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Inside

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FOREWORD

Welcome to the Tanzania Legal Aid Journal, 2019. This is the first issue published by the Tanganyika Law Society. This Journal steps up the intersection between research and practice within the legal aid sub sector. NGO's that provide legal aid services are in serious shortage of legal aid scholarly work. Leading practitioners in the country lack the necessary scholarly work to help them plan and programme legal aid intervention or to measure success/achievements over time. Development of Legal Aid Journal and dissemination of the same will address the aforementioned weaknesses.

The journal provides the guidance to the legal aid providers in Tanzania and every legal aid stake holders in the country, with cutting edge scholarly articles, it will be a regular annual publication with the widest distribution to all legal aid providers and all the legal aid stakeholders in the country.

It is the strong belief at TLS that having publishing the Legal Aid Journal is one of the means of ensuring continued improvement of legal aid services to the indigent and respect for human rights. To be the leading Legal Aid Journal in Tanzania that will bring aboard to address continuous issues on legal aid matters within and outside the legal profession.

We have a voluminous edition this time. This volume consists of five articles. This is a result of the level of interest by people and institutions wishing to write for the Tanzania Legal Aid Journal. So, as always, I wish to thank all contributors, our blind peer reviewers, the Chief Editor, the Editorial Board and the Secretariat for the job well done.

Prof. Alex B. Makulilo

Chairperson
Research and Publication Committee

EDITOR'S NOTE

Welcome dear readers!

I am pleased to present to you a newly launched law journal called 'Tanzania Legal Aid Journal' that is dedicated to articles on the provision of legal aid in Tanzania.

TLS has been among the pioneers of legal aid development in Tanzania from its infancy in the 80s. With such a long standing and consistent background on legal aid provision, TLS has throughout been observed as a leader through which many legal aid providers have drawn inspiration and established operational frameworks for their legal aid programmes. Opportunely, TLS has stepped-in once again, through the legal aid journal, to take leadership in the advancement of legal aid Tanzania.

Inception of the legal aid journal by TLS is traced as far back as 2014 when the first concept was approved by the TLS Legal Aid Committee. Eventually the Journal has been made a reality through the generous funding from the Legal Services Facility (LSF).

This legal aid journal, being the first of its kind, marks another significant milestone in the legal aid sector in the country. The journal bridges the gap between scholarly writing and practice in legal aid sector. Contributors to this first issue are prominent legal aid scholars and practitioners in Tanzania and abroad whose footprints in the legal aid landscape have been conspicuous for the past decade and beyond.

Enjoy your reading!

Dr. John Ubena
Chief Editor

BASIC PRINCIPLES OF THE LEGAL AID LEGISLATION AND THEIR INCORPORATION IN THE TANZANIA LEGAL AID ACT, 2017

Dr. Mugyabuso Eventius*

Abstract

Legal aid is a growing aspect within legal systems and democratic governance. It is perceived to be a part of the rule of law and equality before the law. With all the importance it serves, the principles relating to legal aid are less known. Some have related legal aid with the notion that it is when a destitute or someone who is financially incapacitated, socially or physically seeks for legal assistance. Due to the definitional misconception, legal aid principles are sometimes inadequately reflected in the legal aid legislations of various jurisdictions.

This paper concentrates on the assessment of the basic principles of the legal aid legislation and the manner that these principles have been absorbed in the Tanzania Legal Aid Act 2017. It is revealed that the conventional legal aid principles are insufficiently covered in the Act. Moreover, despite the Act recognising few legal aid stakeholder, it scarcely provide for issues relating to quality, accessibility and availability of legal aid services.

It is recommended that there should be legal and policy initiatives that will ensure that legal aid services are provided at the grassroots in the rural areas. These initiatives may include granting subsidies to legal aid institutions with offices/branches in those areas and; establishing legal aid clinics. Finally, there is a need of conducting a needs assessment, so that legal aid services can be capable of addressing and tackling issues that affect the people of a particular area.

Keywords: *Principles of Legal Aid Legislation, Legal Aid Act 2017.*

1. Introduction

History indicates that legal services are among the most expensive services offered in the world.[1] For instance, development of the legal profession in England indicates that during the 11th to the early 18th century, children from noble and rich families were the ones that could afford to pursue law programs. The legal profession was too rewarding and during that period, legal aid was not a basic component of the justice system because the poor had a direct protection from the king.[2] System was set up where the king could be notified of any injustices done to his subjects.[3]

In the following years, legal aid emerged as a response of adherence towards the principles of separation of powers and democratic governance. In Tanzanian, legal aid services were officially offered from 1969; however, up until 2017, legal aid services were mostly conducted by Non-Governmental Organisations (NGO), Community Based Organisations (CBO) and a few academic institutions with law programs. The general assessment of the activities conducted over the period of years, indicate that legal aid services were both inefficient and uncoordinated.[4] The Enactment of the legal Aid Act has changed the wind of the process as it establishes a wider scope for the provision of legal Aid in Tanzania. This article in its major four sections, will discuss the basic principles of the legal aid

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[2] Jonathan, R., "Legal Profession in Medieval England: A History of Regulation", vol. 48, No. 1 *Syracuse Law Review Journal*, 1998, pp.24- 94. The electronic copy of this article is available at: http://ssrn.com/abstract=1422764

[3] James, B., "the Ethics of the Legal Profession: Medieval Canonists and their Clients" vol. 33, *Jurists*, 1973, p. 237.

[4] Peter, C.M., "Legal Aid and Access to Justice in Zanzibar: Examining Criteria for Provision of Legal Assistance", in Othman, H., and Peter, M., Perspectives on Legal Aid and Access to Justice in Zanzibar, Zanzibar Legal Services Centre, 2003 p. 22.

legislation and its incorporation in the Tanzania Legal Aid Act 2017. Preceding this introduction is the legal framework and principles of the legal aid legislation; which is followed with a section on the conventional principle of the legal aid legislation and the conclusion.

2. *Legal Framework And Conventional Principles Of Legal Aid Legislation*

2.1. Legal Framework

The framework for the provision of legal aid is diverse, however, for the purposes of this article the focus will be on international, regional and national frameworks. Concentration will be based on important and principal conventions, treaties and legislations.

2.1.1.International Law

Legal aid has been a part of the states' endeavours to build a society that respects the rule of law, equality before the law and dignity of all human kind. Historically, legal aid has taken part of all activities that were carried out to recognise and promote human rights in the world. The first "law" which recognised the importance of legal aid is the Universal Declaration of Human Rights.[5] This declaration enshrines the key principles of equality before the law and the presumption of innocence, as well as the right to a fair and public hearing by an independent and impartial tribunal. It also provides for guarantees necessary for the defence of anyone charged with a penal offence and the entitlement to be tried without undue delay. Basing on this declaration a number of states have attempted to ensure that legal aid is available to the accused persons.

[5] Resolution 217 A (III)

The Universal Declaration of human rights is not a treaty in strict sense, however, it has a great impact on the constitutions and jurisdictions of various states. The International Covenant on Civil and Political Rights (ICCPR) and the counter Covenant on Economic, Social and Cultural Rights (ICESCR) provide conventions, resolutions and guidelines that recognise legal aid to be an important aspect of the rule of law. The International Covenant on Civil and Political Rights of 1966 requires that everyone charged with a criminal offence to be entitled to personally defend himself or herself, or through the legal assistance of his or her own choice or assign to him or her where the interests of justice so require; in a fair and public hearing by a competent, independent and impartial tribunal established by law.[6]

Alongside the International Covenant on Civil and Political Rights is the Standard of Minimum Rules for the Treatment of Prisoners.[7] These rules were approved by the Economic and Social Council in its resolution[8] and extended by the Council in its resolution[9]. These rules provide, among others, the rights of an untried prisoner. The basic rights for the purposes of legal aid is to receive visits from his or her legal adviser. These visits should aim at enabling the prisoner and the legal advisor to discuss on issues relating to the prisoner's defence.

Law on legal aid is also provided in the Principles for the Protection of All Persons under any Form of Detention or Imprisonment.[10] These principles generally require a detained

[6] Article 14 of the International Covenant on Civil and Political Rights.
[7] Human Rights: A Compilation of International Instruments, Volume I (First Part), Universal Instruments (United Nations publication, Sales No. E.02.XIV.4 (Vol. I, Part 1)), sect. J, No. 34.
[8] 663 C (XXIV) of 31 July 1957
[9] 2076 (LXII) of 13 May 1977
[10] Resolution 43/173, annex.

person to be given a right to defend himself or herself or to be assisted by a counsel as prescribed by law.[11] The Basic Principles on the Role of Lawyers also promote legal aid.[12] These principles generally state that any person without a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them, in order to provide effective legal assistance without payment where they lack sufficient means to pay for such services.[13]

The Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice contains principles on legal aid with specific reference on access to justice.[14] The declaration calls upon the member states to take steps, in accordance with their domestic laws, to promote access to justice, to consider the provision of legal aid to those who need it and to enable the effective assertion of their rights in the criminal justice system.[15]

The Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World highlights on issues of legal aid.[16] The Declaration recommends that Member States should endeavour to reduce pre-trial detention, where appropriate, and promote increased access to justice and legal defence mechanisms.[17]

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[11] See principle 11.
[12] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990. A report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex.
[13] See principle 6.
[14] Resolution 60/177, annex.
[15] Paragraph 18 of the Declaration.
[16] Resolution 65/230, annex.
[17] Paragraph 52.

International law on legal aid with specific reference to Africa is contained in the Economic and Social Council Resolution 2007/24 of 26 July 2007 on the international cooperation for the improvement of access to legal aid in criminal justice systems. In this resolution it is recommended that member states should recognise the rights and cooperate in the provision of legal aid in the criminal justice system.

The primary international law on legal aid is the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[18] The guidelines recognise legal aid as an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial. The guidelines recognise the key principles of legal aid and fair trial as established and defined in Article 11, paragraph 1 of the Universal Declaration of Human Rights. The principles are preconditions to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process. Furthermore, it recognises article 14 (3) (d) of the International Covenant on Civil and Political Rights which requires everyone to be entitled, among other rights to be tried in his presence and 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".[19]

The guidelines list advantages of having an effective legal aid system. It states that a functioning legal aid system, as part of an

[18] Adopted in 2013.
[19] See paragraph 2 of United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

effective criminal justice system, may reduce the length of time suspects are held in police stations and detention centres; alongside reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and victimization. It may also protect and safeguard the rights of victims and witnesses in the criminal justice process. Legal aid can be utilized to contribute to the prevention of crime by increasing legal awareness. A legal aid system plays an important role in facilitating diversion and the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment; rationalizing criminal justice policies; and ensuring efficient use of State resources.[20]

Generally international law on legal aid concentrates more on criminal matters. Other International laws which provide for legal aid include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child,[21] the Convention on the Elimination of All Forms of Discrimination against Women,[22] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

2.1.2.Regional Law

There are numerous regional laws that contain provisions on legal aid. These include the African Charter on Human and Peoples' Rights of 1981, African Charter on the Rights and Welfare of the Child of 1999, American Convention on Human

[20] See paragraph 2 – 4 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.
[21] United Nations, Treaty Series, vol. 1577, No. 27531.
[22] United Nations, Treaty Series, vol. 1577, No. 27531.

Rights of 1969, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994, Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities of 1999, European Convention on Human Rights of 1950, European Social Charter of 1961, and European Social Charter (Revised) of 1996 and; the Framework Convention for the Protection of National Minorities of 1995. For the purposes of this part we will concentrate on Africa.

In Africa, there is no specific law on legal aid. Legal aid principles are scattered in different documents and case laws.[23] The remarkable law is the African Charter on Human and People's Rights of 1981. The Charter contains principles that relate to equality before the law and equal protection of the law.[24] Generally, the Charter aims to enable all people, including those with insufficient resources to be assisted in protecting their legal rights. It also recognises the right to be heard and the state's obligation of recognising, promoting and protecting it.[25]

In operationalizing the Charter, a Protocol to the African Charter on Human and Peoples Rights was adopted. This protocol contains the basic principles of legal aid, it also establishes the right to free legal representation.[26] The protocol requires member states to establish systems and mechanisms that will enable citizens to defend their causes. Additionally, the principles established by the protocol aim at ensuring that there is dual process in determining people's rights.

[23] *Anaglet Paulo v. United Republic of Tanzania,* Application No. 020/2016, African Court On Human and Peoples' Rights, Judgment 21 September 2018.
[24] See article 3.
[25] See article 7.
[26] 10(2) of the Protocol.

Other principles on legal aid are enclosed in the Statute for the Establishment of the Legal Aid Fund of Human Rights Organs of the African Union. The purpose of the Fund is to provide assistance to indigent applicants before the human rights organs of the Union.[27] The objective of the statute is to enable the Union to mobilize and receive resources to finance the legal aid schemes of Human Rights Organs of the African Union. The statute also aims at encouraging cooperation and coordination of legal aid activities that are carried out by different stakeholders.[28]

The law on legal aid in Africa is also provided in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. These guidelines were adopted pursuant to Article 45(c) of the African Charter on Human and Peoples' Rights. The guidelines recognise a right to legal assistance to the accused or a party to a civil case. Under the guidelines, legal assistance should be where the interest of justice requires it to be without payment of the accused or party to a civil case if he or she does not have sufficient means to pay for it. In criminal matters, the interests of justice should be determined by considering the seriousness of the offence and severity of the sentence. In civil cases, consideration should be in regards to the complexity of the case and the ability of the party to adequately represent himself or herself, the rights that are affected and the likely impact of the outcome of the case to the wider community.[29]

The guidelines require legal assistance to be provided to the accused in any capital case, including for an appeal, executive clemency, commutation of sentence and amnesty or pardon. An accused person or a party to a civil case has the right to an

[27] See article 2(1) of the Statute for the Establishment of the Legal Aid Fund of Human Rights Organs of the African Union
[28] See article 3 of the Statute for the Establishment of the Legal Aid Fund of Human Rights Organs of the African Union
[29] see DOC/OS(XXX)247

effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. However, they may contest the choice of his or her court-appointed lawyer. When legal assistance is provided by a judicial body, the lawyer appointed shall be qualified to represent and defend the accused or the party to a civil case. Furthermore, the lawyer must have the necessary training and experience corresponding to the nature and seriousness of the matter, be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body, advocate in favour of the accused or party to a civil case, be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.[30]

The guidelines recognise Professional associations of lawyers as important stakeholders in the provision of legal aid. They have been mandated to co-operate in the organisation and provision of services, facilities and other resources. They are to ensure that when legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person or party to a civil case. Where legal assistance is not provided by the judicial body on important or serious human rights cases, they should provide legal representation to the accused or party in a civil case, without any payment by him or her.[31]

Given the fact that in many States the number of qualified lawyers are low, guidelines require States to recognize the role of paralegals in the provision of legal aid and establish a legal framework to enable providence of basic legal assistance. In conjunction with the legal profession and non-governmental

[30] Ibid.
[31] Ibid.

organizations, states are to establish training, qualification procedures and rules governing the activities and conduct of paralegals.[32]

2.1.3.Tanzania's Domestic Law

Unlike other jurisdictions where legal aid services have been offered for many years, the history of legal aid in Tanzania is not old enough. Even after the introduction of the Order in Council in 1920, no recorded evidence show that colonial government allocated resources or encouraged the development of legal aid services. This may partly be explained by the fact that the colonial legal system was an instrument for the realization of colonial objectives. Assisting natives to understand and fight for their rights would be amounting to defeating the colonial objectives.

After the independence, the government made various economic, social, legal and political reforms. The aim for the reforms were to build a system that abides and respects fundamental principles of democracy. In the legal sector there were several reforms, in particular there were legislative and practical initiatives which were made for the purposes of ensuring that legal aid services were available. Legislations enacted after the independence include the ***Legal Aid (Criminal Proceedings) Act 1969,*** Civil Procedure Code and other laws that address specific issues other than legal aid. These laws have been taken advantage of either by interpretation or practice to offer legal aid. These laws include, but not limited to, the Tanganyika Law Society Act,[33] Court of

[32] Ibid.

[33] Tanganyika Law Society has taken advantage of section 4 (e) to establish Legal Aid Committee. Reports from the Committee show that averages of 83 persons are granted legal aid annually in the form of legal representation. And an average of 7,000 people are granted legal advice annually most of them being attended on Law Day.

Appeal Rules of 2009 as amended in 2015 and Non - Governmental Organizations[34]. All these laws played an important part in enacting the Legal Aid Act 2017.

As for the Legal Aid Act 2017, the Act intended to ensure that people with limited financial resources are able to get free legal aid. The preamble to the Act read as follows:

> "An Act to provide for the rendering of free legal aid in criminal proceedings involving indigent persons"

The Act listed conditions and procedures for a person to be granted legal aid in criminal proceedings. All these were provided for in section 3 of the Act. The section read as follows:

> "Where in any proceeding it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defense or appeal, as the case may be, and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued the Registrar shall, where it is practicable so to do, assign to the accused an advocate for the purpose of the preparation and conduct of his defense or appeal, as the case may be"

Although the Act was intended to benefit "accused persons whose means were insufficient to enable them to obtain legal services in the preparation and conduct of their defenses and appeals", records show that beneficiaries of legal aid under the Act were mostly accused persons facing offences attracting capital punishments: murder and treasons. The nature and

[34] Act, 2002

seriousness of these offences required and compelled the need of having a fair trial.[35]

There is no thorough research made on the effectiveness of this Act, empirical evidence shows that the beneficiaries of legal aid services have been facing a lot of challenges. These challenges relate to non- accessibility and availability of legal aid services. In regards to the quality of legal aid services, evidence shows that service providers, specifically advocates, did not deliver standard services by either nonappearance in court hearings / mention or appeared without proper preparations. Some clients were abandoned without notice and others failed to receive feedback from their advocates, on the issues discussed/ decided upon using layman terms.[36]

It is recorded that before the enactment of the Legal Aid Act, legal aid activities were uncoordinated. Courts in Tanzania have consistently insisted on availing legal aid services to persons charged of capital offences.[37] Eventually, in 2015, Tanzania was recorded to have many legal aid institutions and schemes. Tanzania has been rated to be among the best countries in East Africa to have legal aid institutions that are able to join efforts in protecting peoples' rights. Above all, Tanzania is among the countries, within the region, that have specialized legal aid non-governmental institutions and programs.[38]

In regards to the Legal Aid Act 2017, the Act provides a comprehensive framework for the provision of legal aid in Tanzania Mainland. It establishes a fund and procedures of

[35] Peter, C.M., "Legal Aid and Access to Justice in Zanzibar: Examining Criteria for Provision of Legal Assistance ", op cit., p. 22.
[36] Mugyabuso, E., "Protection of Legal Service Consumers in Tanzania: an Examination of the Law", vol.2 Issue 1, *LST Law Review*, 2017, p.28 at p. 32;
[37] *Lekasi Mesawalieki v. Republic* [1993] TLR 139; *Simon Chatanda v. Republic* (1973)LRT 11;*Dawido Qumunga v. Republic* [1993] TLR 120
[38] TAMWA, TAWLA, WLAC and others.

mobilizing the resources that are to be used when financing legal aid. The Act provides for a line of cooperation and coordination of legal aid activities carried out by different stakeholders. Generally, the Act brings in new approaches and principles, necessary for the effective management of legal aid activities.

