



LEGAL ASSISTANCE CENTRE  
*Fighting for human rights in Namibia since 1988*



# Pro Bono

## INFORMATION ABOUT NAMIBIA'S LAW

### COMPULSORY PRO BONO REQUIREMENTS FOR LAWYERS: CONSTITUTIONAL?

The Minister of Justice recently announced that the Ministry is considering amendments to the Legal Practitioners Act that would require legal practitioners (attorneys and advocates) to provide a minimum of 120 hours of pro bono (free) work each year for clients with limited means.

The requirement would be waived if the legal practitioner had already completed an equivalent number of hours in the public interest, as determined by the Law Society of Namibia, or if the legal practitioner makes a financial contribution to the government's Legal Aid fund equivalent to what they normally charge for 120 hours of work. It is also proposed to exempt certain groups of lawyers such as those in small firms with small profit margins, those just starting out in practice or those experiencing other forms of hardship.<sup>1</sup>

Some lawyers immediately cried foul, asserting that such a requirement would be unconstitutional.<sup>2</sup> The Legal Assistance Centre is of the view that this proposal would be both constitutional and also good policy.

#### Right to practise any profession

Namibian courts have repeatedly held that the constitutional right of all persons under Article 21(1)(j) "to practise any profession, or carry on any occupation, trade or business" does not mean that there is a right to do these things free from regulation – as long as the regulations are rational and not unduly invasive.<sup>3</sup>

Would a requirement for a reasonable amount of mandatory pro bono work pass muster on this score? Probably so, particularly if provision is made for exceptions in appropriate circumstances.

In 2017, a legal practitioner in Canada challenged Law Society rules in one province that required all practising lawyers to complete 12 hours of continuing professional development activities each year, with sanctions for failure to comply. The Canadian Supreme Court found that these rules were a reasonable exercise of the Law Society's statutory duty "to uphold and protect the public interest in the delivery of

<sup>1</sup> As reported in Maria Amakali, "Compulsory pro bono proposal mulled...minister questions lawyers' ethics", *New Era*, 15 September 2022, <<https://neweralive.na/posts/compulsory-pro-bono-proposal-mulled>>.

<sup>2</sup> Esther Mbathera, "Forcing lawyers to work for free 'unconstitutional'", *The Namibian*, 19 September 2002.

<sup>3</sup> See, for example, *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC); *Ex parte in re: Kamwi v Law Society of Namibia* 2009 (2) NR 569 (SC).

legal services”, noting also that many lawyers had failed to comply when the continuing professional development programme was voluntary.<sup>4</sup>

Admittedly, this case involved different requirements and a substantially lesser number of hours. Perhaps somewhat more on point, in the US state of Florida, several courts considered the acceptability of a rule saying that practicing lawyers “should” provide 20 hours of pro bono legal services to the poor each year or make an annual contribution of US\$350 to a legal aid organization - with exceptions for government lawyers as well as judges and their staff members. The contribution was voluntary, but the rule imposed a mandatory annual reporting requirement, which some asserted would lead to public pressure that would make the requirement binding in practice.

The State Supreme Court supported the rule, noting that lawyers are granted a monopoly on participating in the public justice system and so are in return “ethically bound to help the State’s poor gain access to that system”.

One lawyer then took the same issue to a federal court, arguing that the rule violated a number of his constitutional rights. The court disagreed, saying that “the free provision of legal services to the poor has long been recognized as an essential component of the practice of law”. It also found that the expected contributions were not very onerous and were thus a rational response to a legitimate goal, supported by a reporting requirement that was a constitutionally sound way of determining if the targets had been met.<sup>5</sup>

### **Forced labour**

Would mandatory pro bono work constitute “forced labour”, which is prohibited by Art 9(2) of the Constitution? Article 9(3) provides a number of exceptions to this prohibition, including “any labour reasonably required as part of reasonable and normal communal or other civic obligations”.

Requiring mandatory pro bono hours from legal practitioners is probably not equivalent to forced labour in the first place, particularly if there are alternative options such as the payment of a financial contribution – in the same way that requiring candidate lawyers to take entrance exams is not forced labour.<sup>6</sup> In any event, even if this requirement were considered to be a form of forced labour, it would probably fall into the category of exceptions for reasonable and normal civic obligations since so many other countries require it.

For example, the US state of New York requires aspiring lawyers to complete at least 50 hours of pro bono service before being admitted to practise law in the state.<sup>7</sup> Uganda requires 40 hours of pro bono legal services per year or a payment in lieu of such services.<sup>8</sup> In The Philippines, lawyers must accept pro bono cases assigned to them by the Court or the Bar Association unless there is a “serious and sufficient

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<sup>4</sup> *Green v Law Society of Manitoba* 2017 SCC 20, <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16499/index.do>>.

