



Policy Brief on Legal Aid for Persons in Custody in Tanzania: A Need for Legal Reform

1.1 Executive Summary

This policy brief reflects an analysis of the enforcement of the Legal Aid Act No 1 of 2017 conducted by the Tanzania Network of Legal Aid Providers (TANLAP) through USAID support. The main focus is to identify gaps in the Legal Aid Act No 1 of 2017 (LAA of 2017) concerning legal aid funding in Tanzania. Both the Constitution of the United Republic of Tanzania (URT) of 1977¹ and the Legal Aid Act of 2017² recognise the provision of legal aid on civil and criminal matters.

The Legal Aid Act No 1 of 2017 has been reviewed, and observations have been made to maintain the provision of legal aid in Tanzania; however, after the enactment of the new Legal Aid Act, there is no legal framework for legal aid which recognises police force and prisons services as responsible for the provision of the legal aid.

The provision of section 36(1) of the LAA of 2017 only identifies the Police Force and Prison Services as facilitators for the provision of legal aid services to the accused or convicts³ under lawful custody. The statutory obligations imposed to the Police Force and Prison Services only extend to the process of designating mechanisms for facilitating the provision of legal aid services by legal aid providers to persons in custody.

The Legal Aid Regulations⁴ of 2018 provides for the manner to be applied by a police officer-in-charge of a police station or prison officer in charge of a prison in order to ensure accessibility of legal aid services to persons in custody. Finally, the officer in charge of a police station or prison is statutorily obliged to facilitate and enable meetings of persons in custody with advocates, lawyers, or paralegals to provide legal aid services.

Therefore, the issue at hand is the fact that despite remarkable achievements brought about by its enactment in 2017 yet, on the aspect of legal aid in criminal matters, there is a gap in the LAA of 2017 for failure to mention police officers in police stations as officers responsible for the provision of legal aid services but rather in charge officers are charged with duties of facilitating legal aid provision to persons under custody⁵. Regulation 25(1) of the Legal Aid Regulations of 2018, G.N. No. 44/2018 provides: - *"For purposes of these Regulations, officer-in-charge of a*

¹ Article 13(6)(a) and (b) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

² Sections 27 and 33 of the Legal Aid Act No.1 of 2017

³ A person found guilty of an offence under the law

⁴ G.N No. 44 of 2018 (Regulations of 2018) Regulations 23(1) (2), 24, 25 and regulation 27(1) provides to the effect that the in-charge officer shall distribute application forms to each detainee who intends to access legal services, then he shall collect all duly filled forms before submit the same to the designated legal aid desk within a police station or prison, and where necessary to the legal aid providers within the area

*police station or prison shall collect all duly filled in application forms and prepare a list of names of persons in custody who require legal aid services and **submit the list and forms to the designated legal aid desk within a police station or prison**, and where necessary to the legal aid providers within the area".* The practice is far from reality; hence there is a serious need for laws and regulations on law aid to provide categorically that police officers shall provide legal aid for persons in custody.

1.2 Introduction/Background

Tanzania Network of Legal Aid Providers (TANLAP) is a Non-governmental organisation founded in 2006 by eight organisations: Comprehensive Community Based Rehabilitation in Tanzania (CCBRT), Disabled Organization for Legal Affairs and Social Economic Development (DOLASED), Lawyers Environmental Action Team (LEAT), Legal and Human Rights Centre (LHRC), Tanzania Women Lawyers Association (TAWLA), Women in Law and Development in Africa (WiLDAF), Women's Legal Aid Centre (WLAC) and the National Organization for Legal Assistance (NOLA).

It is an umbrella network that coordinates legal aid providers (civil society organisations in Tanzania) that provides legal aid services to members of the public. Its main objective is to coordinate legal aid providers in the country. It also builds the capacity of its members through institutional support. It has contributed to improved coordination mechanisms such as identification, registration, and harmonisation of legal aid providers.

Currently, TANLAP is implementing the "Mwanamke Imara Project", which aims at providing legal aid services to members of the public (under activity outcome No 1 – access to justice). The project is implemented in three regions: Kilimanjaro, Rungwe and Mbeya. The focus for the past four years has been to review the relevance and applicability of the Legal Aid Act.

With the support from USAID Tanzania, TANLAP analysed Legal Aid Act No 1 of 2017 to identify key achievements, lessons learned, areas that require improvement, areas that require stakeholders' engagement and challenges associated with the implementation of the same such as limited funding and limited training and legislative awareness of the Legal Aid Act to law enforcers especially Police and Prison officers on access to justice to detained people⁶.

This policy brief provides a summary of these gaps that needed legal reforms.