2.2. Conventional Principles of Legal Aid Legislation

2.2.1.Pyramid Principle

The principle started to emerge in the early 19th century when European countries were facing major challenges when reforming their judicial systems. Originally, legal aid was associated with cases (criminal/civil) that were tried in the courts of law.[39] Mostly with the right to counsel and the right to a fair trial.[40] In the same characterization of the pyramid and in the course of reforming the judicial systems, the "Poor man's laws" were passed, waiving court fees only for the poor and providing the appointment of duty solicitors to only those who could not afford to pay for a solicitors' fees. Initially the expectation was that duty solicitors would act on a *pro bono* basis.

Up until the early 20th century, many European countries had no formal approach towards legal aid. Therefore, the poor relied on the charity of lawyers. Most countries decided to establish laws that provided for the payment of a moderate fee to duty solicitors. To meet the demand, legal aid was restricted to lawyer costs in the judicial proceedings, requiring a lawyer in the bid to restrict beneficiaries and the extent of the benefit, realizing the pyramid shape. Countries with civil law and common law legal systems took different approaches to the right to counsel in civil and criminal proceedings. Countries with civil

[39] Tamanaha, Z., "Understanding Legal Pluralism: Past to Present, Local to Global", vol. 30, Issue 3, *Sydney Law Review*, 2008, pp 375–411.
[40] European Court of Human Rights, *Subinski v. Slovenia*, Application No. 19611/04, Judgement of 18 January 2007.

law emphasised on the right to counsel in civil law proceedings, and therefore provided legal aid where a lawyer was required. Common law countries emphasised on the right to counsel and provided legal aid primarily in relation to criminal law proceedings.[41]

As time went on it was realised that poor people required other services other than legal representation in civil and criminal cases. Evidence indicated that the number of civil and criminal cases filed in courts by the poor was constantly increasing while the number of lawyers committed to provide legal aid in respect of these cases was gradually decreasing.[42] Studies conducted at different times realised that to expand the scope of legal aid would reduce the number of cases filed in courts. Most importantly, it was soon realised that legal aid restricted to litigation was becoming more expensive, therefore the less expensive legal aid options/activities were recommended. It was believed that if these options/activities were fully executed there was likelihood of having less disputes going for litigation.[43] The recommended options/activities of legal aid were legal assistance, legal representation, legal advice/ADR and legal information/education.

With all recommendations, it was realised that all legal aid aspects and activities required distinct resources and were supposed to be given varying weights. It was difficult to determine which activity required priority over others. In the final analysis these activities were arranged in their order of

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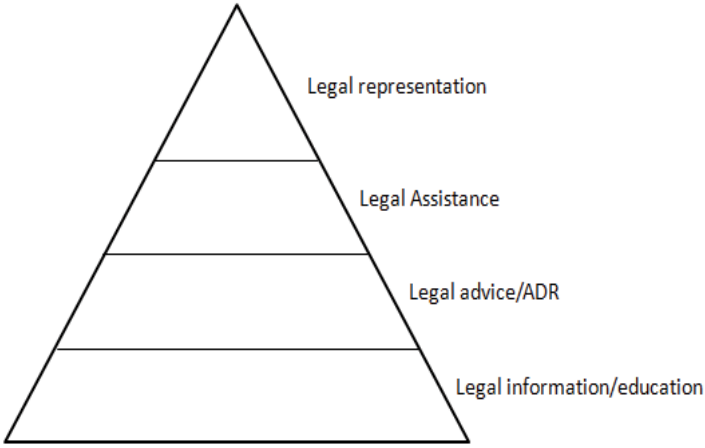
[41] Regan, F., *The Transformation of Legal Aid: Comparative and Historical Studies*. Oxford University Press. 1999, pp. 89–90

[42] Maisel, P., "Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa", vol. 30, Issue 2, *Fordham International Law Journal,* 2007,pp. 374–420.

[43] Abel, Richard L. (February 1985). "Law without Politics: Legal Aid under Advanced Capitalism". *UCLA Law Review*. **32** (3): 474–642.

importance and impact in empowering the poor to defend their causes on their own.[44] This arrangement appeared in the form of a pyramid, hence the pyramid principle.[45] From that time, the term legal aid was redefined to include legal assistance, legal representation, legal advice/ADR and legal information/ education. The figure below illustrates the concept behind the pyramid principle of legal Aid provision from the Danish Institute of Human Rights, Access to Justice and Legal Aid in East Africa. A comparison of the Legal Aid Schemes used in the Region and the Level of Cooperation and Coordination Between the Various Actors, 2011 (Report)



From the bottom to the top of the legal aid pyramid is legal information and education, legal advice, legal assistance and

[44] Doran, Jay; Leonard, Beth (Fall 2016). "The Power of Story: How Legal Aid Narratives Affect Perceptions of Poverty". *Seattle Journal for Social Justice*. **15** (2): 333–356 – via HeinOnline

[45] Danish Institute of Human Rights, Access to Justice and Legal Aid in East Africa, A comparison of the Legal Aid Schemes used in the region and the level of cooperation and coordination between the various actors, 2011 Pp.17-18 (Report)

legal representation.[46] Priority is given from the bottom of the pyramid to the apex. Allocation of the resources should therefore take into account the priority sequence. It is assumed that in the case where activity/priority number one is executed/implemented fully, the best results are likely to be achieved. Priority number one aims at empowering individuals by giving them the necessary skills and techniques that assist them to pursue their causes on their own. A report from the Danish Institute of Human Rights documented the advantages and importance of the legal aid priorities/activities as follows;

> The Legal Aid Pyramid Principle operates with a strategic framework that aims at solving legal problems at the lowest and simplest level possible. Legal services can start with legal information and education, giving people knowledge that they have rights under the law and how to exercise them. Such knowledge and confidence can help in solving legal problems without recourse to the courts, a cost-effective and empowering strategy. Where legal remedies are available, this can be the cheapest and simplest form of legal aid, and the one where the greatest resources should be applied. Legal advice (explaining what the law means and how to exercise it in relation to a concrete problem) is often less costly than providing assistance – understood as helping a person to take legal steps to protect his rights. Representation in court is often the most expensive legal service, and is thus placed at the top of the pyramid. There are of course occasions where the more expensive forms of legal aid are absolutely necessary, and legally required by national and international human rights standards, but these should not be used if the problem

[46] See article 8 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted 20th December, 2012.

could be solved with simpler and cheaper interventions.[47] [Emphasis is mine]

2.2.2.Non-discrimination

This principle started to emerge after the adoption of the Universal Declaration of Human Rights, together with the Convention on the Prevention and Punishment of the Crime of the Genocide in 1948. It emerged as part of the principle of equality before the law. The Declaration proclaims that all human beings are born free and equal in dignity and rights.[48] It further declares that everyone is entitled to all rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[49] With regard to the right to equality, the Declaration stipulates that all people are equal before the law and are entitled, without any discrimination, to the equal protection of the law.[50] All are entitled to the equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.

The principle was further adopted and incorporated in International Covenant on Civil and Political Rights, 1966. It requires each State party to respect and ensure that all individuals within its territory and subject to its jurisdiction are entitled to the rights recognized in the Covenant without distinction of any kind including; race, colour, sex, language, religion, political or other opinion, national or social origin,

[47] Danish Institute of Human Rights, Access to Justice and Legal Aid in East Africa, A comparison of the Legal Aid Schemes used in the region and the level of cooperation and coordination between the various actors, 2011 Pp.17-18 (Report)
[48] Article 1of Universal Declaration of Human Rights
[49] Ibid, Article 2
[50]Ibid, Article 7

property, birth or other status.[51] Article 26 of the Covenant is the cornerstone of the protection against discrimination under the Covenant. It reads:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This principle was also incorporated in various international and regional instruments. Examples include, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights 1966, Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965, Article 2(1) of the Convention on the Rights of the Child 1989, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women 1979, Article 1(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, the sixth preamble paragraph to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 and Article 2 of the African Charter on Human and Peoples' Rights 1981.

The principle of non-discrimination in legal aid is elaborative in the United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice Systems. Article 26 of the Guidelines provides as follows:

[51]Ibid, Article 2(1)

> States should ensure the provision of legal aid to all persons regardless of age, race, color, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status.

The rationale of this principles is based on the fact that legal aid services are both non substitutable and credence.[52] They are non-substitutable in the sense that legal service is part of human relations shaped and regulated by the law. Every human relation be it social, economic, political and private has legal dimensions where the law acts as a lubricant to human relations. It is in this sense that every person needs legal services (whether free or otherwise).[53] Due to the high demand of legal aid services and taking into account that legal aid services attract very few stakeholders to engage in the provision of the same, a principle aims at ensuring that all persons have equal chances and opportunities of accessing legal aid services.[54]

2.2.3. Consumption Principle

The Consumption principle is popular in consumer law than other branches of law. Legal aid and legal services fall in the category of services that can be consumed. This is due to the fact that these are not mere services, but professional services that may only be offered by persons who are regarded by the law as

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[52] Mugyabuso, E., Protection of Consumers of Legal Services in Tanzania: an Analysis of Law and Practices, PhD thesis submitted to the University of Dar es Salaam School of Law, 2017, p. 92.

[53] Mugyabuso, E., "Protection of Legal Service Consumers in Tanzania: an Examination of the Law", vol.2 Issue 1, *LST Law Review*, 2017, p.28 at p. 32; Mkumbukwa N, "Thoughts on the Mandatory Legal Aid in Criminal Proceedings in Tanzania", *Wakili Bulletin*, November, 2014, p.11

[54] UNHCR Vulnerability Screening Report (December 2017), available at: https://data2.unhcr.org/en/documents/download/64592

professionals in terms of either possession of the specific skills or being registered as persons having the ability to offer such services.[55] Although human beings are now living and transacting in a free market economy, legal services including legal aid services are not offered in a free market. They are offered in a monopolistic/ closed market where access is restricted in terms of entry and enjoyment of its benefits.[56]

The consumer principle is usually built on three concepts; recognition, protection and promotion of consumer rights.[57] Recognition of consumer rights relates to having a legislation that establishes consumer rights, whereas protection of consumer rights is all about having a legal framework that ensures that consumer rights are not violated and; promotion of consumer rights relates to having policies and systems that ensure that consumer rights are part of the long term national agenda and are mainstreamed in all government priorities.[58]

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[55] Writing on the nature of legal services generally Mugyabuso states that Legal services are consumable products which have no substitute. When they are consumed without guidance and assessing their qualities,they are likely to cause injury and harm to consumers. For that reason, laws are in place to ensure that consumers are availed with quality legal services which are appropriate to their needs. See Mugyabuso E., Protection of Consumers of Legal Services in Tanzania: an Analysis of Law and Practices, PhD thesis submitted to the University of Dar es Salaam School of Law, 2017, p. 92.

[56]Dias, C., and Paul J., "Lawyers, Legal Professions, Modernization and Development", in Dias C., et alia. (eds.) Lawyers in the Third World: Comparative and Developmental Perspectives, Uppsala Offset Center, AB, Uppsala, 1981, p.11 at p.14.

[57] Boston Bar Association, Investing in Justice: A Roadmap to Cost-effective Funding of Civil Legal aid in Massachusetts, 2014 available at http://www.bostonbar.org/docs/default-documentlibrary/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf

[58] Mugyabuso, E., Protection of Consumers of Legal Services in Tanzania: an Analysis of Law and Practices, ibid, p. 89; Kazoba G., *Protection of Consumers and a Guard against Counterfeit and Substandard Pharmaceuticals in Tanzania: Examining National, Regional and International Legal and Institutional Frameworks*, Dar es Salaam: Dar es Salaam University Press, 2013, p. 185.

The other equally important parts of the consumer principle is the presence of the mechanisms that enable consumers to enjoy their consumer rights. These mechanisms should guarantee quality, availability, accessibility and affordability of services.[59] These three aspects can only yield better results if the resources are directed towards strengthening consumer information. Consumer information needs to play a role of empowering consumers so that they may be able to protect themselves.[60] The consumer principle of legal aid with specific reference to consumer information is reflected in the United Nations Principles and Guidelines on Access to Legal Aid within the Criminal Justice Systems.

In order to guarantee that people are being informed of their right to legal aid, the Guidelines require states to ensure that information on the right to legal aid and what it consists of, including the availability of legal aid services and how to access such services and other relevant information is made available to the community and to the general public in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means. In regards to the availability of information, it needs to be made available to isolated and marginalized groups. Here, states are required to use radio and television programs, regional and local newspapers, Internet, community meetings and other means.[61]

The Guidelines require Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned

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[59] For the detailed discussion of these aspects see [59] Mugyabuso E., Protection of Consumers of Legal Services in Tanzania: an Analysis of Law and Practices, ibid, 2017, chapters 3 and 4

[60] Kenneth, A., Smith and Andrea, J., "Economic Impacts of Civil Legal Aid Organizations in Virginia", September, 2011, available at http://www.vplc.org/wp-content/uploads/2012/10/VAReport-on-Economic-Impacts.pdf

[61] See Guideline 42 (a) and (b)

or detained to inform unrepresented persons of their right to legal aid and of other procedural safeguards.[62] Information on the rights of a person suspected of or charged with a criminal offence in a criminal justice process and on the availability of legal aid services is to be provided in police stations, detention centers, courts and prisons. For instance, through the provision of a letter of rights or in any other official form submitted to the accused. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity.[63]

Additionally, the Guidelines require the states to provide effective remedies to persons who have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation.[64] States are supposed to put in place means of verification that a person has actually been informed.[65]

3. Appraisal Of The Conventional Principles Of Legal Aid In Tanzania's Legal Aid Act

3.1.1. Pyramid Principle

The Legal Aid Act has adopted the pyramid principle by identifying legal aid priorities and activities. Section 3 of the Act defines legal aid services. Accordingly, "legal aid services"

[62] Guideline 42 (c)
[63] Guideline 42 (d)
[64] Guideline 42 (e)
[65] Guideline 42 (f)

include the provision of legal education and information, legal advice, assistance or legal representation to indigent persons

The Act has made a step ahead by identifying key stakeholders in the execution of these activities. These key stakeholders are legal aid institutions, paralegals and advocates/lawyers.[66] Each key stakeholder is authorised to implement a specific activity/activities in accordance to the law. For example, paralegals can only execute activities relating to the provision of legal education, information and legal advice only. Section 20 of the Act reads as follows

> "(1) a paralegal may provide legal aid services in accordance with the provisions of this Act.
> (2) without prejudice to the generality of subsection (1), a paralegal shall have the following duties
> (a) carrying out educational programmes in national or local languages on legal issues and procedures of concern to the community;
> (b) assisting aided person in the procedures to obtain necessary documents
> (c) guiding an aided person to a proper forum or to access justice, or
> (d) advising the conflicting parties to seek amicable settlement or referring them to a dispute settlement institutions"

Legal aid institutions, as key stakeholders in executing legal aid activities have specific roles. These roles may defer from one institution to another. Legal aid activities that may be executed by a specific legal aid institution will depend on the laws

[66] Section 24 (1) and (2) requires that legal aid shall be provided by an advocate, a lawyer or a paralegal on behalf of the legal aid provider.

regulating that institution and its constitution. Section 10 reads in part as follows

> "An institution shall not be registered as a legal aid provider unless it has the following qualifications
> (a) it has been registered under the relevant laws
> (b) the provision of legal aid services is one of its core functions"[67]

The Act makes a distinction between registered legal aid institutions and legal aid institutions established by the Act of Parliament or academic institution accredited under any written law. Registered legal aid institutions are bound by the provisions of section 10 (1) (a) and (b) of the Act. Legal aid institutions established by the Act of Parliament or academic institution accredited under any written law need not to comply with these requirement of registration.[68] Although there is such exemption, legal aid institutions established by Act of Parliament and accredited academic institutions are to comply with basic principles relating to the provision of legal aid. One of the principles being non-discrimination.[69]

The other key stakeholders are advocates. The Act does not make direct reference to the Tanganyika Law Society Act,[70] the Notaries Public and Commissioner for Oaths Act[71] and the Advocates Act.[72] The only general reference is in section 42 (1) which reads as follows

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[67] This should be read together with section 11(1) which requires an application for registration of a legal aid provider to be accompanied by copy of the constitution of the institution or any other document establishing the institution.
[68] S.10 (3) of the Legal Aid Act
[69] Ibid, S. 16 (3) (f)
[70] Cap 307 [R.E 2002]
[71] Cap 12 [R.E 2002]
[72] Cap 341 [R.E 2002]

> "A advocates who provides legal aid under this Act shall be required to adhere to any rules or code of conduct of a professional body to which he belongs and, his rights, obligations and responsibilities, or duties as a member of that body shall not in any way be affected by the provisions of this Act.

It is usually difficult to define the role of the advocate. Certificate of admission of an advocate and the practising certificate do not exhaustively and in clear terms list the roles and functions of the advocate. The common roles of advocates are legal representation, drafting of legal documents, administering oaths and offering legal advice.[73]

The scope of the role of advocates in provision of legal aid is very wide. It is not limited to legal representation. It extends to the entire life and activities of the respective society. Advocates have the role of performing all activities constituting and forming part of the legal aid pyramid, i.e legal information and education, legal advice and assistance, alternative dispute resolution (ADR) and/or legal representation. In performance of these roles, advocates are bound by the rules of conduct stipulated under the Advocates (Professional Conduct and Etiquette) Regulations.[74]

Generally, the Act has sufficiently incorporated in itself the principle of legal aid pyramid. That notwithstanding, the Act has provided the limited scope of stakeholders involved in the execution of legal aid activities listed in the legal aid pyramid. Moreover, the Act has only recognised paralegals, advocates/lawyers and legal service providers (institutions that

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[73] Quoted from Dias C., and Paul J., "Lawyers, Legal Professions, Modernization and Development", in Dias C., et alia., (eds) Lawyers in the Third World: Comparative and Developmental Perspectives, Uppsala Offset Center, AB, Uppsala, 1981, p.11 at p.15.

[74] GN No. 118 of 2018

have been registered under section 10 of the Legal Aid Act). In actual practice, some legal aid activities are implemented by other stakeholders other than those mentioned in the Act. For example, government ministries and agencies provide legal education/information on matters that relate to the core functions of those ministries. For instance, the Social welfare department has a duty to provide legal education/information and advice on matters relating to family welfare, marriage, and children. The same applies to other agencies like TRA, Labour Office and others

The scope of the stakeholders in the provision of legal aid ought to be enlarged for purposes of enabling the legal aid services to be available and accessible. Despite legal aid being perceived to be a "free of charge service," when the scope of stakeholders in the provision of legal aid is limited, obtaining legal aid services becomes too expensive. This may require a person in need of legal aid services to travel long distances in search for the said services. Sometimes a person may forfeit his rights because of the unavailability and limited accessibility of services.

In criminal justice, the United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice Systems propose a wider scope of legal aid service providers in articles 9 and 10 which read as follows

> "*Article 9*: For the purposes of the Principles and Guidelines, the individual who provides legal aid is herein referred to as the "legal aid provider", and the organizations that provide legal aid are referred to as the "legal aid service providers". The first providers of legal aid are lawyers, but the Principles and Guidelines also suggest that States involve a wide range of stakeholders as legal aid service providers in the form of non□governmental organizations,

community□based organizations, religious and non□religious charitable organizations, professional bodies and associations and academia. Provision of legal aid to foreign nationals should conform to the requirements of the Vienna Convention on Consular Relations and other applicable bilateral treaties.