<sup>5</sup> *Schwartz v Florida Bar Foundation*, United States Court of Appeals, Eleventh Circuit, Case No.96-3276, decided January 12, 1998 <<https://caselaw.findlaw.com/us-11th-circuit/1129302.html>>.

<sup>6</sup> Justin Hansford, “Lippman’s Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission”, 41 (4) *Fordham Urban law Journal* 1141, March 2016 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2539&context=ulj>>.

<sup>7</sup> New York State Unified Court System, “Pro Bono Bar Admission Requirements”, undated <[www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml](http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml)>; A Barnard, “Top Judge makes free legal work mandatory for joining State Bar”, *The New York Times*, 1 May 2012, <[www.nytimes.com/2012/05/02/nyregion/new-lawYERS-in-new-york-to-be-required-to-do-some-work-free.html](http://www.nytimes.com/2012/05/02/nyregion/new-lawYERS-in-new-york-to-be-required-to-do-some-work-free.html)>.

<sup>8</sup> Advocates (Pro Bono Services to Indigent Persons) Regulations, Statutory Instrument No. 39 of 2009, <<http://ugandanlawyer.com/wp-content/uploads/2019/03/Advocates-ProBono-Services-To-Indigent-Persons-Regulations-2009.pdf>>; Uganda Law Society, “Pro Bono Project of ULS”, undated; last accessed 20 September 2022 at <<http://www.uls.or.ug/pro-bono-scheme>>. In Uganda, the term “advocates” refers to all enrolled lawyers with a right of appearance in court.

cause” to decline, and are also required to provide a minimum of 60 hours per year of free legal aid or pro bono services in cases involving indigent litigants.<sup>9</sup>

In South Korea, lawyers are required to engage in public interest activities for a set number of hours each year, with the requisite number of hours being set by the Korean Bar Association.<sup>10</sup> In the past this has at times been 20 or 30 hours a year, with an option to pay into a pro bono fund instead and exemptions for lawyers who have been practicing for less than two years and lawyers over age 60.<sup>11</sup>

The Canadian Bar Association encourages lawyers to contribute 50 hours per year, or alternatively 3% of their annual billings, to pro bono service, without making this a mandatory rule.<sup>12</sup> The American Bar Association says that every lawyer has a professional responsibility to provide legal services to persons who are unable to pay, and suggests at least 50 hours of pro bono legal services per year to persons of limited means or organisations that serve such persons.<sup>13</sup>

In South Africa, the Legal Practice Act includes a community service requirement, authorising the relevant minister to prescribe requirements for community service by candidate legal practitioners or as a condition of the continued enrolment of practising legal practitioners.<sup>14</sup> Regulations currently under discussion would require legal practitioners to provide 40 hours of community service each year, with some exemptions.<sup>15</sup>

At the same time, a draft Legal Sector Code of Good Practice under the Broad-Based Black Economic Empowerment Act is also under discussion in South Africa. This Code would not be mandatory, but it would affect BEE ratings that would impact eligibility for government contracts. Pro bono service is one aspect of the calculation. The targets for certain categories of legal practitioners are 148 hours of pro bono services for the benefit of poor, marginalised, and black clients, while legal practitioners at larger entities would be expected to contribute 224 hours. Advocates with an annual revenue greater than R3 million would also be expected to contribute 224 hours of service each year. Optional payments in lieu of pro bono hours would range from R40 000 to R60 000 per year. (An earlier draft set even higher targets.)<sup>16</sup>

## Fair trial

What about the constitutional right to a fair trial? Would mandatory pro bono requirements threaten this right?

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<sup>9</sup> Republic of the Philippines, Supreme Court, Resolution BM No. 2012, 10 February 2009, “Proposed Rule on Mandatory Legal Aid Service for Practicing Lawyers Resolution”, full text in English at <[www.lawphil.net/courts/bm/bm\\_2012\\_2009.html](http://www.lawphil.net/courts/bm/bm_2012_2009.html)>; see also <<https://pnl-law.com/blog/tag/rule-on-mandatory-legal-aid-service-for-practicing-lawyers/#:~:text=5BThe%20Supreme%20Court%20recently%20issued,indigent%20litigants%20in%20a%20year>>.

<sup>10</sup> Attorney-at-Law Act No. 8321, 2007, <[https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=766&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=766&lang=ENG)>.

<sup>11</sup> Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, March 2016, at 610, <[www.probonoinst.org/wpps/wp-content/uploads/Global-Survey-2016.pdf](http://www.probonoinst.org/wpps/wp-content/uploads/Global-Survey-2016.pdf)>; TrustLaw, Thomson Reuters Foundation, *Trustlaw Index of Pro Bono 2016* at H15, <[www.trust.org/contentAsset/raw-data/d31d8b72-0f82-4241-88e1-71abc90e3d72/file](http://www.trust.org/contentAsset/raw-data/d31d8b72-0f82-4241-88e1-71abc90e3d72/file)>).