Key Words:

Advocate: means any person whose name is duly entered as an advocate upon the Roll⁷, explicitly someone who actively promotes the interests of another person or enterprise. This may involve filing claims, defending against the claims of others, and persuading other parties (e.g., government officials) to act favourably towards the relevant person or enterprise. This policy brief explores the gaps existing in the law where the law does not consider a commission of an offence for any person who willfully obstructs legal aid services to persons in custody by legal aid

⁶ Page 22 of the analysis of the implementation of the Legal Aid Act (LAA) 2017 conducted by TANLAP

⁷ Advocate Act, Cap. 341 [R.E. 2019]

providers such as the advocates. Advocates usually encounter unfriendly environments at police stations when they go to provide legal aid to the accused or convicts.

Covid-19: Coronavirus disease (COVID-19) is an infectious disease caused by the SARS-CoV-2 virus. This policy addresses the need for amendments in the LAA of 2017, which will provide urgent and special legal aid schemes to persons in custody if there is an outbreak of a pandemic. The policy has highlighted the event in 2020 where a number of people in custody in Tanzania failed to have legal aid services and representations due to COVID-19 restrictions imposed to the legal aid providers who intended to visit police stations and prisons.

Indigent defendant/person: means a person whose means are insufficient to enable him to engage a private legal practitioner and include other categories of persons where the interests of justice so require⁸. This policy has identified hardships that persons in custody face for failure to access prompt legal aid services while in police stations or prisons; need a reformation in the LAA of 2017 to solve the problem.

Paralegals: means a person who is accredited and certified to provide legal aid services after completing necessary training in the relevant field of study approved or recognised by the LAA of 2017⁹. Paralegals also face an unfriendly environment when reaching persons in custody for legal aid.

Police officer: means any member of the force of or above the rank of constable¹⁰. This policy has pointed out a need for legal reforms in the LAA of 2017 for having a legal framework that will indulge police officers in legal aid provisions for persons under custody.

Police Station: means any place appointed by the Inspector General to be a police station and includes any local area policed from such a station¹¹. This policy has tried to address the unfriendly environment which detainees face in accessing legal aid at police stations, and it is still unclear if the designated legal aid desk within police stations has been helpful to persons in custody in accessing legal aid services.

Prison Officer: means any member of the Tanzania Prisons Services of whatever rank. It is still difficult for prison officers to provide legal aid under the current legal setting despite time-to-time training.

Key highlights

The Legal Aid Act No. 1 of 2017 has designated a mechanism for Police Officers and Prison Officers to facilitate access to legal aid services for persons in custody; however, the Act does not provide a legal framework for legal aid which recognises police officers and prisons officers as persons responsible for the provision of the legal aid.

⁸ Section 5 of the Legal Aid Act, Act No. 1 of 2017

⁹ Ibid., section 2

¹⁰ Section 2 of the Police Force and Auxiliary Services Act, Cap. 322

¹¹ Ibid., Section 2

The Legal Aid Act No. 1 of 2017 is silent on the sanctions against a person who willfully obstructs a person held in lawful custody from accessing legal aid services administered by legal aid providers.

The Legal Aid Act No 1 of 2017 is silent on immediate legal aid provisions to women in custody whilst having children in contact with the law. There is a gap in the Act for failure to give priority for legal aid to women in custody with children in contact with the law or even children in conflict with the law.

2.1 Contextual Analysis

The LAA of 2017 is the main instrument which governs legal aid services in Tanzania. This law still faces several gaps in terms of providing adequate legal aid services to persons in custody.

On that basis, the point of determination is to analyse whether the introduction of the LAA of 2017 and its regulations have successfully provided for the legal framework on the right of early access to legal aid services to persons in custody by police officers and prison officers.

Concerning **The United Nations Office on Drugs and Crime (UNODC)**, a published book in 2014 titled *"Early Access to legal aid in criminal justice processes"*, provides that the right to early access to legal aid cannot be effective without cooperation. The police authorities are following appropriate procedures, and this is recognised by the United Nations' Principles and guidelines, which require States to ensure that effective legal aid is promptly provided at all stages of the criminal justice process, namely: *to ensure that information is provided about that right to persons in custody by a police officer, to ensure that police officers facilitate access to legal aid and to establish effective remedies and safeguards where access to legal aid is undermined, delayed or denied*¹².

The UNODC handbook of 2014 also provides for the roles and responsibilities of the police officers to persons in custody as their role in ensuring the effectiveness of the right to early access to legal aid by persons in custody, that the suspect or accused while in custody is dependent on the police officers to be informed of the right to early access of legal aid (to understand the significance of that right), to be able to make an informed and independent decision about whether to exercise that right.