Article 10: It should be noted that States employ different models for the provision of legal aid. These may involve public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations, paralegals and others. The Principles and Guidelines do not endorse any specific model but encourage States to guarantee the basic right to legal aid of persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, while expanding legal aid to include others who come into contact with the criminal justice system and diversifying legal aid delivery schemes."

Therefore, it is safe to mention that while the enactment of the Legal Aid Act is a step towards the recognition, protection and promotion of rule of law in Tanzania, there is a need for the government and stakeholders at large to adopt best practices that will make legal aid service available and accessible to people in need of the same.[75] This may be done by encouraging Non-Government Organization, Community Based Organization, religious and charitable organization, professional organizations and associations and the academia to take a lead in the provision and implementation of legal aid activities.

[75] See article 15 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

3.1.2.The Principle of Non-Discrimination

The Legal Aid Act has specific provisions that prohibit and create offences for acts that constitute discrimination. Section 44 of the Act provides as follows:

> "(1) Subject to the provisions of this Act, no legal aid provider, advocate, lawyer or paralegal shall provide legal aid on the basis of discriminating aided person on his gender, religion, race, tribe or political affiliation.
> (2) A person who contravenes subsection (1) commits an offence and shall, on conviction be liable to a fine of not less than five million shillings but not more than ten million shillings or to imprisonment for a term not less than six months but not more that twelve months or both."

The Act further grants power to the Registrar to cancel the certificate of registration of the service provider who is believed to do acts constituting discrimination. S. 16 (3) (f) of the Act provides as follows:

> "16(3)(f) the registrar may cancel the certificate of registration of a legal aid provider if he is satisfied that a legal aid provider has discriminated aided person in terms of gender, religion, race tribe or political affiliation

It is clear that the Act has taken into account the principle of non-discrimination to ensure that there is no discrimination in provision of legal aid services. The main problem that arises is that the framing of section 44 (1) of the Act tends to be the use of the words "subject to the provisions of the Act," seem to affect or otherwise defeat the whole purpose of prohibiting acts relating to discrimination. The words "subject to the provisions of the Act,"

suggest that the Act has provisions that allow discrimination.[76] Going through the whole Act there are no such provisions that allow discrimination.

Furthermore, while the Act constitutes offences relating to discrimination, the term 'discrimination' is not defined. Although we have many judgments from Tanzania and the African Court on Human and Peoples' Rights on issues of legal aid, none of them define discrimination.[77] This therefore is likely to cause difficulty in the enforcement of the Act.

3.1.3. Consumer Principle

The Legal Aid Act does not constitute legal aid a statutory right.[78] As such, persons in need of legal aid (as consumers of legal aid services) have no adequate protection. No duty is imposed on any person/ institution to provide legal aid. Nevertheless, the Act does not refer to any right of persons in need of legal aid, it has not even incorporated in itself basic rights reflected in case laws from Tanzanian courts.[79] As a consequence, there are no mechanisms throughout which consumer rights (i.e. rights of aided persons) are to be recognised, protected and promoted.

The Act has tried to identify key stakeholders in the provision of legal aid which are advocates/lawyers, legal aid institutions and

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[76] For the definition of the phrase "subject to the provisions of the Act," see Chaturvedi, R., *Pleadings, Drafting and Conveyancing*, Allahabad, Central Law Publications, 4th Edition, 2012, p.6.

[77] *Lekasi Mesawalieki v. Republic* [1993] TLR 139; *Simon Chatanda v. Republic* (1973)LRT 11;*Dawido Qumunga v. Republic* [1993] TLR 120 and *Anaglet Paulo v. United Republic of Tanzania,* Application No. 020/2016, African Court On Human and Peoples' Rights, Judgment 21 September 2018.

[78] For comparison purposes see article 50 of the Constitution of Kenya, *David Njoroge Macharia versus Republic* [2011] EKLR, *John Swakka and two others* [2013] EKLR petition No. 318 of 2011.

[79] Ibid.

paralegals.[80] The Act has not provided the mechanisms through which these legal aid providers will be accessible and available to people in need of the services. Although the Act has given powers to the registrar to deal with issues of the quality of legal aid services and to promote legal literacy and awareness among the public,[81] these are still these omnibus powers because there are no guidelines of assessing quality of legal aid services and framework for the promotion of legal literacy and legal awareness among the public.

4. Conclusion And Recommendations

The Legal Aid Act 2017 is a cornerstone towards protection, recognition and promotion of rights to persons that cannot afford to pay for legal services. Reflection of some legal aid principles in the Act have played a major step towards the respect of the rule of law and the democratic governance. Although some of the principles have not been adequately incorporated, there is room to adopt policies and the best practices so that the poor and marginalised populations are placed in a better position where they can pursue their legal causes on their own.

Taking into account that some of the principles have not been adequately incorporated in the Act, it is recommended that there should be legal and policy initiatives that will ensure that legal aid services are provided at the grassroots in rural areas. These initiatives may include granting subsidies to legal aid institutions with offices/branches in those areas and; establishing legal aid clinics. Finally, there is a need of conducting needs assessment so that the legal aid services directed to particular areas are capable of addressing the peoples' needs of those areas.

[80] Section 24 (1) and (2) of the Legal Aid Act.
[81] Ibid, Section 7 (1) (e) and (f).

ENHANCING ACCESS TO JUSTICE FOR ACCUSED PERSONS IN TANZANIA: A PRELIMINARY APPRAISAL OF THE LEGAL AID ACT (2017) IN LIGHT OF THE JURISPRUDENCE OF INTERNATIONAL HUMAN RIGHTS TRIBUNALS

***Dr. Clement Julius Mashamba**

Abstract

Before the enactment of the Legal Aid Act in January 2017, many complainants who lodged their complaints (i.e. communications and applications) in some of the United Nations human rights treaty-bodies and in the African Court on Human and Peoples' Rights complained, inter alia, that they were denied legal aid while their cases were being determined by the domestic courts in Tanzania. This article considers at least four cases filed in the international human rights tribunals, which criticized Tanzania for its lack of a comprehensive mechanism that ensure that the accused are provided with legal aid during trials in the domestic courts in compliance with Article 7 of the African Charter and Article 14 of the ICCPR.

But, with the enactment of a comprehensive legal aid law and its Regulations, Tanzania has now expanded the scope of provision of legal aid to every indigent person in need of such service. It has also established structures for the provisions of legal aid, as well as trained paralegals and lawyers for that purpose. With this development, therefore, it is expected that international human rights treaty-bodies will not make their criticism like they did prior the enactment of the Legal Aid Act and its Regulations. It is also expected that persons in need of legal aid in criminal as well as civil proceedings will find it easy to access legal aid services, thus, omitting complaints for lack of such services in the international human rights tribunals.

Key words: *access to justice, African court, legal aid, accused persons*

1.0 Introduction

The right of access to justice, which is quite often realised as the right to legal aid in relation to the indigent, is one of the fundamental entitlements an individual in any society is entitled to.[1] It ensures that the person who believes that his interest or right has been infringed upon, or such interest or right is a subject matter of a court dispute, accesses an impartial court or tribunal for a fair determination of such interest or right. So, access to justice and legal aid requires each state to establish a judicial system that accords to all persons equality before the law and provide unimpeded access to the judicial system when they are involved in a dispute 'adjudicable' by the courts.[2] It is for this reason that the right of access to justice has universally been protected and guaranteed under various international treaties[3] as well as in national constitutions[4] and laws.[5]

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[1] *See* generally Danish Institute for Human Rights, *Access to Justice and Legal Aid in East Africa: A Comparison of the Legal Aid Schemes Used in the Region and the Level of Cooperation and Coordination Between the Various Actors* (Copenhagen: The Danish Institute for Human Rights, 2011); and United Nations Office On Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: A Survey Report* (Vienna: United Nations Office On Drugs and Crime/UN, April 2011).

[2] *See*, particularly, Article 3 of the International Covenant on Civil and Political Rights (ICCPR).

[3] *See*, for instance, Articles 3 and 14(3)(d) of the ICCPR; Article 7 of the African Charter on Human and Peoples' Rights (ACHPR); and Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

[4] *See*, for example, Article 13(6)(a) of the Constitution of the United Republic of Tanzania (1977); and Article 48 of the Constitution of the Republic of Kenya (2010).

[5] *See*, for instance, the Tanzania Legal Aid Act (No. 1 of 2017).

This is a preliminary assessment of the extent to which the Legal Aid Act (2017)[6] (together with its Regulations[7]) has addressed a criticism raised in the recent jurisprudence of the African Court on Human and Peoples' Rights (the African Court) and the UN Committee on the Rights of Persons with Disabilities (CRPD)[8] that has found Tanzania in violation of the right to legal aid entitled to the accused in a criminal trial. In particular, such criticism has been raised in *Alex Thomas v Tanzania*;[9] *Wilfred Onyango Nganyi & Others v Tanzania;*[10] *Mohamed Abubakari v Tanzania*;[11] and *X v Tanzania*.[12]

Therefore, this appraisal of the new development in the law relating to legal aid in Tanzania begins by considering the underlying principles of access to justice and legal aid, and then proceeds to examine the right of access to legal aid in Tanzania through the lens of the jurisprudence of international human rights tribunals, particularly in the four cases cited above cited. The article also evaluates Tanzania's response to the criticism raised by the International Human Rights Tribunals, in relation to the need of providing legal aid to the accused persons in criminal proceedings through the enactment of the Legal Aid Act in 2017; and the legal aid scheme under this law: *i.e.* an assessment of relevant provisions relating to the provision of legal aid to the accused persons in criminal cases. In conclusion, our preliminary examination of this development in Tanzania's

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[6] Act No. 1 of 2017.
[7] The Legal Aid Regulations, GN. No. 44 (published on 9 February 2018) made under Section 48 of the Legal Aid Act (2017).
[8] The CRPD oversees the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD).
[9] (2016) 1 AfCLR 465 (*merits*).
[10] (2016) 1 AfCLR 507 (merits). Judgment dated 18 March 2016.
[11] *Mohamed Abubakari v Tanzania (merits)* (2016) 1 AfCLR 599
[12] Communication 22/2014. The decision was adopted on 31 August 2017 (UN Doc CRPD/C/18/D/22/2014.)

legal regime in respect of access to justice indicates that, to a larger extent, the Legal Aid Act has addressed most of the elements of such criticism.

2.0 The Underlying Principles of Access to Justice and Legal Aid in International Law

The right of access to justice, which is realised through the provision of legal aid to the poor, is premised in the fundamental principle of equal protection before the law for all persons in any given state.[13] It requires that state to ensure that all persons are equal before the law and have the right to equal protection and benefit of the law, with the assurance of effective access by all persons to judicial and legal services, including legal aid.[14]

The right of access to justice encompasses a person's right to be represented and/or defended by a counsel of their choice. In the administration of criminal justice, access to justice is a fundamental element of the right to a fair trial, which is a fundamental human right that implies that 'every individual accused of a crime or an offence shall receive the guarantees under the procedure and afforded the right of defence.'[15] Given its significance in enhancing a well-functioning criminal justice system, the right to a fair trial is well entrenched in all universal, regional and municipal laws.[16]

As noted above, access to justice to the poor is mainly actualised through the provision of free legal aid by the state or any other entity recognised by the state. The relevant provisions in international human rights treaties guaranteeing the right to legal

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[13] *See*, for instance, Article 8 of the Maputo Protocol.
[14] Ibid.
[15] *African Commission on Human and Peoples' Rights v Libya (merits)* (2016) 1 AfCLR 153 ("*African Commission v Libya*"), para. 89.
[16] Ibid.

aid include: Article 7(1)(c) of the African Charter on Human and Peoples' Rights (the Charter or the ACHPR), Article 8 of the Maputo Protocol and Article 14(3)(d) of the ICCPR.[17] There are also other international instruments providing further elaboration on this right, including the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems;[18] the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment;[19] and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[20]

In the context of fair trial in the administration of criminal justice, the right to legal aid is very crucial as set out in the Charter and the ICCPR. According to Article 14(3) (d) of the ICCPR,

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> *(a)-(c) Not applicable.*
>
> (d) To be tried in his presence, and 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 [...].

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[17] *See* also Article 40(2) of the UN Convention on the Rights of the Child (CRC); Article 17(1) of the African Charter on the Rights and Welfare of the Child (ACRWC); and Article 11(1) of the Universal Declaration of Human Rights, adopted by the UN General Assembly Resolution 217 A (III) dated 10 December 1948.
[18] (A/67/458) (2012).
[19] Adopted by the UN General Assembly in Resolution 43/173 of 9 December 1988.
[20] African Commission on Human and Peoples' Rights DOC/OS(XXX)247 (20o3).

As the African Court held in *Alex Thomas v Tanzania;*[21] *Wilfred Onyango Nganyi & Others v Tanzania; African Commission v Libya;* and *Mohamed Abubakari v Tanzania,*[22] Article 14(3) (d) of the ICCPR is more elaborate than Article 7(1) (c) of the Charter;[23] and accordingly, the former contains three distinct guarantees:

(i) The accused persons 'are entitled to be present during their trial';[24]

(ii) The provision refers 'to the right of the accused to defend himself or herself, whether in person or through legal assistance[25] of their own choosing';[26] and

(iii) The provision guarantees the right 'to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case, if they do not have sufficient means to pay for it.'[27]

2.*1 State Obligation to Ensure Access to Justice*

State obligation to domesticate and implement underlying principles contained in an international treaty is a fundamental norm of international law. In terms of the provisions of Article 26

[21] Op. cit, p. 486, para. 114 (pointing out that: 'even though Article 7(1)(c) of the African Charter does not specifically provide for legal aid, the Court can, in accordance with Article 7 of the Protocol, apply this provision in light of Article 14(3)(d) of the ICCPR').
[22] Op. cit.
[23] In particular, Article 7(1)(c) of the Charter provides that: 'Every individual shall have the right to have his cause heard. This comprises [...] (c) the right to defence, including the right to be defended by counsel of his choice.'
[24] *Wilfred Onyango Nganyi & Others v Tanzania,* op. cit, p. 535, para. 166.
[25] In the *Matter of Dayanan v Turkey*, Application No. 7377/03, ECtHR (13 October 2009), para. 30, the ECtHR held that: 'the right of every accused person to be effectively defended by a lawyer, if need be, is at the heart of the notion of fair trial.'
[26] *Wilfred Onyango Nganyi & Others v Tanzania,* op. cit.
[27] Ibid.

of the Vienna Convention on the Law of Treaties (1960), 'Every treaty in force is binding upon the parties to the treaty and must be performed in good faith.' Under international human rights law, there are three categories of state obligations or duties. The said state obligations include: the obligation to *respect*, the obligation to *protect* and the obligation to *fulfill* human rights. These obligations 'universally apply to all rights and entail a combination of negative and positive duties.'[28] Whereas the obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights, the obligations to fulfill and protect requires states to protect individuals and groups against human rights abuses.[29]

In tandem with the foregoing sets of state obligation under international law, Article 3 of the ICPPR sets out the key state obligations in ensuring access to justice to every person:

> 3. Each state party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority

[28] *Social and Economic Rights (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

[29] https://www.ohchr.org › professionalinterest › pages › internationallaw (accessed 9 October 2019).

provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

According to the United Nations (UN), access to justice is 'a basic principle of the rule of law' and in its absence, people 'are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.'[30] For that matter, the UN Declaration of the High-level Meeting on the Rule of Law emphasizes the right of equal access to justice for all, including members of vulnerable groups. It also reaffirms the commitment of member states to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all.[31] Additionally, the Declaration requires States to ensure that the delivery of justice is impartial and non-discriminatory, highlighting the independence of the judicial system, together with its impartiality and integrity, as an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.[32]

2.2 *State Obligation to Provide Legal Aid to the Indigent in Criminal Proceedings*

International law explicitly imposes obligation on a state to provide legal aid to a person whose fate is to be determined by a

[30] https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ (accessed 9 October 2019) (pointing out that: 'United Nations activities in support of Member States' efforts to ensure access to justice are a core component of the work in the area of rule of law').

[31] The UN Declaration of the High-level Meeting on the Rule of Law, para's. 14 and 15.

[32] Ibid, para. 13.

court of law but such person lacks the means to engage a private legal counsel. Article 7(1) (c) of the Charter and Article 14 of the ICCPR implicitly impose an obligation on the state to ensure that people charged with criminal offences are accorded a fair hearing, through the provision of legal aid and assigning a legal counsel that will enable an individual to defend his or her case or prosecute his or her cause in a court of law. In this regard, where an individual is unable to afford counsel to defend his case due to his limited financial means 'it is then the responsibility of the sate member to ensure such individual is provided with such assistance.'[33]

One of the critical issues relating to the grant of legal aid to an accused person is always the duration from and/or within which such person should be provided with legal aid. This question was addressed by the African Court in the *African Commission v Libya* case, where it held instructively that: 'This right should be exercised at every stage of a criminal procedure especially during investigation, periods of administrative detention and during judgment by a trial and appellate court.'[34]

The decision of the African Court in *Onyango* was premised around the jurisprudence of the UN human rights treaty-bodies, the European Court on Human and Peoples' Rights (ECtHR), the African Commission on Human and Peoples' Rights (the Commission), and the Inter-American Court of Human Rights,[35] 'which are courts of similar jurisdiction.'[36] For instance, in

[33] Tanzania Network of Legal Aid Providers, "Tanzania Legal Aid Report 2017," p. 7. Available at www.internationallegalaidgroup.org/images/miscdocs/ILAG_2017_National_Report_-_Tanzania_-_Ms_Christina_Kamili.pdf (accessed 9 October 2019).
[34] *African Commission v Libya,* op. cit, p. 170, para. 93.
[35] *See* particularly *Case of Suarez-Rosero v Ecuador*, Inter-American Court of Human Rights, Judgment of 12 November 1997 (merits), para. 82.
[36] *Onyango,* op. cit, p. 535, para. 168.

Avocats Sans Frontières (on behalf of Bwampamye) v Burundi,[37] the Commission held that legal aid is 'the fundamental element of the right to fair trial. More so, where the interests of justice demand so.'

Again, in *Onyango*, the African Court drew inspiration from the jurisprudence of the Human Rights Committee[38] – which oversees the implementation of the ICCPR – on the interpretation of Article 14(3) (d) of the ICCPR. In *Anthony Currie v Jamaica*,[39] the Committee had to consider a situation similar to the one in *Onyango*: issues of compliance with constitutional guarantees of accused persons regarding their right to a fair trial in a criminal trial and appeal. The Committee held that:

> The author has claimed that the absence of legal aid for the purpose of filing a constitutional motion itself constitutes a violation of the Covenant. The Committee notes that the Covenant does not contain an express obligation as such for a State to provide legal aid for individuals in all cases but only, in accordance with Article 14(3)(d), in the determination of a criminal charge where the interests of justice so require.

Additionally, there are two important elements on the legal assistance under Article 6(3) (c) of the European Convention of Human Rights.[40] Firstly, the right of an accused person to defend

[37] (2000) AHRLR 48 (ACHPR 2000.

[38] Article 60 of the Charter and Article 7 of the Court's Protocol requires the Court to draw inspiration and apply the Charter in light of any other relevant international human rights instruments ratified by the States concerned.

[39] Communication No. 377/89, HRC.