<sup>12</sup> Canadian Bar Association Resolution 98-01-A, “Promoting a Pro Bono Culture in the Canadian Legal Profession”, <[http://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/LLR/98-01-A.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/LLR/98-01-A.pdf)>.

<sup>13</sup> Model Rules of Professional Conduct, American Bar Association, Rule 6.1, <[www.americanbar.org/groups/probono\\_public\\_service/policy/aba\\_model\\_rule\\_6\\_1/](http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1/)>.

<sup>14</sup> Legal Practice Act 28 of 2014, section 29, <[www.gov.za/documents/legal-practice-act#:~:text=to%20provide%20for%20a%20Legal,provide%20for%20matters%20connected%20therewith](http://www.gov.za/documents/legal-practice-act#:~:text=to%20provide%20for%20a%20Legal,provide%20for%20matters%20connected%20therewith)>.

<sup>15</sup> Mapula Oliphant, “Comment on community service for legal practitioners”, *De Rebus* 3, June 2022, <[www.derebus.org.za/comment-on-community-service-for-legal-practitioners/](http://www.derebus.org.za/comment-on-community-service-for-legal-practitioners/)>.

<sup>16</sup> Draft Legal Sector Code, *SA Government Gazette 47061*, 22 July 2022, <[www.gov.za/sites/default/files/gcis\\_document/202207/47061gen1165.pdf](http://www.gov.za/sites/default/files/gcis_document/202207/47061gen1165.pdf)>. The previous 2021 draft Legal Sector Code can be found at <[www.lssa.org.za/wp-content/uploads/2021/02/Legal-Sector-Code-Second-Draft-9.2.2021-1.pdf](http://www.lssa.org.za/wp-content/uploads/2021/02/Legal-Sector-Code-Second-Draft-9.2.2021-1.pdf)>; see also Janine Smyman, “The draft Legal Sector Codes and how it will impact legal practitioners”, *De Rebus* 12, Jan/Feb 2022, <[www.derebus.org.za/the-draft-legal-sector-codes-and-how-it-will-impact-legal-practitioners/](http://www.derebus.org.za/the-draft-legal-sector-codes-and-how-it-will-impact-legal-practitioners/)>.

Quite the contrary. Courts in many jurisdictions, including Namibia, already ask legal practitioners to step in without pay where they are concerned that justice may be compromised in a case involving an unrepresented litigant. The constitutionality of this practice in the United States was upheld back in 1965 by a federal court that identified this as “an ancient and established tradition” and “a condition under which lawyers are licensed to practice law”. Lawyers in the United States, as in Namibia and most other countries, are considered to be “officers of the court”. In the US, this status is understood to include an obligation to represent indigent clients for little or no compensation at the order of a court, and any lawyer admitted to practise law is considered to have effectively consented to shoulder this obligation.<sup>17</sup>

Failure to provide a diligent standard of service to a client purely on the basis of the fee arrangement would almost certainly be considered unprofessional, dishonourable or unworthy conduct that could result in disciplinary proceedings.

The details of any future pro bono obligation can surely be discussed and debated, but we hope that some members of the legal profession will speak out in support of greater access to justice for all.

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<sup>17</sup> *United States v Dillon* 346 F.2d 633 (1965), <[www.leagle.com/decision/1965979346f2d6331804](http://www.leagle.com/decision/1965979346f2d6331804)>. See also *Hurtado v United States* 410 U.S. 578 (1973), <<https://supreme.justia.com/cases/federal/us/410/578/>>, where an individual’s contribution of personal services was found to be a “public duty” and not a compensable taking of private property, in the context of the requirement that witnesses must give evidence at trial, holding this to be a traditional public obligation owed by every person within the government’s jurisdiction.

In addition, see Sarah B. Schnorrenberg, “Mandating Justice: *Naranjo v. Thompson* as a Solution for Unequal Access to Representation”, 50 (2) *Columbia Human Rights Law Review* (2021-2022), <<https://hrlr.law.columbia.edu/hrlr/mandating-justice-naranjo-v-thompson-as-a-solution-for-unequal-access-to-representation/>>; this article discusses the contrasting outcomes in *Colbert v Rickmon*, 747 F. Supp. 518 (W.D. Ark. 1990) and *Bothwell v Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995) on whether or not federal courts have inherent power to order free representation, and *Naranjo v Thompson* 809 F.3d 793, 795–96 (5th Cir. 2015) which held that this inherent power exists in exceptional circumstances. See also Bruce Andrew Green, “Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance”, 81 *Columbia Law Review* 366 (1981), <[https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1209&context=faculty\\_scholarship](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1209&context=faculty_scholarship)>.