from criminal activities through seizures or fines to cover legal aid for victims;
>
> (c) To identify and put in place incentives for lawyers to work in rural areas and economically and socially disadvantaged areas (e.g., tax exemptions or reductions, student loan payment reductions);
>
> (d) To ensure fair and proportional distribution of funds between prosecution and legal aid agencies.
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> 62. The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.

CONCLUSION

With all due respect, the Supreme Court rules on MLAS and CLAS requiring free or pro bono legal aid service for private practitioners are essentially devoid of proper constitutional, legal, factual, and historical basis. They provide for involuntary servitude and regulatory taking of private property without just compensation, and even an undue form of taxation; at the same time, they constitute a breach of international human rights. Exacting gratuitous service by mandatory rules will only encourage public neglect of a constitutional mandate imposed on the government by the sovereign Filipino people. But all these constitutional and human rights infirmities can readily be avoided if legal aid service is engaged by contract and justly compensated or if unpaid private lawyers are retained on a voluntary basis.

Under the rule of law and basic *recta ratio*, there can never be "compelled charity" or a "forced donation" since it is plainly oxymoronic and against commonsensical wisdom.

For that matter, most of us private practitioners do provide pro bono services in our own free and independent ways and within the limits of our means and resources not as "officers of the court," but more properly as Members of the independent Bar or "essential agents of the administration of justice" in line with international principles.[151]

It is high time now that our one government invest more and adequately provide for legal aid as a matter of constitutional duty instead of expediently passing the buck to private lawyers and struggling practitioners in these Covid-19 pandemic times.

By these back-to-basics strategies then, we could rightly advance legal aid in the Philippines.

REFLECTION

I grew up during the dark days of martial law in a family of human rights lawyers, that is, my twice-detained father, J. Antonio M. Carpio, Sr., and my older brother Jesus Antonio Z. Carpio, Jr. I then helped out in every little way I could in their work such as serving drinks and food to visiting clients or doing home-office chores. Thus, I had seen firsthand the sublime example for Primum Regnum Dei and the great benefits for the community of laying down one's life each day for another out of one's free will, courage, and generosity even in trying times. Never underestimate, as the wisdom of old tells us, the compelling power for the good of a volunteer or the hired laborer who is paid a just wage as the Gospel teaches us.

From these lenses then, I stand for voluntary or contracted legal aid service for us private practitioners. We presume good faith, too, and any practicing lawyer will always do selfless deeds for our society including legal aid without need for compulsion.

Mandatory exaction makes us slaves and robs us of our fundamental freedoms. It denies us of the supernatural joy of selfless altruism in our profession that makes it a most noble pursuit. It is like the dictatorial tree

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[151] U.N. Basic Principles, sec. 12, *supra* note 145. See U.N. Office on Drugs and Crime, Model Law on Legal Aid in Criminal Justice Systems with Commentaries, (2017). Available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf.

planting decree during martial law, which Papa decried in his now classic poem "Trees" (adapted from Joyce Kilmer's "Trees")—

TREES

I think I shall not plant a tree
I shall not follow this decree.
I'm neither cowardly nor brave
I just don't wanna be a slave
Of any mortal same as me!
God made us free; and free I'll be!

Why should they rob me of the joy
I've known since I was still a boy?
The thrill of growing what I chose—
A pili, mango or a rose!
That's why I will not plant a tree.
I say—"to hell with this decree!"

Why let the loggers roam at will
Denuding every virgin hill
Then let the burden on us fall?
Where is the justice of it all?
Poems are made by fools like me
But greater fools made this decree![152]

Truly, why let the robbers in office roam at will, plundering every treasury hill, then let the burden of state-guaranteed legal aid on us, practicing attorneys, fall?

Where is the justice of it all?

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[152] J. ANTONIO M. CARPIO, "VIVA LA VIRGEN!" VERSES & POEMS & A PINCH OF PROSE, 18 (1995).

Papa led the Free Legal Assistance Group in Bicol. He served as our IBP Camarines Sur chapter's pioneer president and first IBP governor for Bicolandia.