[40] Article 6(3)(c) of the European Convention on Human Rights provides that: '3. Everyone charged with a criminal offence has the following minimum rights: […] (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'

himself in person or through legal assistance of his choosing. Secondly, this provision guarantees the right to have legal assistance assigned to accused persons 'whenever the interests of justice so require, and without payment by them in any case they do not have sufficient means to pay for it.'[41]

The provisions of Article 6(3) (c) of the European Convention of Human Rights have generated a very rich jurisprudence. For example, in *Artico v Italy*,[42] although the Applicant had been granted legal aid for his appeal in the Court of Cassation, the lawyer who was assigned did not act for him at all, later requesting to be replaced for work related commitments and ill-health. However, the Court of Cassation did not act on this excuse as well as despite subsequent requests by the Applicant to have him replaced. The ECtHR found this to be a violation of Article 6(3) (c) of the Convention, because the right to legal aid in this provision is not fulfilled by simply a formal appointment of a lawyer, but it requires that legal aid must be effectively provided; and that the state must take "positive action" to ensure that the Applicant effectively enjoys his or her right to free legal assistance.[43]

It should be noted that states 'cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes.'[44] However, it is a duty of responsible or competent state authorities to take measures in ensuring the accused persons who deem themselves to need legal aid 'to effectively enjoy [that] right in any particular circumstance.'[45]

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[41] *Onyango*, op. cit, p. 536, para. 171.
[42] Application No. 6694/74)
European Court of Human Rights
Court (Judgment dated 13 May 1980).
[43] Ibid, para.'s 33-35.
[44] *Onyango*, op. cit, p. 536, para. 175.
[45] Ibid.

In describing the term 'in the interest of justice' in relation to facilitating legal aid, the ECtHR has identified four factors that should be taken into account: (*i*) the seriousness of the offence; (*ii*) the severity of the potential sentence; (*iii*) the complexity of the case; and, (*iv*) the social and personal situation of the defendant.[46]

3.0 Legal Aid in Tanzania through the Lens of the Jurisprudence of International Human Rights Tribunals

One of the most critical human rights that challenges numerous states in its implementation at the domestic level around the world, is the provision of legal aid to every person that is in need of such assistance.[47] This is one of the rights that require a positive action on the part of the State: *i.e.* the State is required to inject some finances into one's realisation of the right to legal aid, particularly in terms of the State's obligation to provide financial coverage for legal and associated attorney fees on behalf of the beneficiaries of the legal aid services.[48] Tanzania is one of the developing countries that have been facing challenges in their endeavours to ensure that their citizens are given legal assistance. The challenges that Tanzania face in providing legal aid and legal assistance have been brought into the spotlight in

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[46] *See*, for example, *Benham v The UK,* Application No. 19380/92, Judgment of 10 June 1996 (Grand Chamber) (pointing out that because there was a likelihood of severe sentence, the interests of justice demanded that the Applicant ought to have benefited from legal aid); and *Salduz v Turkey*, Application No. 36391/02, Judgment of 27 November 2008 (Grand Chamber), para. 54 (pointing out that legal aid should be granted to every accused person irrespective of the nature of a particular crime and that legal aid is particularly crucial for people suspected of serious crimes).

[47] For discussion on policy challenges facing state-sponsored legal aid schemes, *see* particularly Prescott, J. J., "The Challenges of Calculating the Benefits of Providing Access to Legal Services," *Fordham Urb. L. J.* 37, no. 1 (2010): 303-46.

[48] *See* generally Danish Institute for Human Rights and East African Law Society, *Access to Justice and Legal Aid in East Africa: A comparison of the Legal Aid Schemes Used in the Region and the Level of Cooperation and Coordination Between the Various Actors* (Copenhagen: Danish Institute for Human Rights, 2011)

the recent cases decided by the international human rights treaty bodies, including the African Court on Human and Peoples' Rights (African Court) and some UN treaty-bodies.[49]

Of late, the underlying principles of the right of access to justice, through legal aid in Tanzania, have been a subject of dispute in international human rights litigation. However, the following decisions are instructive: *Alex Thomas v Tanzania; Wilfred Onyango Nganyi & Others v Tanzania*; *Mohamed Abubakari v Tanzania*; and *X v Tanzania*.[50] In *Alex Thomas v Tanzania*, the Applicant alleged that his right to free legal assistance was violated when he was denied legal aid 'despite being a lay, indigent and incarcerated person, having being charged with a serious offence'[51] for which he was sentenced to a thirty-year imprisonment.[52] According to the Applicant, Section 3 of the Legal Aid (Criminal Proceedings) Act[53] placed a 'positive obligation on the certifying authority to make determination to grant legal aid where it is desirable, in the interests of justice, or where the accused does not the means to retain legal aid.'[54]

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[49] Mezmur, B.D., "A Step to Zero Attacks: Reflections on the Rights of Persons with Albinism Through the Lens of *X v United Republic of Tanzania*" (2018) 6 *African Disability Rights Yearbook* 251-262. Available at http://doi.org/10.29053/2413-7138/2018/v6a12 (accessed 2 August 2019).

[50] Communication 22/2014. The decision was adopted on 31 August 2017 (UN Doc CRPD/C/18/D/22/2014.)

[51] *Alex Thomas*, op. cit, p. 486, para. 111.

[52] Ibid, p. 465, para. 1.

[53] Cap. 21 R.E. 2002.

[54] *Alex Thomas*, op. cit, p. 486, para. 112. Indeed, the African Court noted that, in *Moses Muhagama Laurance v Government of Zanzibar*, Court of Appeal of Tanzania at Zanzibar, Criminal Appeal No. 17 of 2002 and *Thomas Mjengi v R.* [1992] 1 TLR 157, the Court of Appeal of Tanzania has held that the provision of Section 3 of the Legal Aid (Criminal Proceedings) Act (read together with Section 310 of the Criminal Procedure Act, Cap. 20 R.E. 2002), provided 'to the right of accused persons to get legal aid, the right to be informed of that right and that failure to so inform an accused person [would] render a trial a nullity.' *Alex Thomas*, op. cit, p. 488, para. 122, note 25.

The Respondent's general denial that the Applicant ought to have proved that he ever requested for such legal assistance and that he was indeed an indigent person,[55] was rejected by the Court, which held that the Applicant 'was entitled to legal aid and he need not have requested for it.'[56] The Court noted that, even after he requested for it, the Applicant was denied legal aid in the domestic courts in Tanzania. According to the Court,

> The Applicant was charged with the offence of armed robbery, which is a serious offence and which carries a minimum sentence of thirty (30) years imprisonment. He was unrepresented and of ill health, which occasioned him to be absent during the presentation of his defence. Under these circumstances, it was desirable and in the interests of justice for the courts of the Respondent State to have provided the Applicant with legal aid.[57]

The Court set out the following relevant factors for the domestic courts in Tanzania to take into account in the determination of the provision of legal aid to the Applicant: (*i*) the gravity of the offence that the Applicant was facing; (*ii*) the minimum sentence the offence carries as specified under the Minimum Sentence Act;[58] and (*iii*) his being unrepresented.[59] Therefore, the Court concluded that because the trial Magistrate and the Appellate Judges denied the Applicant legal aid in respect of the trial and subsequent appeals, the Respondent State 'failed to comply with its obligation under the Charter and the ICCPR.'[60]

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[55] Ibid, p. 486, para. 113.
[56] Ibid, p. 488, para. 123.
[57] Ibid.
[58] Cap. 90 R.E. 2002.
[59] *Alex Thomas*, op. cit, p. 488, para. 124.
[60] Ibid.

In *Onyango*, the Applicants alleged before the African Court that they had been arrested in Mozambique and forcibly transferred to Tanzania by the collective actions of the Tanzanian, Kenyan and Mozambican police forces. Before the African Court, the Applicants alleged, *inter alia*, that during their trial in Tanzania, the Respondent State did not provide them with legal aid.

However, the Respondent State argued that, at the beginning of the trial the Applicants had retained the services two counsel. But it was noted that the counsel deserted the Applicants before the trial was concluded. Although the Respondent State argued that the Applicants did not take any action to be given another counsel in light of the repealed Legal Aid (Criminal Proceedings) Act, the African Court held the Respondent State was under an obligation to provide the Applicants with legal aid when the judicial authorities realised that they had no legal representation, even if this was not requested.

In *Mohamed Abubakari v Tanzania,* the Applicant alleged before the African Court that, upon his arrest, he was not afforded the right to call a lawyer and be assisted by him. In particular, he complained that, during his detention at the police post, his fundamental rights (including the right to legal aid) were neither read to him nor brought to his attention and that this was in violation of the law. However, the Respondent State disputed such allegations, asserting that the Applicant was informed of his right to remain silent and his right to consult a lawyer, relative or friend in accordance with Section 53 of the Criminal Procedure Code.[61]

Nonetheless, the African Court, basing on the national court's records, found the Respondent State to have violated the

[61] Cap. 20 R.E. 2002.

Applicant's 'right to have access to Counsel upon his arrest.'[62] Relying on *Abdel Hadi & Others v The Sudan*,[63] the African Court opined that: 'the fact of not having ability to be assisted by Counsel for a long period after arrest affects the victims' ability to effectively defend themselves, and constitutes a violation of Article 7(1) (c) of the Charter.'[64] So, the African Court found a violation of Article 7(1) (c) of the Charter as 'the Applicants were entitled to legal aid at all stages of the proceedings' and such assistance was not provided.[65]

In *X v Tanzania*,[66] a person with albinism, Mr X, complained before the UN Committee on the Rights of Persons with Disabilities (CRPD)[67] that he was attacked with clubs by two strangers while collecting firewood. Once he had been rendered unconscious, the two strangers hacked off half of his left arm. The attack took place on 10 April 2010 and was immediately reported to the police.[68] He alleged, *inter alia*, that he had been discriminated against as a result of his albinism and that 'the violence and the non-access to justice that he has suffered are generalised practices against people with albinism'.[69] However, the Respondent challenged the assertion that the complainant did not have the financial resources to institute a civil case, arguing that 'there were a number of legal aid service providers, including non-governmental organisations (NGOs) that assist

[62] *Mohamed Abubakari v Tanzania,* op. cit, para. 122.
[63] *Abdel Hadi & Others v The Sudan*, African Commission on Human and Peoples' Rights, Communication No. 368/09. Decision of November 2013, para. 90. *See* also *Matter of A.T. v Luxembourg*, European Court of Human Rights, Judgment of 9 April 2015, para.'s 63-5.
[64] *Mohamed Abubakari v Tanzania,* op. cit, para. 121.
[65] *Onyango and Others v Tanzania*, op. cit, para.'s 181 and 182.
[66] For a discussion on this communication, *see* Mezmur, op. cit.
[67] The CRPD oversees the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD).
[68] *X v Tanzania*, op. cit, para. 7.3.
[69] Ibid, para 3.1.

indigent persons to bring cases to court in Tanzania.'[70] As Prof. Benyam Dawitt Mezmur contends,

> This argument potentially raises a number of issues. First, the extent to which there is an obligation in international human rights law to provide legal aid to victims or witnesses, especially in civil cases, needs to be clarified.[71] Second, it is not only the availability of a legal aid scheme that could be the subject of an inquiry, but also its accessibility and efficiency.[72]

According to Prof Mezmur, an additional consideration requiring reflection in the provision of legal aid to persons in marginalised positions, including persons with albinism, is the manner 'in which a means test for legal aid is applied.'[73] Prof. Mezmur argues, for instance, that where family members may be complicit in attacks (or have another conflict of interest), a means test based on the total household income 'should not be applicable.'[74] Somewhat, the criteria 'should focus only on the income of the person applying for legal aid.'[75] However, in *X v Tanzania*, it is not clear why the CRPD Committee 'did not reflect on the state's arguments regarding legal aid.'[76]

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[70] Mezmur, op. cit, p. 258.
[71] According to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle G (Legal Aid and Legal Assistance), an accused person or a party to a civil case has the right to have free legal assistance where the interests of justice so require and the person lacks the means to pay for it.
[72] Mezmur, op. cit. *See* also Article 13(1) of the CRPD, which calls for 'effective access to justice for persons with disabilities on an equal basis with others'.
[73] Ibid.
[74] Ibid. *See* also Guidelines 1(f), 7, 48(a), (c) & (d) of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, (A/67/458) (2012).
[75] Mezmur, op. cit, p. 258.
[76] Ibid, p. 259.

Regrettably, this omission means that 'the opportunity to interrogate and clarify some of the issues raised above unfortunately has been missed for now.'[77] Nevertheless, in 2017 Tanzania decided to address some of the concerns raised by international human rights tribunals by enacting the Legal Aid Act[78] (followed by the promulgation of the Legal Aid Regulations in 2018), which is canvassed below.

4.0 Tanzania's Response to the Need to Provide Legal Aid to Accused Persons

As a way of recognizing the need to domesticate its international law obligation in respect of the rights of access to justice and legal aid, in early 2017, Tanzania enacted a comprehensive legal framework to ensure that legal aid was provided to all persons in need of such legal services, irrespective of whether they are involved in civil or criminal proceedings. Up until early 2017, legal aid was *legally* provided to perpetrators of *only* a few capital offences under the repealed Legal Aid (Criminal Proceedings) Act (1969)[79] – particularly murder and treason. Otherwise, there was no legal framework for the provision of legal aid to *all* persons charged with criminal offences provided for free by the State in Tanzania.[80]

However, towards the end of 2016, a Bill to enact the Legal Aid Act was gazetted in the official *Gazette of the United Republic of*

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[77] Ibid.

[78] Act No. 1 of 2017.

[79] Cap. 21 R.E. 2002. According to its long title, this was an Act 'to provide for rendering of free legal aid in criminal proceedings involving indigent persons.'

[80] *See* particularly *Thomas Mjengi v R*[1992] TLR 157. Under Section 3 of the Legal Aid (Criminal Proceedings) Act, legal aid was provided to an indigent upon discretion of the "certifying authority" – i.e. the Chief Justice, *Jaji Kiongozi* or Judge in charge of a High Court Registry.

Tanzania.[81] It was tabled in the Parliament for the first time in the November 2016 Parliamentary Session after which the Parliament enacted it into law on the 31st of January 2017. After it received presidential assent, the Legal Aid Act entered into force on 1st July 2017.[82] The enactment of the Legal Aid Act was followed by the adoption of the Legal Aid Regulations in 2018 by the Minister responsible for justice 'for the better carrying into effect the provisions' of the Legal Aid.[83]

5.0 Provision of Legal Aid in Criminal Cases

Briefly, the Legal Aid Act (together with its Regulations) established structures and offices (the National Legal Aid Advisory Board,[84] the Registrar of Legal Aid[85] and Assistant Registrars[86]), as well as it introduced a mandatory requirement to the effect that the Registrar of Legal Aid must register all legal aid providers.[87] For the first time, this law recognises paralegals as one of the providers of legal aid,[88] although their scope of service delivery is limited[89] and does not include providing legal services reserved for advocates.[90]

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[81] *See* the official *Gazette of the United Republic of Tanzania* (No. 36 Vol. 97) published on 26 August 2016.
[82] Legal Aid Act, No. 1 of 2017.
[83] Ibid, Section 48(1). According to sub-section (2) of this provision, the Minister responsible for justice may make Regulations in relation to setting out procedure for, *inter alia*, provision of legal aid to person in police custody, remand, or prison; registration of legal aid provides and paralegals; and inspection of legal aid providers.
[84] Ibid, Section 4.
[85] Ibid, Section 6.
[86] Ibid, Section 8.
[87] Ibid, Part III (Sections 9-20).
[88] Ibid, Section 19.
[89] Ibid, Section 20(2) (providing that, althougha paralegal is not a lawyer, he or she has the following roles and duties in the provision of legal aid:

(a) carrying out educational programmes in national or local languages on legal issues and procedures of concern to community;

The critical issue here is whether the enactment of the Legal Aid Act and its Regulations has effectively addressed the criticism raised by international human rights tribunals in the three cases afore-mentioned. In order to determine this question, one needs to look at the analysis of three fundamental aspects brought about by the Legal Aid Act and its Regulations: (*i*) expansion of the scope of provision of legal aid to cover all cases of indigence and need; (*ii*) establishment of structures and offices; and (*iii*) introduction of mandatory requirement for the registration of legal aid providers; and see if these aspects will totally cure this criticism.

5.1 *Expansion of the Scope of Legal Aid to Cover All Cases of Indigence and Need*

It should be noted from the outset that, the Legal Aid Act has expanded the scope of provision of legal aid to cover *all* cases of indigent persons (both in civil[91] and criminal cases[92]).[93] This was

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(b) assisting aided persons in the procedures to obtain necessary legal documents;
(c) guiding an aided person to a proper forum or to access justice; and
(d) advising the conflicting parties to seek amicable settlement or referring them to settlement institutions).

[90]Ibid, Section 20(5). In terms of Section 20(6), paralegals are also not allowed to charge for the services they offer; and they must be registered under Section 20(3). This means that for one to be recognised as a paralegal, he or she (*i*) must be specifically trained by a designated training institution (Section 19(2)); (*ii*) must be registered by the Registrar of Legal Aid; (*iii*) should not charge for the services provided; and (iv) should not discharge services reserved for advocates. Where a paralegals violates these prerequisites, he or she will be held liable for an offence and, upon conviction, to a fine not less than TShs. 1,000,000/= or to an imprisonment not less than 3 months, or both (Section 20(7)).

[91]Ibid, Sections 27-32.

[92]Ibid, Sections 33-36.

[93]*See* particularly Mashamba, C.J., "A Brief Analysis of the Bill to Enact the Legal Aid Act,2016", a paper presented at a stakeholder's meeting organised by the Legal Aid Secretariat and held at The Law School of Tanzania, Dares Salaam, on 1 December 2016.

not the case when the alleged violation of the right to legal aid was said to have occurred in the four cases analysed above. The scope of provision of legal aid was limited on a number of aspects: (*i*) it was highly discretionary on the presiding judicial officer[94] or 'certifying authority',[95] and, as such, it was not provided as of right;[96] (*ii*) it covered only a few capital offences; and (*iii*) it depended on the availability of counsel to whom a presiding judge or judge-in-charge of a High Court Registry would handle a case in which an accused person required legal aid.[97] In addition to this, no voluntary legal aid providers were interested in providing legal aid to the accused persons in that almost all of the hitherto existing legal aid providing NGOs and

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[94] This power was delegated under Section 6 the repealed Legal Aid (Criminal Proceedings) Act (No. 21 of 1969), which provided that:

> 'The Chief Justice may, by writing, delegate any of his functions under this Act to a Judge of the High Court either generally or for any specific proceeding.'

[95] Under Section 2 of the Legal Aid (Criminal Proceedings) Act, "certifying authority" meant:

> '[…] in the case of a proceeding before the High Court, the Chief Justice or the Principal Judge of the High Court or the Judge in charge of the district registry where the proceeding [was] conducted; and in the case of proceedings before a district court or a court of a resident magistrate the Chief Justice or the Principal Judge of the High Court or the Judge in charge of the district registry where the proceeding [was] conducted.'

[96] Ibid, Section 3, which provided, *in extenso*, that:

> 'Where in any proceeding it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal, as the case may be, and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued the Registrar shall, where it is practicable so to do, assign to the accused an advocate for the purpose of the preparation and conduct of his defence or appeal, as the case may be.'