Therefore, from this perspective, it is undoubtedly obvious that a police officer in charge of the police station or a prison officer can hardly discharge his/her duties as a legal aid provider if he/she does not possess knowledge about legal aid or human rights just like any other legal aid provider.

Sequel to that the UNODC handbook of 2014 has opined for the effective early access of legal aid services to persons in custody, and such recommendations includes *training for police officers in relation to that right, designed to ensure that officers understand the relevant law and the significance of that right, including the benefits of early access for their work*. As a result, this will trigger for a need of policymakers and legislators to push for amendments of the LAA of 2017 in order to come with mandatory requirements for all police officers and prison officers to undergo

¹² https://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf

intensive legal aid training as one of the qualifications before being appointed to the position of providing legal aid in custody.

The Lilongwe Declaration on Accessing Legal Aid in Criminal Justice System in Africa, 2006,¹³ highlights the importance of "providing legal aid services at all stages of the criminal justice process". The Lilongwe Declaration states: "*Suspects, accused persons, and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited paralegal, or legal assistant*"¹⁴."

The LAA of 2017 and its regulations provide a legal framework and mechanism for facilitating legal aid services to persons in custody by police officers and prison officers in charge of police stations and prisons, however despite the existence of such legal aid schemes still, various incidences have been reported where police officers/prison officers in charge of police stations and prisons are alleged to make unfriendly environment to legal aid providers who intend to provide legal aid to persons in custody; briefly, persons in custody are denied of their right to access legal aid whilst in custody.

The Tanzania 2020 Human Rights Report (THRR,2020) reported that on March 19, 2020, authorities banned all prison visits due to COVID-19, including those by prisoners' lawyers. Since authorities provided no alternative methods for detainees to contact attorneys, Human Rights Watch argued that this ban sharply slowed the resolution of ongoing cases. As a result, most criminal defendants were not represented by counsel, even for serious offences being tried before a high court¹⁵. This is another flaw in the LAA of 2017 for failure to provide alternatives during urgent times; hence there is a need for amendment in the Act to provide an alternative solution for detainees to have access to legal aid provisions in the event of an outbreak of a pandemic disease.

The Tanzania 2021 Human Rights Report (THRR,2021) unveiled the reality of the treatment of detainees by the police force, and it reported that although the law gives accused persons the right to contact a lawyer or talk with family members, however, police often fail to inform detainees of this right.

Regarding (THRR) 2021 the ultimate conclusion could be, despite the existence of the LAA of 2017 and its regulations yet the mechanism designated by the Act for providing access of legal aid to persons in custody have proven futile, despite the establishment of the designated legal aid desk within a police station for facilitating the legal aid service to the accused, still the experience shows in practice police officers have failed to inform detainees of their rights or giving accused persons the right to contact a lawyer or even talk with family members, the practice shows the process of a legal aid provider to meet the accused in police custody is always a complicated process and a

¹³ The African Commission on Human and Peoples' Rights adopted the Lilongwe Declaration in a Resolution at its 40th Ordinary Session held in November 2006

¹⁴http://defensewiki.ibj.org/index.php/Lilongwe_Declaration_on_Accessing_Legal_Aid_in_Criminal_Justice_System_in_Africa_and_Plan_of_Action#3. Providing legal aid at all stages of the criminal justice process

¹⁵ <https://www.state.gov/wp-content/uploads/2021/03/TANZANIA-2020-HUMAN-RIGHTS-REPORT.pdf> at page 7 of the report

tough mountain to climb, on several occasions it has been also reported that even some lawyers who attempted to visit a person in a police station always found themselves behind the bar, hence there is still unfriendly environment for providing legal aid to persons in custody as provided for by Legal and Human Rights Center Report 2021.

The (THRR) of 2021 reported more on the violation of detainees' rights for access to legal aid services denied by the police. The report provides that, in November 2020, police detained Chadema chairman Freeman Mbowe and two other senior Chadema members before planned protests in the wake of the 2020 elections. However, police subsequently released them without charge. On July 2021, police arrested Mbowe, and he remained in police custody for five days without being officially charged. Police initially denied Mbowe access to his lawyers¹⁶.

This policy brief has highlighted the gap in the LAA of 2017 as far as legal aid in custody is concerned, particularly on the fact that section 4(2) of the Act has failed to mention categorically that police officers or prison officers as officers responsible for the provision of legal aid services in custody.

Moreover, the National Legal Aid Advisory Board, in its composition, does not include Police Force and Prison services as part of the board and thus making these two departments inactive as far as direct involvement in designing and enforcing legal aid services in custody is concerned. Including the police force and prison service in the board may trigger the effectiveness of the two departments in their involvement in providing legal aid services, for they are specific departments dealing with several people in need of the legal aid service.