At the IBP First Annual Convention of the Third House of Delegates held at the Manila Hilton on May 20, 1977, with then President Marcos as Guest of Honor and Keynote Speaker, Papa delivered the Invocation he wrote for the purpose. Marcos was then at the height of his martial law powers wielding both executive and legislative powers with a subservient Supreme Court. Papa's words then could hopefully give us more courage for challenging legal aid work under the present dispensation. The prayer reads in part:

> We're told this "temporary" martial rule
>
> Is "under the Supreme Court." Yet only a fool
>
> Would see reality in what is read
>
> But see not what are seen and left unsaid
>
> The subtle sight of military might
>
> The climate of coercion, where might is right!
>
> The uselessness of writs of liberty!
>
> But ah, all these we must not fear; instead
>
> Must dare where even Justices fear to tread! [153]

Our home in Naga was a de facto sanctuary for the poor and the underprivileged including some "nice people around" or families of the disappeared or "salvaged" then seeking legal help plus lodging after days of travel from far flung towns. At one time, I came home not even being able to sleep in my bed since our room had been lent to some visiting clients with nowhere to stay in the city.

Our home was likewise a headquarters in the fight against the dictatorship then, including justice for the victims of the infamous 1981 Daet Masscacre that killed four marchers and injured scores of peaceful protesters.[154] This mission Papa relentlessly pursued, which even led to his arrest and detention by the military upon orders of then President Marcos.[155]

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[153] *Id*., at 29.

[154] https://www.bantayog.org/martyrs-of-the-1981-daet-massacre/.

[155] See generally, *Carpio v. Guevarra*, G.R. No. L-57439, August 27, 1981.

On another instance, I answered a call at our front gate by a trembling man and his wife from a nearby town looking for "Atty. Carpio". He was in handcuffs. I let them in and quickly called Papa and Mama. His story was that an abusive policeman arrested him for no reason at all, but then abandoned him in the middle of the market square. Papa then plucked a hairpin from Mama's hair and used it to pry loose the handcuffs. The great joy of that man upon being set free and the huge relief of his wife were simply indescribable.

That picture is forever etched in my childhood memory. It has inspired me to do pro bono work whenever I could. For one, I am now setting up the new legal office of the Diocese of Sorsogon, with plans for legal aid services in due time. It was for this reason, too, that earlier in 2017 when I became the founding dean of the Ateneo de Naga University College of Law (ADNU Law), I pursued the immediate establishment of the Ignatian Legal Apostolate Office (ILAO) as a beacon light for legal aid, experiential learning, and global legal education for our students. For startup and capacity-building, I secured a strategic partnership with The Asia Foundation. I further ensured a forward location of ILAO's office on the ground floor of the law building so that our students would first pass by it on their way to their classrooms—a subtle way of instilling the spirit of service and volunteerism in our future Ignatian lawyers. For as Papa and Mama showed us, "values are never taught; they are caught."

And I was elated to know that ILAO, in a collaborative effort with the government and other private organizations, recently assisted 13 Filipino migrant workers, who ended up as trafficking in persons victims stranded in Damascus, Syria. Twenty-four (24) pioneer graduating students then of ADNU Law helped prepare the judicial affidavits of the victims, which facilitated the filing of cases against their illegal recruiters.[156] Our congratulations to ADNU Law-ILAO and everyone else for such great global legal aid service!

To close, may Papa's Invocation for the IBP Camarines Sur Chapter induction of officers way back on August 6, 1977, strengthen us and inspire more lawyers to volunteer or work for the cause of legal aid, thus:

Dear Jesus, we are gathered in Your name,

And we of the Camarines Sur Bar proclaim

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[156] Clinical Legal Education Program, "Law Clinics Beyond Borders: Ateneo de Naga University Assistance to Migrant Workers in Damascus, Syria," at https://clep.ph/2021/07/09/law-clinics-beyond-borders-ateneo-de-naga-university-assistance-to-migrant-workers-in-damascus-syria/.

Anew our commitment to the Rule of Law

….

May we see You in each case we try
Beyond the dockets disposed that satisfy
Statistical efficiency; the size
Of retainers; the want to win at any price
That renders litigations up for sale
And the ministering of justice bound to fail.
Because each case is people. And what we do
To the least of our brethren, we do to You!

May we visit you in prison cells
In civil jails and army citadels
Upholding human rights with fortitude
For criminal or rebel as we should.
Because, our Lawyer's Oath and our Christian Creed
See only with compassion, those in need.
And each detainee is a sister or brother
Loved by God—by You—if by no other![157]

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[157] CARPIO, *supra* note 152, at 31-32.