[97] In most cases, some presiding judges would find it difficult to secure counsel to be assigned what was popularly known "dock briefs" due to scarcity of privately practicing advocates, particularly upcountry/small towns where advocates were scarce.

paralegals were providing legal aid to indigent persons in civil cases.[98]

However, with the enactment of the Legal Aid Act, the scope of provisions of legal aid to the accused persons has comparatively expanded, as compared to the time before the advent of this law. In particular, legal aid to an accused person in a criminal case may now be provided by:

(i) an application by the accused person for legal aid to any registered legal aid provider;[99] or

(ii) the court where the presiding magistrate or judge is of the view that the accused person is indigent or it is in the interest of justice for him to be granted legal aid.[100]

Additionally, where an accused person is in police custody or in a prison facility, the Police Force or Prison Service, as the case may be, is obliged to ensure that such person receives legal aid. In terms of Section 36 (1) of the Legal Aid Act, the two law enforcement institutions are obliged to 'designate a mechanism for facilitating the provision of legal aid services by legal aid providers[101] to the accused or convicted persons in custody in the manner to be prescribed in the Regulations.'[102]

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[98] *See* generally Legal Services Facility, *Baseline Survey on Tanzania Mainland and Zanzibar for Legal Services Facility* (Dar es Salaam: ST Associates, Dar es Salaam, 2012).

[99]Sections 21-26 of the Legal Aid Act.

[100] Ibid, Sections 33-36.

[101] Of late, the two law enforcement agencies have trained paralegals, who are also police and prison officers, so that can provide legal aid to accused persons who come into contact with these agencies.

[102]In terms of Section 36(2), the Regulations envisaged in subsection (1) of Section 36(1) are to be made in consultation with the minister responsible for home affairs.

The essence of legal aid in the criminal trials in Tanzania was well stated by Mwalusanya, J. (as he then was) in *Thomas Mjengi v R*[103]: 'The right to legal representation implies that the right to be informed of that right and that failure to inform an accused of that right renders a trial a nullity.'[104] In addition, Mwalusanya held that:

> That is why I held that the statutory right to legal representation is contained in s. 310 of the CPA […] as interpreted in the light of international human rights stands [*sic*] and norms […]. In short s. 310 of the CPA should be interpreted to mean that those who cannot afford to pay [i.e. who are poor] have an equal right to legal aid paid for by the state as provided for in [the Legal Aid (Criminal Proceedings)] Act No. 21/1969. Perhaps it is important to emphasize that, the above construction of [Section] 310 is inevitable in the light of international human rights standards and norms.

Moreover, nder Section 35, the Legal Act extends the provision of legal aid to children in conflict with the law. In particular, this provision obliges a person with the duty of supervising the welfare of the child, to cause a child who comes into conflict with the law to obtain legal aid "immediately" after such person comes into contact with such child. This provision is constantly progressive and reflects the international law guarantees to

[103]This authority was quoted with approval by the Court of Appeal of Tanzania in *Moses Muhagama Laurence v Government of Zanzibar*, Court of Appeal of Tanzania Crim. App. No. 17/2002 (unreported).
[104]*See* particularly Section 310 of the CPA and *DPP v Daudi Pete,* opt. cit.

which a child in conflict with the law is entitled to when he or she comes into conflict with the law.[105]

As noted above, up until early 2017, legal aid was *legally* provided to perpetrators of *only* a few capital offences under the repealed Legal Aid (Criminal Proceedings) Act (1969) – particularly murder and treason. Otherwise, there was no legal framework for the provision of legal aid to *all* persons charged with criminal offences provided for free by the State in Tanzania.[106] However, the Legal Aid Act now strives to ensure that every eligible indigent person gets legal aid, be it in respect of a criminal or civil case. This means that, with the advent of the Legal Aid Act and its Regulations, now every indigent person and any other person in need of legal aid will be availed with such service as of right, whether he stands accused in criminal proceedings or is pursuing his rights in civil proceedings.

5.2 *Establishment of Structures and Offices*

In addition to expanding the scope of provision of legal aid to cover all indigent persons and those in need of such services in both civil and criminal cases, the Legal Aid Act and its Regulations have established structures and offices to provide support services to legal aid providers while they effectively engage in the provision of legal aid services. Such structures and offices include the National Legal Aid Advisory Board,[107] the Registrar of Legal Aid[108] and Assistant Registrars.[109]

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[105] *See* particularly Article 17 of the African Charter in the Rights and Welfare of the Child (ACRWC); and Article 40 of the UN Convention on the Rights of the Child (CRC).

[106] *See* particularly *Mjengi*, op. cit. Under Section 3 of the Legal Aid (Criminal Proceedings) Act, legal aid was provided to an indigent upon discretion of the "certifying authority" – i.e. the Chief Justice, *JajiKiongozi* or Judge in charge of a High Court Registry.

[107] Section 4 of the Legal Aid Act (2017).

[108] Ibid, Section 6.

Particularly, the National Legal Aid Advisory Board is established under Section 4 of the Legal Aid Act. Its main functions are to provide policy guidance to legal aid providers, to advise the Minister responsible for justice on policy and other matters relevant to the provision of legal aid in the country, to approve the annual reports of legal aid providers, to determine appeals from the decisions of the Registrar of Legal Aid, and to perform any other function as may be directed by the Minister responsible for justice.[110] A mounting element in the Legal Aid Act concerning this Board is that, in the performance of its functions, the Board is obliged to 'maintain as far as practicable, a system of consultation and cooperation with Ministries, Government institutions, legal aid providers or any other public or private bodies established under any written law.'[111]

part from the Board, the Legal Aid Act has established the office of the Registrar of Legal Aid,[112] which is responsible for legal aid matters in the Ministry responsible for legal affairs.[113] The main functions for the Registrar of Legal Aid are, *inter alia*, to register legal aid providers;[114] to investigate complaints of malpractice, negligence, misconduct or disobedience amongst legal aid providers;[115] to suspend or cancel registration of legal aid providers;[116] to keep and maintain the Register of Legal Aid Providers;[117] and to inspect any legal aid provider's office with the view of satisfying himself on the type and quality of the legal aid services offered. [118]

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[109] Ibid, Section 8.
[110] Ibid, Section 5(1)(a)-(e).
[111] Ibid, Section 5(2).
[112] Ibid, Section 6(1).
[113] Ibid, Section 6(2).
[114] Ibid, Section 7(1)(a).
[115] Ibid, Section 7(1)(b).
[116] Ibid, Section 7(1)(c).
[117] Ibid, Section 7(1)(d).
[118] Ibid, Section 7(1)(e).

Other functions of the Registrar are to take appropriate measures for promoting legal literacy and legal awareness among the public and, in particular, educate vulnerable sections of the society about their rights and duties under the Constitution and other laws;[119] to coordinate and facilitate the formulation and accreditation of the curriculum for training of paralegals in the consultation with legal aid providers, education and training accreditation bodies;[120] and coordinate, monitor and evaluate the functions of legal aid providers and give general and specific directions for the proper implementation of legal aid programmes.[121]

In addition to the foregoing structures, the Legal Aid Act vests power in the Permanent Secretary, in the Ministry responsible for legal affairs, to designate public officers at the Regional and District levels for the purposes of registration of legal aid providers at these levels. As of now, Assistant Registrars of Legal Aid have been designated and fully functional in their respective areas of jurisdiction.

By establishing such structures and offices, the Legal Aid Act has ensured that there are effective administrative infrastructures put in place to provide support services to legal aid providers while they effectively engage in the provision of legal aid services. This means that now legal aid providers at all levels of government functioning and in all parts of the country are provided with such support services as registration, coordination, training and monitoring, which ensure that their legal aid provision functions are discharged effectively and without any unnecessary administrative bottlenecks.

[119] Ibid, Section 7(1)(f).
[120] Ibid, Section 7(1)(g).
[121] Ibid, Section 7(1)(h).

5.3 *Introduction of Mandatory Requirement for Registration of Legal Aid Providers*

Before the enactment of the Legal Aid Act and its Regulations, there was no legal framework recognising legal aid providers. The hitherto legal aid providers were voluntary NGOs, which were engaged in the provision of legal aid without any need for registration and regulation. Although there were almost no complaints concerning malpractice or misconduct on the part of the legal aid providers, the lack of a legal framework for registration and regulation of such entities or persons was a risk in itself.

Now, with the advent of the Legal Aid Act and its Regulations, all legal aid providers and paralegals must be duly registered in the Register of Legal Aid providers. This is a mandatory requirement obliging the Registrar of Legal Aid to make available Register for Legal Aid Providers to any interested or prospective legal aid providers[122] and paralegals.[123] Unlike before, the enactment of this law is now for an entity to be registered as a legal aid provider or as a paralegal, as the case may be, such entity or paralegals must possess prerequisite qualifications.[124]

To say the least, the mandatory requirement for registration of all legal aid providers and paralegals serves a number of functions in relation to the legal aid provision. Firstly, it ensures that legal aid providers and paralegals are legally recognised and function within the parameters of the law. Secondly, it assists in creating a sense of accountability, ethical conducts and transparency on the

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[122] Ibid, Section 9.
[123] Ibid, Section 19(4).
[124] Whereas the conditions precedents for an entity to qualify as a legal providers are set out in Section 10 of the Legal Aid Act, the preconditions for registration as paralegal are set out in 19 thereof.

part of the legal aid providers and paralegals, which in turn provide a safety net to the beneficiaries of legal aid services and reduces the chances of poor delivery of such services. Thirdly, it ensures that legal aid providers and paralegals are evenly distributed in parts of the country, unlike the case in the past when legal aid providers used to concentrate their services in major cities and towns. Fourthly, it assists the Government to have effective monitoring, regulating, control and coordination of the functions of legal aid providers to the advantage of legal aid beneficiaries.

5.4 *Efforts undertaken to ensure that Legal Aid Law is Effectively Operationalized*

It is universally-accepted that the enactment of a sound law is one thing, while its effective implementation is another. This means that, unless a law is effectively implemented, it will never bring about the intended results, however good it may look on paper. Regarding the implementation of the Legal Aid Act and its Regulations, the critical question is: how practical is it now for an accused person to obtain legal aid services right from the time of arrest to the sentencing and subsequently to the appeal against the conviction and sentence?

Although there is no hundred percent positive answer to this question, the analysis made above in respect of the expansion of the scope of legal aid, the establishment of structures and offices to provide support to legal aid providers, as well as the mandatory requirement to register legal aid providers and paralegals are positive pointers to the extent to which this law is being effectively implemented. Besides, immediately after the Legal Aid Act and its Regulations became operational, the Officer of the Registrar of Legal Aid, in collaboration with the Law School of Tanzania and legal aid providers (including the Tanganyika Law Society, TLS, and the Tanzania Network of

Legal Aid Providers, TANLAP), embarked on preparing a training curriculum for paralegals. Subsequently, the Office of the Registrar of Legal Aid has provided training to paralegals who are now registered and provide legal aid in all settings, with trained and registered paralegals also available at police stations and prison facilities as required by the law.[125] Additionally, the Office of the Registrar of Legal Aid is continuing to carry out public awareness programs to the general public about the existence of legal aid providers and paralegals in all parts of the country.

Additionally, the Permanent Secretary in the Ministry responsible for legal affairs has designated the Assistant Registrar of Legal Aid in Regions and Districts in Tanzania Mainland. This designation of such public officers has brought to the very grassroots all registration services of legal aid providers than before; and, indeed, it has eased the registration process and procedures for grassroots legal aid providers and paralegals.

5.0 *Conclusion*

The enactment of the Legal Aid Act in early 2017 was done at the right time in terms of the constant complaints hitherto raised regularly in the African Court by many complainants in cases filed in that Court, as well as in one communication filed in the CRPD. As we have seen in this article, in at least three cases, international human rights tribunals had criticized Tanzania for its lack of a comprehensive mechanism to ensure that accused persons are provided with legal aid during trials in the domestic courts in compliance with Article 7(1) (c) of the African Charter and Article 14(3) (d) of the ICCPR.

[125] Section 36(1) of the Legal Aid Act requires the Police and Prison Services to designate mechanisms that will enable persons in their custody to be given legal aid services.

Now that Tanzania has adopted a comprehensive legal aid law, established structures for the provisions of legal aid, as well as trained paralegals and lawyers for that purpose; it is expected that international human rights treaty-bodies will not make their findings like they did before the Legal Aid Act was enacted. It is also expected that persons in need of legal aid in criminal as well as civil proceedings will find it easier to access legal aid services, thus, omitting complaints for lack of such services in international human rights tribunals.

PROVISION OF LEGAL AID SERVICES IN TANZANIA MAINLAND: HISTORICAL EVOLUTION AND INCUMBENT CHALLENGES

***Felistas J. Mushi**

Abstract

This Article provides historical background of the legal aid services in Tanzania Mainland from 1945 during the colonization. It also elaborates the National Legal Framework of the legal aid services from then. The article dwells most on the improvement made by the Legal Aid Act 2017. Key features of the Act with a brief explanation on steps taken so far to implement it. Establishment of the National Legal Aid Advisory Board, the Office of the Registrar as part of the oversight mechanism are some of the key features. Quality assurance in legal aid provision is also explained in terms of accreditation of the training curricula; Code of Conduct and inspection of legal aid providers. Inter-agency coordination systems in place as part of the enhancement of legal aid provision, under the Legal Aid Act 2017, characteristically illustrate the challenges facing legal aid provision in the country by citing lack of awareness to the public, ethical issues, perception of some legal practitioner and inadequate cooperation between LAPs and Government officials as some of the challenges. At the end, the author proposes solutions for the challenges raised. It should be noted that legal aid services include legal education and information, legal advice, assistance or legal representation to an indigent person.

***Keywords**: Legal aid services, indigent person, coordination and monitoring and paralegal*

1. Introduction

Provision of the legal aid services includes the provision of legal education, information, advice, assistance and representation to the person with insufficient means to engage a private legal practitioner in legal matters.[1] In Tanzania, Legal aid services are offered free of charge and the Legal Act (LAA) prohibits the legal aid provider from claiming, requesting or receiving any payment for services rendered to the aided person.[2] This is quite a deviating practice for Tanzania as opposed to other Jurisdictions in the region, for instance, Zambia whose legal aid services may be offered at a lower cost.[3] In Tanzania, persons with the sufficient means are required to engage a private legal practitioner, as they do not suffice the provision of legal services covered under LAA. It should be noted that, not every person is qualified to offer legal aid services under the LAA but only an advocate, lawyer and paralegal may offer legal aid services in accordance with the Act.[4] The basis of legal aid services is found from International Instruments, Regional Instruments and Domestic Law. Tanzania is a party to a number of international treaties that promote the provision of legal aid services. For example, the International Covenant on Civil and Political Right (ICCPR)[5] consists of articles 14(1), 14(3) (b) (d) which provide equality before the law, promotes fair trial and imposes the duty to a state party to the covenant of providing the legal assistance/legal representation to indigent person, and the access to advocates of one choice without paying for the service if the aided person

*The First Registrar for the Legal Aid Providers -Ministry of Constitutional and Legal Affairs

[1] Section 3 of the Legal Aid Act, Act No. 1 of 2017

[2] Ibid., Section 25 (1), (2),(3)

[3] Section 17, and 13 (3) of the Zambia Legal Aid Act, Cap 34

[4] Ibid., section 10

[5] Article 14 (1), 14 (3) (b) and (d) of the International Covenant on Civil and Political Rights,(ICCPR) UN General Assembly Resolution 2200A (XX1) December 16, 1966 entered into force March 23, 1976

does not have sufficient means to pay for the advocate.[6]In the African region, Tanzania is a party to the African (Banjul) Charter on Human and Peoples Rights,[7] which promotes equality before the law and the right for one to be defended by an advocate of their choice.[8] Finding judicial interpretation in the matter of *Anaclete Paulo v United Republic of Tanzania*, the court explained that the right to defence includes free legal aid, as it is a right inherent to a fair trial and is applicable when the interests of justice so require. The Court insisted that the person must be informed on his rights to legal assistance or being granted a counsel if he is an indigent.[9]

While the international legal obligation of Tanzania ensues, domestically she strives to hard to meet the obligations by having domestic laws on the legal aid provisions. In the vein, legal aid services are primarily recognized by the Constitution of the United Republic of Tanzania. The constitution promotes the equality of all persons before the law[10] and recommends a fair trial when rights and duties are determined by the Court or agency.[11]The fair trial includes the legal representation for both wealthy and indigent persons. In the case of ***Thomas Mjengi v Republic***,[12] Honourable Judge Mwalusanya interpreted the Constitutional right of fair trial to include the right to free legal representation paid for by the state for an indigent person whose Constitutional rights are at stake, and the right to be informed over that right by the Court. Therefore, the Court insisted that an indigent person must be offered legal aid. In light of the above,

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[6] Legal and Human Rights Centre and Zanzibar Legal Services Centre, Sexual Violence: A Threat to Child Rights & Welfare in Tanzania (Tanzania Human Rights Report 2018), 2019, 289

[7] 1981

[8] The Article 7 (1) (C) of the African Charter on Human and Peoples Rights, 1981

[9] Application No 020/2016 (African Court on Human and Peoples' Rights), p. 21

[10] Article 13 (1) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time

[11] Ibid., Article 13 (6) (a),

[12] [1992]TLR 157

Honourable Judge Mwalusanya allowed the appeal by the appellant who had been denied legal aid by the state. With that interpretation from the Court, it is clear that legal aid is a Constitutional right. Below the Constitution, the Criminal Procedure Act promotes the provision of legal aid to any accused person. Under section 310,[13] it requires any person charged with an offence before any criminal court, other than the primary court, be afforded with legal representation subject to the provisions of any written law relating to the provision of professional services by an advocate. The Legal Aid Act follows this Act in the ladder,[14] enacted by the Parliament of Tanzania and came into operation on the 1st of July 2017.

This Act applies to Tanzania Mainland only.[15] Zanzibar has also enacted their own Legal Aid Act [16]which regulates the provision of legal aid services in Zanzibar. Following the enactment of the LAA, the Legal Aid Regulations were promulgated on 9th February 2018 to facilitate enforcement of the provisions of the Legal Aid Act. The Legal Aid Act was a repeal that replaced the Legal Aid (Criminal Proceedings Act)[17]. This Act establishes an excellent coordination of the legal aid providers and monitoring mechanisms of legal aid services,[18] to recognize Paralegal[19] and to improve provision of legal aid services. Very specifically, the LAA, unlike previous legislation, extends provision of legal aid assistance to all criminal matters and civil matters.[20] The Act also widens the certifying authority from the judges to include a magistrate, chairman of the land tribunal, labour, or tax tribunal, adjudicatory body, or any other tribunal as the Minister

[13] Section 310 of the Criminal Procedure Act, Cap 20 [R.E.2002]
[14] Act No.1 of 2017
[15] Section 2 of the Legal Aid Act, Act No. 1 of 2017
[16] Act No 13 of 2018
[17] Cap 21 RE 2002, see the provisions of section 49 of the Act No. 1 of 2017, ibid
[18] Ibid., part 2
[19] Ibid... section 19 , 20
[20] section 2 of the LAA

responsible for legal affairs may by order published in the gazette determine.[21] The Act allows provision of legal aid services by Legal Aid Providers (LAPs)[22] which may be nongovernmental organizations, Community based organizations, company limited by guarantee and any other organ or Institution formed or recognized under the relevant law that offers legal aid services.

This Article offers an historic overview of the provisions of the legal aid in mainland Tanzania, in line with the incumbent challenges. It is mainly divided into five parts. The first part is the introductory part which defines the key terms like legal aid services, indigent person and explains the legal basis for provision of the legal aid in Tanzania Mainland. Part two deals with the historical background of the provision of Legal aid in Tanzania Mainland from the colonial era to date, part three discusses the salient features of the current legal aid services. Part four discusses the challenges and solutions of legal aid services in Tanzania Mainland whilst part five is the conclusion party.