Also, the LAA of 2017 is not detailed on the rights of the children in custody; section 35 of the Act only provides for legal aid for children in conflict with the law that such children must obtain legal aid immediately. Nevertheless, the Act could have been more detailed on the rights of children in general who find themselves in custody due to the offences committed by the parents; for example, for the accused mother with a child in custody, the law does not provide the rights of children in contact with the law.

Finally, the LAA of 2017 is silent on the rights and things to be considered for persons with disabilities who are in custody. In summary, we can learn from other international instruments, such as the **Convention on Rights of Persons with Disabilities, 2008**, as per Articles 13(1) and (2)¹⁷.

¹⁶ https://www.state.gov/wp-content/uploads/2022/02/313615_TANZANIA-2021-HUMAN-RIGHTS-REPORT.pdf at page 12 of the report

¹⁷ *“it provide that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”*

3.1 Why Policy Reform

The Legal Aid Act No 1 of 2017 needs to be reviewed to address gaps related to legal aid provisions for persons in custody.

1. Amendment of section 36 of the LAA of 2017

There is a need for an amendment of section 36 of the LAA of 2017 to declare police officers in charge of police stations and prison officers in charge of prisons as legal aid providers to persons in custody; this move is necessary for profound outcomes on adherence of legal aid rights by police officers and prison officers to persons in custody across prisons and police stations in Tanzania.

2. Legal aid by police and prison officers

Then there is a need for policymakers, legislatures and other key stakeholders to consider the need for amendments to the LAA of 2017 to introduce a requirement for every police officer in charge of a police station and prison officer in charge to possess requisite knowledge in legal aid provision from any accredited institution as a primary criterion or qualification for their appointment in their respective position. This will cause officers in charge of police stations and prisons not only to comply with the law, which requires them to act as facilitators of legal aid services to the detainees but also to put into the shoes of legal aid providers providing legal aid immediately to persons in custody while informing them of their rights wholeheartedly without being affected with the nature or tradition of their job as the law enforcers.

3. Offence by any person/officer obstructing legal aid provision

Further, there is a need for amendments in the LAA of 2017 where it will be counted as a commission of an offence followed by a strict penalty for any person who willfully obstructs any person held in lawful custody from applying for legal aid. This will bring to an end many incidences where it has been reported that police officers in charge of police stations allegedly have been making challenging environments for persons in custody to access legal aid services and legal aid providers facing unfriendly environments at police stations particularly from police officers while attempting to provide legal aid services to detainees. We can learn from other jurisdictions, particularly Kenya, where this position is provided in their Legal Aid Act, 2016, Act No. 6 of 2016 (LAA of 2016).

4. Include Police Force and Prison service in National Legal Aid Board.

Also, there is a need for the amendment to the schedule made under section 4(2) of the LAA of 2017 on the composition of the (NLAAB) to include the Inspector General of Police (IGP) and Commissioner General of Prison (CGP) as key stakeholder in the legal aid services for the effectiveness of access to legal aid service to persons in custody in Tanzania, the same position can be enshrined under section 2(1)(d) of the Nigeria Legal Aid Act of 2011 (NLAA).

5. Legal aid for children in contact with the law

The amendments in the LAA of 2017 are vital for putting into consideration children's rights, especially those in contact with the law¹⁸ whose mothers are in custody; the blueprint should be laid for a particular legal framework that will provide for a need to prioritising women and children in custody for immediate legal aid services.

Sources Consulted or recommended (References)

Binding Documents

International

- Convention on Rights of Persons with Disabilities, 2006
- The Convention on the Rights of the Child, 1989
- The African Commission on Human and Peoples' Rights adopted the Lilongwe Declaration in a Resolution at its 40th Ordinary Session held in November 2006

National

- The Constitution of the United Republic of Tanzania of 1977 (as amended from time to time)
- Legal Aid Act, 2017 [Act No. 1 of 2017]
- Legal Aid Regulations of 2018, G.N No. 44 of 2018
- Advocate Act, Cap. 341 [R.E. 2019]
- Police Force and Auxiliary Services Act, Cap. 322
- Nigeria Legal Aid Act, 2011
- Kenya Legal Aid Act, 2016, Act No. 6 of 2016

Persuasive Documents or Agreements

- The United Nations Office on Drugs and Crime (UNODC) handbook, 2014 titled "*Early Access to legal aid in criminal justice processes.*"
- The Lilongwe Declaration on Accessing Legal Aid in Criminal Justice System in Africa, 2006
- The Tanzania 2020 Human Rights Report
- The Tanzania 2021 Human Rights Report
- The analysis of the implementation of the Legal Aid Act (LAA) 2017 conducted by TANLAP

¹⁸ Children who are either born in custody or children who find themselves in custody with their mothers due to their tender age.

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