2. *Legal Aid In Tanzania Mainland: Historical Revelation*

The Tanzanian Government, like many other modern states, has been improving numerous services to its citizens. We have witnessed significant improvement in the provision of legal aid services, industrialization, infrastructure, education, health care, agriculture, trade and commerce and a plethora of other things from the colonial era to this date. Historically, provision of legal aid services in Tanzania mainland has been regulated since the Colonial Tanganyika, after independence and the incumbent Tanzania Mainland.

[21] Ibid., section 27
[22] Ibid., section 10

2.1. *In Colonial Tanganyika*

Tanzania Mainland, (then known as Tanganyika) like many other African Countries, was affected by the scramble and partition of Africa during 1880's. During this period, Tanganyika was divided to the Germany colony in 1885, in 1914-1918 British took over the ruling of Tanganyika, and after World War 2 Tanganyika was declared by the United Nations as the trust territory that the British was mandated to maintain and control.[23] Britain applied the Poor Prisoners Defence Ordinance.[24] The application of this law was on the basis it was unrealistic to expect a layperson to draft legal documents or to claim that they have been given a fair hearing without the help of a legal expert.[25] In the first instance, one notes that the Poor Prisoners Defence Ordinance[26] which came into operation in July 1945, afforded an opportunity to the poor prisoners appearing before the High Court Judge or Magistrate with the extended jurisdiction to get legal assistance in preparation of their cases and provision of defence by advocates [27]. The necessary conditions stipulated under the Ordinance were to grant legal aid to an accused person where the matter is either criminal in nature and tried in the High Court or before the magistrate with an extended jurisdiction and he must be approved by the certifying authority (certifying authority were the Registrar or Judge of the High Court) that he has insufficient means to engage a private advocate to defend his case.[28] The state would remunerate the advocates a token amount for this service.[29]

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[23] Legal and Human Rights Centre and Zanzibar Legal Services Centre, Sexual Violence: A Threat to Child Rights & Welfare in Tanzania (Tanzania Human Rights Report 2018), 2019, 1

[24] Cap 21

[25] International Legal Assistance Consortium, Justice in Rwanda: An Assessment, ILAC, 2007, Pg.19

[26] idem

[27] Section 3 of the Poor Prisoners Ordinance Cap 21

[28] Idem.,

[29] Ibid., Section 4

2.2. *Independence Tanganyika*

Tanzania Mainland got its independence in 1961 and in 1964 it was united with Zanzibar.[30] After the independence, Tanzania Mainland continued to apply the Poor Prisoners Ordinance until 1969 before it was repealed by the Legal Aid (Criminal Proceedings) Act.[31] Unlike the Poor Prisoners Defence Ordinance, the Criminal Proceedings Act extended the definition of certified authority to include the Chief Justice and Principal Judge, in case the proceedings are in the High Court and the Judge in charge of the District Registry in the case proceedings are within the Resident Magistrate or District Court of the Respectively High Court District Registry[32]. The Registrar was not a certifying authority as was in the Ordinance rather he was tasked to assign the indigent person an advocate after the certifying authority issued the certificate to aided person.[33]

Also, in the Legal Aid (Criminal Proceedings) Act, legal aid was offered in criminal cases but it was not limited to the proceedings and appeal in the High Court or to the proceedings before the Magistrate with the extended jurisdiction as was in the ordinance, rather the legal aid was extended to criminal proceedings before the Resident Magistrate Courts and in the District Courts after the certifying authority approved it.[34] The cost or remuneration of the advocate assigned to the case of indigent person was carried by the government of Tanzania from general revenue of the United Republic of Tanzania.[35] The Act

[30] Legal and Human Rights Centre and Zanzibar Legal Services Centre, Sexual Violence: A Threat to Child Rights & Welfare in Tanzania (Tanzania Human Rights Report 2018), 2019,pg 1 and 2
[31]Section 8 of the Legal Aid (Criminal proceedings) Act Cap 21
[32] Ibid., section 2
[33] Ibid,
[34] Ibid
[35] section 4 the Legal Aid (Criminal proceedings) Act Cap 21

did not regulate the provision of the Legal Aid by Non-Governmental Organisations.

Lastly, contrary to the Ordinance, the Legal Aid (Criminal Proceedings) Act empowered the Chief Justice to make rules after in consultation with the Minister responsible for Legal Affairs[36] while in the Ordinance the power to make rules for better carrying on of the Ordinance was left to the High Court.[37]

The Legal Aid (Criminal Proceedings) Act of 1969, which like its predecessor relied on the discretion of the certifying authority, depending on the nature of the case, to order legal representation by an advocated at the expense of the State.[38] The former piece of legislation – a colonial legacy- made reference to *poor prisoners*, the post-independence one made reference to *indigenous people.* Be it as it may, the fact remains that both governments recognized the fact that there are vulnerable people who need state intervention and provide legal aid at some point along path of criminal justice process. These two pieces of legislation addressed the criminal justice. No single piece of legislation in pre-colonial and postcolonial seemed to address legal aid in civil cases. Traditionally, dispute settlement mechanisms in our communities covered both civil and criminal matters. There was a gap in our legal system regarding the provision of legal aid to indigent person as there were many legal aid providers but were not coordinate and monitored by the government, paralegal were not recognized by the Act although they were helping the public at large this led to formation of Legal Aid Secretariat.[39]

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[36] Ibid., section 7

[37] Section 6 of the Poor Prisoners Defence Ordinance Cap21

[38] Section 4 of the Legal Aid (Criminal Proceedings) Act Cap 21 and Section 4 of the Poor Prisoners Defence Ordinance Cap 21

[39] Ministry of Constitutional and Legal Affairs, Monitor and Evaluation Report on Legal Aid Secretariat Performance for year 2012-2013 to 2013-2014, Mocla 2015 page 6

Legal aid secretariat was officiated on 28th August, 2012 by the Deputy Minister of Constitutional and Legal Affairs Ms. Angellah Kairuki (MP).[40] The secretariat was formed by government and civil society organizations. The secretariat was formed to coordinate provision of legal aid services in the Country so that to cover the gap left under Legal Aid (Criminal Proceedings) Act.[41]Among the other things, it was recommended in the evaluation report that the Government should enact the legislation which will regulate provision of legal aid services and recognize paralegal as the secretariat performance was inadequate due to insufficient legislation on provision of the legal aid services with eventual enactment of the LAA.[42] And in the upshot, next section revisits the salient features of the LAA.

3. Salient Features Of The Current Legal Aid Services

3.1 *Institutional hierarchy*

The Institutional hierarchy of the legal aid services is the President of the United Republic of Tanzania, Minister of the Constitutional and Legal Affairs, Permanent Secretary of the Ministry of the Constitutional of the Legal Affairs, National Legal Aid Advisory Board, The Registrar of the Legal Aid Providers and the Assistant Registrars in every Region and every District. The President of the United Republic of Tanzania must assent the bill after the parliament has passed the same.[43] And in case there will be any amendments or repeal of the Act it means the President will have the power as the head of State to assent the bill amending or repealing the LAA. Under the LAA the Minister has been empowered to make publication the bill into government gazette, to direct the Board and the Registrar of the

[40] Ibid

[41] Legal Aid Secretariat, "Concept Note: Assessing Tanzania's Criminal Legal Aid System and Making Recommendations for Improvements and Reforms" The International Legal Foundation (ILF) New York, 2014 pg.10

[42] Ibid., 21

[43] Section 4 of the Interpretation of Laws Act, [CAP 1 RE 2002]

Legal Aid Provider to perform any other functions, lay the annual estimates of the Board before parliament for approval, enact code of conduct of LAPs, paralegal and to make rules for better implementation of the Act and appoint the members of the board.[44] Permanent secretary of the Ministry of the Constitutional and Legal Affairs has been given duties to implement under the LAA like to supervise Registrar of the Legal Aid Providers and appoint Regional and District Assistant Registrars after consultation with Permanent Secretary of PO RALG[45]

The National Legal Aid Advisory Board and the Office of the Registrar of the Legal Aid Providers also are in the Institutional hierarchy of legal aid provision and will be discussed below in coordination and monitoring of provision of legal aid services. In other jurisdiction their institutional hierarchy is different from ours. For example Zambia Institutional hierarch is the Minister responsible of Legal affairs who appoints members of Legal Aid Committees, there is the Director of Legal Aid Services whose functions is to grant or terminate legal aid services to indigent persons and Legal Aid Committee established in every District of the Republic of Zambia. [46]

3.2 *Coordination and Monitoring of Legal Aid Services*

3.2.1 ***National Legal Aid Advisory Board (NLAAB)***

The Legal Aid Act established two bodies that help to coordinate and monitor the provision of legal aid services in the Country. The Act establishes the National Legal Aid Advisory Board and the Office of the Registrar of the Legal Aid Providers.

[44]Ibid., section 1,5(1)(e) &7(1)(m), 38 (3),42(2), 48(1)
[45] Ibid., section 7(3) (b), 8(1)
[46] Section 4,7and 22 of the Zambia Legal Aid Act, CAP 34 accessed in parliament.gov.zm(accessed on 14/8/2019)

National Legal Aid Advisory Board[47]is new feature. Before the enactment of the LAA there was no legislative organ to oversee and advise the government on provision of the legal aid service in the country. The main functions of the Board as stipulated under the Act[48] are to provide policy guidelines to the legal aid providers, to advise Minister for MoCLA on policy issues and other matters relating to provision of legal aid so as to improve the legal aid services, approve annual returns of the Legal Aid Providers (LAPs), determine the appeals emanating from Registrar of Legal Aid Providers (RLAPs) and perform other functions which as directed by the Minister for MoCLA.

Structurally the Board comprises the chairperson who is the Judge of the High Court appointed by the Minister after consultation with the Chief Justice and seven other members as elaborated in the Schedule of the LAA. The Registrar of the Legal Aid Providers serves as the secretary of the board. In other jurisdiction like Zambia, their Legal Aid Legislation[49] did not establish the National Legal Aid Advisory Board. The Act establishes the Legal Aid Committee in every District. [50] although members of the Committee are appointed by the Minister responsible for legal affairs however their not duty bound to advise the Minister in different issues related to policy making, amendment of the law, determine any appeal from the Registrar to the Committee as it is in Tanzania[51] rather committees are required to receive and determine applications made before it by the indigent person.[52] It is my opinion that establishment of the board is important in every jurisdiction to enhance effective monitoring and coordination as it is in Tanzania.

[47] Section 4 of the LAA
[48] Ibid., section 5
[49] The Legal Aid Act, [CAP 34]
[50] Ibid., Section 7
[51] The Legal Aid, Act No. 1 of 2017
[52] Regulation 5 of the Legal Aid (General) Regulations

As at the time of writing this article, the respective institutions have appointed the Members of the Board and the administrative processes in respect of their selection conducted. The Minister has already endorsed their names. The First Board meeting is due any time from now.

This is a milestone achievement. Contrary to some misguided complaints and murmuring from some quarters, the NLAAB has a Fund. The Act categorically stipulates the sources of the Board Fund[53] and it includes any sums as may be appropriated by the Parliament, donations, grants and any other monies or assets that may accrue to the Board from other sources. This is a clear statement of the fact that there are actually funds for legal aid. How the funds will be used it is within the mandate of the NLAAB to decide, and good enough the NLAAB comprises of all key stakeholders, including LAPs.

So far, through the Office of the Registrar has opened a special account for legal aid as required by the law[54]. Registration fees by LAPs are deposited into that account. That is a starting point. The NLAAB has all it takes to raise enough for its activities and that of LAPs and it will deem fit.

3.2.2 Registrar of the Legal Aid Providers

The Act introduces the office of the Registrar of the Legal Aid Providers at National level. [55]The Registrar is assisted by assistant registrars at the regional and district levels. The RLAPs[56] is appointed by the Permanent Secretary of the MoCLA. When discharging these functions and duties the Registrar is supervised by the Permanent Secretary. At sub-national level, the Registrar is assisted by Assistant Registrars who are appointed

[53] S. 37 of the Act
[54] Regulation 5(5)
[55] Section 6 of the LAA
[56] The first RLAPs in Tanzania Mainland is Madam Felistas J. Mushi

by the Permanent Secretary -MoCLA in consultation with relevant authority presently being the President's Office - Regional Administration and Local Government Office (PO RALG).[57] There are currently 209 appointed assistant registrars who were published in the Government Gazette No. 215 dated May 18th 2018.

Before the enactment of the LAA, there was no Registrar of the Legal Aid Providers or Assistant Registrars. The legal aid services offered to the indigent person was by the Order of the Court or legal aid providers who and there was Government institution established by any act to adequate monitor exclusively legal aid services executed by LAPs. The core functions of the Office of the Registrar as stipulated in the Act[58] are as described herein below.

a) Registration and Cancellation

The RLAPs and he may registrar, suspend or cancel the registration of any legal aid provider by reason of malpractice, negligence, misconduct or disobedience and fraud.[59] The Registrar can also inspect any legal aid provider's office for type and quality of legal aid services offered. The regulations sets the basic standards of a legal aid provider's office to at least include a separate room for the advocate or paralegal, a secretarial desk and a computer, chairs or benches for clients, a basic collection of reference material like laws, law reports and legal books in addition to legal materials including current paralegal manual, a book shelf, filing cabinet or places for proper keeping of records. The office should physically be easily accessible by people with disabilities[60]. The RLAPs will inspect the LAPs for confirming whether they meet the standards and to review the files and

[57] Section 8 of the LAA
[58] Section 7 of the LAA
[59] Section 7 (1)(a),(b),(c) of the LAA
[60] Reg. 5(6) of the Legal Aid Regulations of 2018

quality of services offered. In the Inspection visits conducted in Arusha, Geita, Singida, Simiyu, Songwe and Katavi has proved to be very useful as it unlocked some of the most difficult cases that the Paralegals could not handle. The Permanent Secretary of the MoCLA who is professionally a lawyer and historically a legal aid provider took up those cases and personally made follow up to their finality. The exercise is ongoing.

b) Promoting literacy and legal awareness

Before the enactment of the LAA, the legal aid secretariat was given a power to promote legal literacy and legal awareness by conducting National Legal Aid Week.[61] After the enactment of the Act, the power to create literacy and legal awareness is left with the Registrar of legal aid providers and he is required to take appropriate measures for promoting legal literacy and legal awareness among the public and, in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and legal obligations. In this regard, the Office of the Registrar in collaboration with other stakeholders have been conducting legal aid week in different regions every year in order to promote legal literacy and legal awareness among the public and in particular educate vulnerable sections of the society about their rights and duties under the Constitution and other laws. So far legal aid week has been celebrated in the regions of Dar es Salaam, Dodoma, Kigoma, Kagera, Morogoro, Singida, Tabora, Mtwara and Rukwa. During the commemoration legal aid is provided through various means including public education through media, legal aid to persons in detention places and in public areas such as bus stations and market place. Special sessions with some target groups like schools and hospitals were

[61] Legal Aid Secretariat, "Concept Note: Assessing Tanzania's Criminal Legal Aid System and Making Recommendations for Improvements and Reforms" The International Legal Foundation (ILF) New York, 2014 pg.10

held in Kagera and it turned out to be quite successful. Also, under the guidance of the Registrar, simplified versions of the Act and the Regulations are developed for easy understanding and use by Paralegals.

c) Supervision of Training of Paralegals

The Office of the Registrar is empowered to coordinate and facilitate the formulation and accreditation of curriculum for training of paralegals. The Office of the Registrar in collaboration with the Law School of Tanzania and other stakeholders formulated the curriculum for training of paralegals. A Training Manual has been developed from the comprehensive Curricula and has so far been used for refresher trainings for existing Paralegals as well as police and prisons officers serving as paralegals. The curriculum comprises of thirteen modules including: Introduction to Paralegalism; Introduction to Law; Land Law; Office Management and Administration; Financial Planning and Management; Civil Procedures and Civil Obligations; Criminal Law and Procedure; Employment and Labor Relations; Law of Family and Domestic Relations; Government Structures and the Law-Making Process; Dispute Settlement Processes and Institutions and the Basic Rights and Duties. Whereas the Manual is already in use, the Curricula has been submitted to accreditation authorities for Vocational Training.

The intention of supervising the training of the paralegal is to ensure the quality of legal aid services. It was insisted in the UNODC, that the states should conduct or supervise the training to legal aid providers to ensure the quality of the legal aid services in their countries.[62]

[62] United Nations Office on Drugs and Crime, Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes Practical Guidance and Promising Practices, United Nations, 2019 p.8

d) Record keeping and legal aid data management

Other functions are to keep and maintain the Register of legal aid providers, coordinate, monitor and evaluate the functions of legal aid providers and give general and Legal Aid Act specific directions for the proper implementation of legal aid programme. The functions include keeping records and reports regarding legal aid providers, preparing various reports on legal aid services and other matters for submission before the Board, to facilitating information sharing in accessible format and providing guidelines for networking between legal aid providers and the Government. In this regard, the Office of the Registrar has developed a web-based online registration and performance monitoring system.[63] As its name suggests, the system caters for both registration and monitoring. The ongoing LAPs registration is being conducted through this system.

Unlike Tanzania Mainland the duty to keep register in Kenya is endowed with National Legal Aid Services and not to the RLAPs. The LAPs are required to submit address, particulars of registration, services issued to the indigent person and number of cases handled to National Legal Aid Services which shall keep the same.[64]

e) Dispute settlement

The Registrar is also mandated to determine disputes between legal aid providers other than advocates, and between legal aid providers and aided persons. The development of the Code of Conducts has been in collaboration with LAPs. It is yet to be tested, and so there has been no reported dispute.

[63] www.legalaid.sheria.go.tz
[64] Section 60 of the Kenyan Legal Aid Act, Act No. 6 of 2016

f) Formulation of Guidelines for Networking

The Act imposes the duty of the RLAPs to issue guidelines that will help to provide the effective networking between legal aid providers and the Government.[65] In carrying out this function, the Office of the Registrar has so far issued Guideline on establishment of inter-sectoral legal aid co-ordination committees and subnational levels. The committee comprises of all key justice sector actors, respective LGA in the locality and the LAPs. Consultations meetings were held in various regions before the Guidelines were issued. In response to the Guidelines, some regions have already established such Committees and their functioning is very encouraging. Kagera, Songwe, Simiyu are some of the very first regions to respond to the call with their regional administration taking the lead as legal aid champions.

In Zanzibar, unlike Tanzania mainland, their Legal Aid Act has establishes the Legal Aid Department which is headed by the Director of Legal Aid Department. The functions of department resemble to the functions performed by the Board and Office of the Registrar of the Legal Aid Providers as stipulated under the Act.[66] Therefore they have one department which monitors and coordinate legal aid services in the Country different from Tanzania Mainland which has two institutions to monitor and coordinate the legal aid services in the Country.

3.3. Extended Services in Criminal and Civil Cases

Legal aid in civil and criminal cases constitutes one of the novel things in the current law. The previous Legal Aid (Criminal Proceedings) Act, [67]and Section 310 of the Criminal Procedure Act[68] regulated the provision of legal aid services in criminal cases only, and in practice legal aid was offered in serious

[65] Section 7 (k) of the LAA
[66] Section 3,4 and 5 of the Zanzibar Legal Aid Act, 2018
[67] Cap 21
[68] Cap 20

offences only. Ensuing as legal assistance, LAA defines it to include legal support granted to persons in civil and criminal cases.[69] LAPs may offer legal representation in civil and criminal cases in their jurisdictions. The legal aid may be provided in various alternatives, for instance where the court orders in Civil cases or where in criminal matters in both serious and minor offences for interest of justice when the accused does not have sufficient funds to hire advocates and is appearing before the Judge or Magistrate[70]

Furthermore, the Act by order of Court, extensively regulates provision of legal aid services. The emphasis is made to children in conflict with the law that they must have legal representation when they are appearing before the Judge or Magistrate.[71]In compliance with the Act, the Chief Justice has issued rules governing provision of legal aid by order of court in both civil and criminal cases.[72] Further the MoCLA has entered into a Memorandum of Understanding with Jot to collaborate in legal aid matters. Under this MoU, among others, consultative meetings with LAPs will be conducted with a view to discuss the implementation of the Act particularly as far as JoT role is concerned.

3.4. The Legal Aid to Person in Police Lawful Custody

The LAA allows provisions of legal aid services to a person detained in police custody or remandees in prison or other places of lawful custody. Advocates, lawyers and paralegal are all allowed to offer legal aid services at lawful custody (prison and police custody) on behalf of their Institutions. The Act also

[69] Section, 2 of the LAA
[70] Section 27 of LAA
[71] Ibid, section 33(1), (2),
[72] Judicature and Application of Laws (Practice and Procedure in Cases Involving Vulnerable Groups) Rules, 2019 GN No. 110 published on 1/2/2019

establish legal aid desk in every prison and police station.[73] This position on providing legal aid to person in lawful custody is backed up with the UNODC principle which compel states to provide legal aid to person lawful detained.[74]The provision of legal aid to indigent person by Lawyers and paralegal is the new development in our country. Previously under the PGO, only advocates were allowed to provide legal assistance to the indigent or any prisoners. [75] There was no legal aid desk established by any Act or regulations. The Act requires regulations governing provision of legal aid to persons in custody be formulated in consultation with the Minister responsible for Home Affairs[76]. Several consultations have been made as a result of which a Memorandum of Understanding was signed between the two Ministries in this regard. Further, Guidelines governing legal aid to persons in custody were developed and are already in use. Under this collaboration, Police Force and Prison Services have appointed Officers to serve in legal aid desks. These Officers have been trained and are already serving in that capacity. However, discussions are ongoing at high levels as to how best to roll out the implementation of the Act and the Memorandum of Understanding.

Unlike Tanzania, the Zambia Legal Aid Act,[77] is silent on establishment of the Legal Aid Desk in police office, prison or any lawful custody. Also their Act is silent on provision of legal aid services to indigent person by lawyer and paralegal. It is my opinion that other jurisdiction which does not have legal aid desk in their police office, prison or any other place of a lawful

[73] Ibid., Regulation 25 (1),
[74] The United Nations Office on Drugs and Crime, Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes Practical Guidance and Promising Practices, United Nations, 2019 p.23
[75] 155 Police Regulations[CAP 280 R.E. 2002]
[76] S.37 of the Legal Aid Act, Act No. 1 of 2017
[77] Cap 34

custody may establish legal aid desk in their jurisdiction to facilitate effective provision of the legal aid service to person in lawful custody.

At level of analysis, the LAA provide quite a very promising piece of legislation. Moving extra miles from what has been the practice regarding the provisions of the legal aid services in Tanzania, forming institutional setup in extension the LAA is a demonstration of Tanzania's eagerness to uphold the rule of law and access to justice to all. Despite is promising future, the next section consider what are live challenges and possible solutions as follow in the next section.

4. Challenges and Solutions

4.1) Challenges

Operationalization of legal aid services *vides* the LAA, as a comprehensive process to for legal aid services in Tanzania is facing the following challenges:-

Firstly, the limited number of Legal aid providers. It is estimated that the population was more than 43,625,354 million people in Tanzania Mainland.[78] Available data suggests that up to 9th July, 2019 the Roll of Advocates in Tanzania reached a number of 8088 advocates. 500 advocates were admitted recently, but only 3500 advocates are practicing advocates[79] and only few working to the registered legal aid providers. Also up to 5th August, 2019 only fifty seven (57) Legal aid providers were registered. There are 122 pending application on registration of the legal aid providers which will be registered after they have met the necessary conditions stipulated by the Act, this is according to legal aid

[78] Legal and Human Rights Centre and Zanzibar Legal Services Centre, Sexual Violence: A Threat to Child Rights & Welfare in Tanzania (Tanzania Human Rights Report 2018), 2019,pg 5

[79] TLS Team presentation on 11th July, 2019 during Criminal Justice Forum held in St. Gasper Conference Centre, Dodoma

database system which may be accessed by the Ministry officials but other information may be accessed by general public.[80]

Secondly, most of LAPs are operating in towns and only few LAPs operate in rural areas, it is estimated that 70% of advocates are located in urban areas.[81] It is indeed true that most of Tanzanian population is found in rural areas and not in towns.[82] After going the through the online applications submitted to RLAPs for registration of LAPs it was discovered that most of the applicant physical and postal addresses where located in urban area and not in rural areas.[83] This leads to shortage of legal aid services in rural areas.[84]

In addition to that the financial constraints, as most of NGOs depend highly on financial support from development partners to execute their functions. Even with the amendments of the NGOs Act which allows to them make profit and limit sharing of profit most of them they are still dependent. Although the development partners are helping them, occasionally they do not execute their financial support on time and this lead to delay of services. Some LAPs they don't get financial support as they lack qualification stipulated by DPs and this limits the provision of legal aid services in the Country.

Furthermore, there is a wrong perception of some legal practitioners regarding the provision of legal aid services to indigent persons is wrong; especially some advocates who

[80] www.legalaid.sheria.go.tz
[81] The Ministry of the Constitutional and Legal Affairs, Child Justice a Five Year Strategy for a Progressive Reform 2013-2017,2012, pg. 93
[82] Legal and Human Rights Centre and Zanzibar Legal Services Centre, Sexual Violence: A Threat to Child Rights & Welfare in Tanzania (Tanzania Human Rights Report 2018), 2019,pg 5
[83] www.legalaid.sheria.go.tz
[84] Ibid

believe that legal aid is affecting their business/services. Nonetheless, the truth is that, according to the LAA, the legal aid services must be offered to a person whose means are insufficient to afford hiring a private practitioner. Therefore, because legal aid is only offered to persons with financial constrictions, there is no way that provision of legal aid can negatively affect the business of a private practitioner/advocate.

Moreover, inadequate cooperation between government organs and non-governmental organizations offering legal aid services is a result of lack of knowledge or inadequate knowledge of this Act and the duties established for each party. Some LAPs go beyond the limit provided by the Act, for example, when paralegals wish to represent their clients in the courts of law. Some government officers are also are unaware of their duties under the Act. However, the Ministry in cooperation with CHRAGG and other NGOs and Developmental partners have been conducting a training to Government officials and Nongovernmental officials in order to eliminate this challenge.

4.2 Recommendations

The following are the recommendations to the challenges raised;

Firstly, in order to minimize the shortage of legal aid providers and extend provision of legal aid services to the rural areas, the number of paralegals needs to be increased. Secondly, LAPs including the NGOs and other institutions should be advised on how to raise their own capital by investing in different activities which will generate profit and help them implement legal aid service activities and not depend solely on the DPs. LAPs are also advised to set a budget to purchase legal materials. The third resolution is to create awareness on the existence of the Legal Aid Act, its regulations, rules, rights of each party and their respective duties. Lastly, the government needs to increase the

budget of the Judiciary and other Tribunals dispensing justice in Tanzania. This will help the government, through the court order, provide legal aid services to an indigent person.

2. *Conclusion*

This article vividly shows that the LAA has improved the legal aid services in the country, compared to the Poor Prisoners Defense Ordinance and The Legal Aid, (Criminal Proceedings) Act as described above. However, the government, through the office of RLAPs and other stakeholders, has a duty to publicize, create awareness and legal literacy on the existence of the LAA and that will help the indigent person to have an absolute access to justice, the same way people with sufficient means to engage private practitioner have. It is also clear that if the LAA will be properly executed by the government and other stakeholders, the indigent people's rights will be protected. It should also be noted that legal aid services are designed to protect the indigenous people's rights, facilitate a fair trial, and promote equality before law.

TOWARDS COORDINATED LEGAL AID SERVICES IN TANZANIA

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Abstract

The enactment of the Legal Aid Act 2017, as a comprehensive Act governing legal aid services in the country, reaffirms the commitment of the government to the fair and humane justice system in which the access to justice is provided to all people. While legal aid is a foundational for the enjoyment of other rights, before the enactment of the Act it was limited in its scope and definition. The only law that dealt with legal aid provision in criminal matters was the Legal Aid (Criminal Proceedings) Act 1969 and, practically, it was offered in criminal proceedings, and in practice to those crimes involving capital punishment.

This article provides a scholarly basis of the legal aid as well as the review of the background to the enactment of the Act; and the selected features introduced by the Act in the legal aid services in the country. This includes relevant provisions on the legal aid providers and the forms of service. It also raises some of the pending challenges such as: the systems of accountability, unreliable funding base, uneven geographical coverage, and inadequate regulations and rules when operationalizing the Legal Aid Act 2017. Accordingly, the article concludes with some recommendations to the legal aid providers, beneficiaries as well as the society.

Key words: *legal aid services, coordination, legal aid providers, laws and regulations, beneficiaries*

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1 *General Introduction*

This article reviews the legal aid services in Tanzania, with particular emphasis on the period before the enactment of the Legal Aid Act 2017. In this context, the paper provides the background of the enactment of the Act and the legal aid services in the country. However, it does not provide all aspects of the Legal Aid Act 2017 and its Regulations.

Legal aid is an essential part of the administration of justice with a fair, humane and efficient civil and criminal justice system that is based on the rule of law, and is perceived as a foundation for the enjoyment of other rights.[1] It is an opening to the stability of any society by granting all people equal access to justice. The absence of legal aid services is tantamount to autocracy, which can even exist without law. Without legal aid, justice becomes too expensive for the poor and laws largely become an instrument of the rich to oppress the poor. As per the then Chief Justice of Tanzania, *Barnabas Samatta*, it is in the democracy where '*judges should be dear, but justice should be cheap*'[2].

Legal aid facilitates access to justice which, as stated by the then Chief Justice of Zanzibar, *Hamid Mahmood Hamid,* is a hallmark against vigilantism, and the chaos and anarchy it causes as it ensures peaceful, regulated and institutionalized mechanisms to solve disputes, without resulting to self-help.[3] Indeed, it was in 1901 where, Lyman Abbott, in his address at the 25th Anniversary Dinner of the Legal Aid Society in New York said:

[1] Annex to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, E/CN.15/2012/L.14/Rev.1.
[2] Sammata, p. 2, Perspectives on Legal Aid Zanzibar.
[3] Perspectives on Legal Aid and Access to Justice in Zanzibar, pp. 81-82.

"If ever a time shall come when in this city only the rich man can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only the golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the hands of men, and they will almost be justified in the revolution which will follow".[4]

Many authors have attempted to define legal aid, legal assistance and legal aid services[5] depending on the context of what they seek to address. Yet, there cannot be said to exist a single universal definition of legal aid.[6] Since this article undertakes the Tanzanian context, the whole concept of legal aid will be captured from the practice of legal aid before 2017 and how the same has evolved to the time of the enactment of the law currently governing the practice of legal aid in the country; i.e. the Legal Aid Act 2017.[7]

Under the Act, the term legal aid has been defined under the term "legal assistance" to mean "A legal aid support granted to a person on civil or criminal cases to assist such person to take legal steps in protection of his rights". This includes provision of legal education and information, legal advice, assistance or legal

[4] Brownell, E.A. (1951), Legal Aid in the United States, p. xiii.
[5] Legal aid is termed as a service due the fact that, the "aid" that the indigent person receives is a professional assistance from the qualified legal personnel (lawyers) and trained paralegals.
[6] For instance, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems defines "legal aid" as including legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. It also includes the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.
[7] Act No.1 of 2017.

representation.[8] Arguably, this definition captures the most appropriate definition for Tanzania, given its socio-legal context, and has the potential to make access to justice a reality across the country.

Before the enactment of this Act in 2017, there was no agreed upon definition of legal aid other than that its legal assistance, representation and advise that is provided to the poor and indigent or in matters of public interest (making reference to public interest litigation) The only law that dealt with legal aid provision in criminal matters was the Legal Aid (Criminal Proceedings) Act 1969 However, it did not comprehensively define legal aid and it was limited in scope; for it only provided for legal aid in criminal proceedings and in practice to those crimes involving capital punishment. Other laws referred to legal aid in the terms of exempting court fees and costs to persons granted legal aid services. This includes the Court of Appeal Rules[9] and the National Elections (Election Petitions) Rules.[10]

2 *Background to the Coordinated Legal Aid Service in Tanzania*

The roots of provision of legal aid in Tanzania can be traced from the establishment of the Legal Aid Committee at the then Faculty of Law, University of Dar es Salaam, in the year 1967. This was the students' initiative of giving back to the community. It was a mother and an inspiration to other legal aid clinics in the

[8] Section 3, Legal Aid Act, 2017.

[9] Rule 122(4) states "No fees or security for costs shall be payable or lodged by an appellant who has been granted legal aid under the Legal Aid Scheme of either the Faculty of Law, University of Dar es Salaam, or the Tanganyika Law Society or the Tanzania Women Lawyers Association (TAWLA) or the Legal and Human Rights Centre."

[10] Rule 11 (4) states "No security for costs shall be payable by a petitioner who has been granted legal aid under the Legal Aid Scheme of either the Faculty of Law, University of Dar es Salaam, the Tanganyika Law Society, the Tanzania Women Lawyer's Association (TAWLA) or the Legal and Human Rights Centre.

academic institutions and non-academic institutions that provide legal aid in the country to-date.[11]

It is important to note that, two years later, the Legal Aid (Criminal Proceedings) Act 1969 was enacted, extending the practice to the Judiciary where advocates were assigned *probono* cases in criminal matters attracting capital punishment to the accused who could not engage in private legal services. This was the first statute ever in the independent Tanzania to deal with legal aid.

Increased provision of legal aid and assistance became one of the objectives of the Government of Tanzania's Legal Sector Reform Programme (LSRP) under which the government was committed to establishing a National Legal Aid Scheme funded by it in partnership with external partners. This was partly out of the realization that legal aid schemes run by the civil society organizations were heavily dependent on donor funding which were not always forthcoming and thus influenced negatively on sustainability.

The National Legal Aid Forum in Tanzania held in November 2010 resolved and proposed to the government that: (a) a national legal aid scheme should be established as a hybrid model that includes both the public and private sector; (b) an autonomous, independent legal aid regulatory body should be established; (c) the position and roles of legal aid providers including paralegals should be clarified; and (d) the day-to-day running of the independent legal aid regulatory body should be independent of the government but the latter should provide any support required. The government then resolved to enact a comprehensive law on the Mainland Tanzania on legal aid

[11] Tanzania Network of Legal Aid Providers (TANLAP), Tanzania Legal Aid Report, 2017, page 5.

service provision within the country, which also recognizes paralegals in the country.

It needs to be noted that, the need to recognize and provide a legal framework for the paralegals in the country started on 17 November 1983; when the Minister of Justice, then Hon Justice Damian Lubuva, assigned the Law Reform Commission of Tanzania (the LRC) to conduct a research on Private Legal Practice in Tanzania. A Committee of ten people, headed by Prof. Issa G. Shivji was set up to conduct an in-depth research and come up with recommendations on how to implement Judicial System Review Commission (the JSRC) recommendations to ban the private practice.

Specifically, this committee was directed to consider the following: (a) how JSRC recommendations can best be carried out without jeopardizing the Constitutional and statutory right of persons to legal assistance and representation; (b) what measures could be taken to ensure that members of the public in urban as well as in rural areas are availed an opportunity to obtain legal assistance and representation, and (c) what measures should be taken to mold the legal profession into an organ of the people of Tanzania to be more responsible and responsive to the needs of the public, and those whose functions and systems of operation are well understood by the people.

In August 1985, the Committee issued a working Paper No.1/1985 entitled "*Discussion Paper on Issues on Reform in the Private Legal Practice in Tanzania*" for the purposes of soliciting views of members of the public, the bar and the bench and members of other professional bodies as well as members of the academia. The Committee presented its Report to the LRC on 29 September 1986 with a number of recommendations including the following:

(a) the private legal practice should continue to be part of our legal system in order not to jeopardize the constitutional and statutory right of persons to legal assistance and representation.

(b) the definition of certifying authority in section 2 of the Legal Aid (Criminal Proceedings) Act, 1969 (No.21/69) be amended to include any Judge of the High Court for the purposes of granting legal aid to accused persons in subordinate courts;

(c) the provisions of the Legal Aid (Criminal Proceedings) Act, 1969 be publicized and used extensively for indigents even in District Courts and Courts of Resident Magistrate in deserving cases for more people to benefit from the provision of legal aid services than it is at present;

(d) the Government establish a special fund from which to make grants to support voluntary legal aid schemes; and

(e) the Government should review and revitalize the internship programme or, alternatively, establish a Law School, to strengthen the practical training of newly qualified lawyers.

In 2002 the LRC, on its own accord, commenced a study on the scheme for provision of legal services by paralegals. The study aimed to produce a report that would supplement the report on Private Legal Practice in Tanzania which was presented to the Honorable Attorney General and Minister of Justice in 1987. The aim for undertaking the said study was to determine: (a) whether there was a need for legally establishing the cadre of paralegals, (b) the paralegals' role in the justice system, (c) the qualification for paralegals, and (d) the need to establish an institution to deal with the procedure of recognizing credentials of paralegals, enrolment, conduct, training and the setting of fees for the services of paralegals.

The LRC completed the study and submitted its report to the government on August 2004 pursuant to section 14(1) of the Law Reform Commission of Tanzania Act No. 11 of 1980. The LRC made a major recommendation for the establishment of the paralegal cadre to represent parties in primary courts and perform other legal activities for the sake of ensuring justice is timely and accessible to every Tanzanian.

Based on the above, in 2009, the Ministry of Justice and Constitutional Affairs submitted a Cabinet Paper pursuant to the Inter–Ministerial Committee Directives 1/2009-10 requesting for the same. After deliberation of the Cabinet Paper it was directed that a Concept Paper be developed and submitted to supplement the said Cabinet paper.

On the political plane, the need to recognize paralegals was one of the agenda of the current ruling party's election manifestos. Clause 108 (j) of CCM Election Manifesto 2005 - 2010 promises: *'kuweka mfumo utakaowezesha kutumika kwa wanasheria wa awali (paralegals) katika mahakama za mwanzo'*. Again Clause 186 (j) of CCM Election Manifesto 2010-2015 promises *'kuweka mfumo wa kuwasaidia wananchi wasiojiweza kupata msaada wa kisheria'*.

In 2010, the government established a department in the Ministry of Constitutional and Legal Affairs to deal with Legal Services including legal aid, then under the Directorship of Mr. Joseph Ndunguru. Through this Department, in 2011 the government established a 'Task Force' headed by Dr Kennedy Gastorn, then the Chairperson of the Legal Aid Committee of the University of

Dar es Salaam.[12] It was mandated to study and recommend appropriate law(s) on the legal aid provision services in the country, to provide for the formation of the permanent and sustainable legal aid coordinating body along with recognizing and formalizing the work of paralegals in Tanzania.

The TaskForce did an extensive literature review on the state of legal aid service provisions in the country. It also visited neighboring countries including Uganda, Malawi, Zambia and Sierra Leone, to learn international best practices. The Task Force then drafted a Bill as an annex to its Final Report to the government as part of its recommendations. The Bill was subjected to various stakeholders' workshops and significantly benefitted from their useful comments and suggestions[13] and also received useful expert opinions.[14]

One of the key reform proposed under the Task Force Final Report was to recognize, regulate and coordinate paralegals within the larger framework of the legal aid service provision in

[12] Members of the Task Force included Dr. Kennedy Gastorn (Chairperson, LAC – UDSM), Mr. Harold Sungusia (Vice Chairperson, LHRC), Ms. Juliana Munisi (Member, AGC), Ms. Felistas Mushi (Member, MoCLA), Ms. Jamila Lugembe (Member, TAWLA), Mr. Zepherine Galeba (Member, TLS), Mr. Juvenal Rwegasira (Member, WLAC), Mrs. Christine Sonyi (Member, MoCLA), Mr. Daniel N. Lema (Secretary, LAS) and Mr. Jonas Lyakundi (Secreatary, LAC – UDSM).

[13] Stakeholders usually includes TAMISEMI, Ofisi ya Rais, Menejimenti ya Utumishi wa Umma, Wizara ya Maendeleo ya Jamii, Jinsia na Watoto, Tume ya Kurekebisha Sheria Tanzania, Mahakama ya Tanzania, Ofisi ya Mwanasheria Mkuu a Serikali, Wadau wa Maendeleo, Jeshi la Polisi, Vitivo vya Sheria vya Vyuo Vikuu nchini, Taasisi za hiari kama vile Chama cha Mawakili wa Tanzania Bara (TLS). Asasi binafsi kama TAMWA, Women Legal Aid Committee, Tanzania Women Lawyers Association (TAWLA), Legal and Human Rights Centre (LHRC), Envirocare, Kivulini Women Rights Organization and Tanzania Paralegal Network (TAPANET).

[14] This includes the Nova Scotia Legal Aid Commission (*Karen Hudson*, QC, Director) and the Legal Service Society of British Columbia (*Mark Benton*, Executive Director) under the support of *Marcia Colquhoun* of the Canadian High Commission in Tanzania and *Andrea Redway* of the International Development Program of the Canadian Bar Association.

Tanzania. By 2011, a number of trained paralegals in Tanzania were estimated at 1,770 out of which 850 were actively working as paralegals.[15] It was estimated that over 80% of all Tanzanians could not afford to engage an advocate for legal services. That meant an average of paralegal/clients stood at 1/41,411.

The Task Force Final Report also recommended the establishment of the legal aid fund and an independent legal aid body to regulate legal aid services and implement the National Legal Aid Scheme. Accordingly, it was also proposed that the Legal Aid (Criminal Proceedings) Act, Cap 21 be repealed and some of its provisions be taken into the new comprehensive law on legal aid service provisions in the country. Other laws, such as the Magistrates Courts Act 1984 and the Advocates Act Cap 341, were also earmarked to be appropriately amended.

Some of the Task Force's recommendations were included in the final Bill issued by the government, which led to the enactment of the new law on legal aid services in Tanzania, the Legal Aid Act 2017. In relation to the paralegals, it is fair to say that the walking of paralegals eased their recognition, first by the community and non-state actors and later by the Legal Aid Act 2017.

3 Legal Aid Services in Tanzania

3.1 Who receives legal Aid?

The provision of legal aid in Tanzania extends to an "indigent person" who is either financially or socially vulnerable,

[15] This included Taswira ya Haki Paralegals Unit, Sauti Zetu Paralegals Unit (Monduli), Azimio Paralegals Unit (Arusha Urban), Equity Paralegals Unit (Karatu), Morogoro Paralegals Unit, Mtwara Paralegal Centre Company Limited (MPCCL), Lindi Women Paralegal Aid Centre (LIWOPAC) and Lindi Women Paralegal Aid Cente (LIWOPAC).

depending on the material conditions of his or her case.[16] However, it has been customarily known that, such services only extend to the economic vulnerable with no financial means to access private legal services. The experience has shown that, not only does the economic vulnerable people fit for legal aid, but also the social vulnerable. This is to mean, a person with economic stability but with other social impediments[17] may opt for legal aid services due to the belief that his or her legal rights are better protected in such scheme than when she hires such services from private practitioners. Here, the legal aid provider has the duty to assess the "social vulnerability" of such indigent person before admitting him or her as a legal aid client.[18] Before the enactment of the Legal Aid Act the LAPs were by and large operation under the same procedures, the qualification to get legal aid was being an indigent or there being some public interest in the matter. The laps had their own means testing mostly through a set of questions the client needs to answer to justify either their indigence or vulnerability. This practice has continued even with the advent of the law. LAPs also receive clients who are perceived as indigent or vulnerable through referrals from the courts, local government authorities, regional administration as well as other institutions depending on where the LAP is located and the institutional affiliation.

The underpinning reason behind the right to legal aid is premised in the universally accepted principle of 'fair trial' or "fair hearing". This principle which is generally one of the

[16] Section 3 of the Legal Aid Act, *ibid*, defines an indigent person to mean "a person whose means are insufficient to enable him to engage a private legal practitioner and includes other categories of persons (emphasis added) where the interest of justice so require."

[17] This may be his or her counterpart's relationship with the office of private practitioners he or she always hire such services from.

[18] See section 21 (3) of the Legal Aid Act, *ibid* providing for assessment of the indigent person's legal aid application.

human rights standards is universally recognized and documented in national constitutions, regional and international human rights instruments.[19]

3.2 Laws Related to Legal Aid in Tanzania

The concept of legal aid in Tanzania emanates from a wider human rights aspect of "access to justice" which has a bearing on the international instruments recognized by Tanzania and national legislation. When a person is legally aided to access his legal rights, he or she is standing the ground to protect his or her inherent human rights before the designated authorities (not necessarily Courts of law). Fortunately, such aid is backed by laws at the international and domestic law levels as discussed below.

3.2.1*International Level*

Internationally, the Universal Declaration on Human Rights 1948[20] under Article 11(1); states have been placed under an obligation to ensure that every person facing charges before Courts of law (in criminal cases) are afforded with all means to defend their case. The same right to defend a person's case while facing criminal charges through the state's assistance is addressed in the later International Covenant on Civil and Political Rights 1966.[21] The Covenant spells a material condition that; a person may defend his case via his private legal counsel; but when he or she fails to hire one due to financial or other

[19] Handbook on Improving Access to Legal Aid in Africa, New York, 2011; Criminal Justice Handbook Series, United Nations Office on Drugs and Crimes: Available at: https://www.un.org/ruleoflaw/files/Handbook_on_improving_access_to_legal_aid_in_Africa.pdf accessed on 3rd July, 2019.

[20] General Assembly Resolution 217 A (III), 10 December 1948, also recognized by the Constitution of the United Republic of Tanzania, 1977 under Article 9 (f).

[21] General Assembly Resolution No. 2200A (XXI) of 16 December, 1966. Ratified by Tanzania on 11th June, 1976.

social limitations, the same must be afforded legal aid by the state.[22] This is implemented in Tanzania. Legal aid given to alleged offenders who cannot afford the costs to hire private legal services via the famous "dock briefs" system that existed during the era of the Legal Aid (Criminal Proceedings) Act and has been adopted by the Legal Aid Act 2017.

Another impetus for legal aid under international law can be seen on the provisions of the Convention on the Elimination of all Forms of Discrimination against Women[23], albeit not expressly pronounced. When one reads the principle of equality before the law as enshrined in the Convention, they can clearly see it imposing an obligation to the state parties, to ensure women are accorded equal rights with men before the law.[24] This may include affording indigent women equal opportunity with men to receive legal aid. The Convention on the Rights of the Child adopted in the year 1989[25] also provides for the obligation of state parties to afford a child in conflict with the law, who has no means to afford legal assistance; an assistance to be informed of his or her charges, prepare and present his or her defense.[26] Likewise, under the International Convention on the Rights of Persons with Disabilities of the year 2006,[27] in its Article 12 (3) and 13, the State Parties are charged with the responsibility to take all reasonable steps to ensure persons with disabilities access their legal rights on equal ground with others. This may include affording them with the necessary legal aid.

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[22] Article 14(3) (b) of the International Covenant on Civil and Political Rights, 1966.
[23]United Nations General Assembly Resolution No. 34/180 of 18th December 1979. Signed by Tanzania on 17th July 1980 and ratified by the same on 20th August 1985.
[24] Section 15 (1) of the International Convention on Elimination of all Forms of Discrimination against Women, 1979.
[25] General Assembly Resolution No. 44/25 of 20 November, 1989 signed by Tanzania on the year 1990 and ratified the same on 1991.
[26] Article 40 (2) (b) (ii) & (iii), *ibid.*
[27]General Assembly Resolution No.61/106 of 13th December, 2006. Signed by Tanzania on 30th March, 2007 and ratified on 10th November, 2009.

Notably, some of the international instruments that recognized vulnerable groups[28] have been specifically discussed to portray the multiple vulnerability these groups hold when viewed from an indigent persons' perspective to receive legal aid. For instance, a child or a woman with a disability and financial shortcomings, who at the same time faces legal challenges; may be in more need for legal assistance. However, this does not mean legal aid should be provided with preferences but, these considerations may be taken into account while assessing whether a person fits for legal aid by the legal aid providers.

3.2.2*Regional Level*

The African Charter on Human and Peoples Rights 1981[29] which provides for human and peoples' rights in the African region, guarantees a person's right to have his or her case heard including the right to defend one's case and be represented by the Counsel of his or her choice.[30] This provision speaks of a person's right not to be condemned unheard. Here the implication is that, states are under the obligation to ensure people whom by their means cannot afford Counsel of their choices, are afforded legal aid.[31] The African Charter on the Rights and Welfare of the Child 1989 which addresses the rights and welfare of the Child in the African region, expressly provides for the child's right to be accorded with legal assistance in

[28] Women, children and persons with disabilities

[29] Adopted in 27 June, 1981 by the Eighteenth Assembly of the Heads of States and Governments of the Organization of African Unity (OAU) now the African Union (AU) as OAU Doc.CAB/LEG/67/3/Rev.5

[30]See Article (7) (1) (c) of the African Charter on Human and Peoples' Rights. Signed by Tanzania on 31st May, 1982 and ratified on 18th February, 1984.

[31] See Article (7) (1) (c) of the African Charter on Human and Peoples' Rights. Signed by Tanzania on 31st May, 1982 and ratified on 18th February, 1984.

preparation and presentation of his or her defense.[32] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[33] affords women equal rights with men before the law. The Protocol further imposes an obligation to the state parties to ensure women are adequately represented among the notaries public, judges, magistrates, lawyers, bailiffs, prosecutors, police officers and gendarmes.[34] This includes assisting women to access their rights via legal aid when it is not possible for them to engage in private legal services.

At the East African Community level, there is no specific provision under the Treaty for the Establishment of the East African Community 1999 that expressly dealt with access to justice via legal aid. However, with the consideration of legal aid being a human right, one can appropriately make inference that legal aid is an important aspect of rights and social justice within the Community legal framework as in Article 3 (3)(b) of the Treaty which makes the respect of human rights a prerequisite for acceptance into the Community.

Furthermore, the Treaty recognizes the promotion and protection of human and people's rights as a fundamental principle of the Community under Article 6 (d).[35] The Treaty

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[32] Adopted by the Organization of African Unity (OAU) now the African Union (AU) on 1990 as OAU Doc. CAB/LEG/24.9/49. Signed by Tanzania 23rd October, 1998 and ratified on 16th March, 2003.
See http://hrlibrary.umn.edu/research/ratification-tanzania.html

[33] Adopted by the African Union at its second Summit in Maputo Mozambique on 11th July, 2003. Signed by Tanzania on 15th November, 2003 and ratified on 3rd March, 2007.

[34] Article 8 (e) of the African Charter on Human and Peoples Rights on the Rights and Welfare of

[35] For a detailed discussion of the General Principles enshrined in the EAC Treaty see Kamanga, Khoti Chilomba, and Ally Possi. "General Principles Governing EAC Integration." In East African Community Law: Institutional, Substantive and Comparative EU Aspects, edited by Ugirashebuja Emmanuel, Ruhangisa John

emphasizes on the harmonization of laws pertaining to the Community, legal education and cross boarder legal practice.[36] This has implications on legal aid provisions across the region. When all the laws on provision of legal aid are harmonized in the region, the multitude of legal aid providers in Tanzania will increase. This is yet to be achieved at the Community level. However, the Treaty further emphasizes adherence to the principles of social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights per the African Charter on Human and Peoples' Rights and other universally recognized human rights standards;[37] provision of legal aid to the indigent persons being one of them.

Apart from the above, international legal instruments addressing legal aid in the country, Tanzania takes cognizance of several other international and regional initiatives which provide for the indigents person's access to legal aid. Such initiatives are like the

Eudes, Ottervanger Tom, and Cuyvers Armin, 202-16. LEIDEN; BOSTON: Brill, 2017. http://www.jstor.org/stable/10.1163/j.ctt1w76vj2.15.

[36] Article 126 of the Treaty for the Establishment of the East African Community, 1999.

[37] See Article 6(d) and Article 7 (2) of the Treaty, *ibid*, which spells the fundamental and operational principles of the East African Community.

Dakar Declaration[38] and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004.[39]

3.2.3*The National Level*

Unlike the current situation in the country, in the previous years, Tanzania had no comprehensive national legal aid policy nor legal framework. With time, the legal aid environment is developing more muscles in terms of policy and legal framework to ensure access to justice for all. The Constitution of the United Republic of Tanzania 1977[40] under Article 13(6) (a), the right to legal representation is explained through the right to fair hearing. This cuts across both civil and criminal cases which calls for legal representation to persons with or without capacity to hire legal services. The Legal Aid Act 2017 which is currently the most comprehensive legal aid legislation in Tanzania provides for right to legal aid to indigent persons in both civil and criminal matters unlike the Legal Aid (Criminal Proceedings) Act 1969[41] whose scope was rather limited to crimes attracting capital

[38]This Declaration was developed in Dakar Senegal on the Seminar on the Right to a Fair Trial in Africa held between 9 to 11 September 1999 in collaboration with the African Society of International and Comparative Law and Interights where the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa were adopted. Such recommendations were subsequently adopted in a Resolution by the African Commission on Human and Peoples' Rights at its 26th Ordinary Session in November 1999. See The Resolution on the Right to a Fair Trial and Legal Assistance in Africa - The Dakar Declaration and Resolution available at http://defensewiki.ibj.org/index.php/Resolution_on_the_Right_to_a_Fair_Trial_and_Legal_Assistance_in_Africa_-_The_Dakar_Declaration_and_Resolution accessed on 6th July, 2019.

[39] Adopted by 128 delegates from 26 countries including 21 African countries who met to discuss legal aid services in the criminal justice systems in Africa on a Conference titled: Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa held in Lilongwe, Malawi between 22nd and 24th November, 2004. See the Declaration at https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-2004-lilongwe-declaration-en.pdf

[40] Cap. 2 R.E 2002

[41]Cap. 21 R.E 2002, now repealed by the Legal Aid Act, 2017, Act No.1 of 2017.

punishment which are murder and treason. The Law of the Child Act 2009[42] also has a bearing on legal aid to children in conflict with the law. The Act directs that, such child shall have a right to legal representation by an advocate.[43] In this situation, legal aid chips in to ensure this right is attained for an indigent or unrepresented child.[44] Furthermore, the Criminal Procedure Act 1985[45] provides for an accused person's right to defend his or her case using an advocate of the High Court per the provisions of any written law relating to the provision of professional services by an advocate.[46] The professional services by an Advocate may be private or through legal aid assistance.

4 Delivery of Legal in Aid Tanzania

4.1 Legal Aid Providers

When one reads the Legal Aid Act[47] and its Regulations[48] there is no specific definition of who is a legal aid provider. However, the Act impliedly indicates the qualifications of who may be termed as a legal aid provider under section 10 of the Act. Such qualifications are: the legal provider has to be an institution which is registered under the relevant laws and provision of legal aid being one of its basic function.[49] The institution must have permanent office and office facilities plus a personnel that consists not less than two advocates, or one advocate and one lawyer, one lawyer and two paralegals, one advocate and two

[42] Act No. 21 of 2009.
[43] Section 99 (1) (f) of the Law of the Child Act, 2009
[44] Section 35 of the Legal Aid Act, *ibid*, provides for legal aid to children in conflict the law.
[45] Cap. 20 R.E. 2002
[46] Section 310 of the Criminal Procedure Act, 1985.
[47] *Supra*, note 2.
[48] Legal Aid Regulations, 2018, GN. No. 44 of 9th February, 2018.
[49] Under section 10 (3) these requirements are waived in relation to legal aid provided by the Judiciary and the higher learning institutions.

paralegals, or three paralegals. The Act further provides that, in case the office lacks an advocate, it must be affiliated to another legal aid provider who has an advocate before its registration.[50] This gives a direct impression that, legal aid provision has to be offered by registered offices or institutions.[51]

4.2 Legal Aid by the Higher Learning Institutions

It may seem surprising to some as to why the higher learning institutions provide legal aid in the country. It must first of all be understood that, the legal aid initiative in Tanzania started at the higher learning institution as already traced in the preceding paragraph. Other reasons are that higher learning institutions have the duty to give back to the society through public service, as these institutions are by all means run by the funds obtained from the society. Moreover, schools of law and faculties are staffed with well experienced legal personnel to tackle complicated legal aid cases. Also, higher learning institutions fit in legal aid provision as they are part of the legal training in the country (legal aid include training the society on substantive laws and procedures). Moreover, legal aid practice in such institutions is more practical to enable students to have a glimpse of practical training in tackling legal issues and the sense of giving back to the society under the academic staff's supervision.[52] Also, the role of academic staff in provision of legal aid in higher learning institutions avails such personnel with practical aspects of law that enhance the Schools of Law and Faculties' quality of legal training to law students. Examples of Legal aid clinics in the higher learning institutions are: the Legal Aid Committee of the University of Dar es Salaam School of Law

[50] Section 10 (1) and (2) of the Legal Aid Act, *supra.*
[51] Section 24 of the Legal Aid Act, *supra.*
[52] Temu Goodluck, "The Place and Role of Higher Learning Institutions in the Provision of Legal Aid in Tanzania" in *Zanzibar Year Book of Law*, Volume 5, 2011, pages 311,313 and 314.

(which is the oldest legal aid provider in the country), University of Dodoma Legal Aid Clinic (UDOM-LAC), legal aid clinics at Faculty of Law of the Open University of Tanzania and Moshi University College of Cooperative and Business Studies.

4.3 Legal Aid by the Judiciary

Before the Enactment of the currently operating Legal Aid Act (*supra*), Legal aid by the Judiciary has been practiced under the mandate of the Legal Aid (Criminal Proceedings) Act 1969; although the same limited its scope to cases attracting capital punishment, mostly murder. There is no record of a specific reason as to why such a limitation was exercised. However, some have argued that the reason could be; cases attracting death penalty as a capital punishment in Tanzania are typical cases not to risk having an accused unrepresented, while defending his or her case, as it involves a matter of life and death. It should be noted that, under this Act, it was the Judiciary that determined a person's suitability to legal aid and assign his or her case to a practicing advocate via the Judiciary Registrar.[53] Under the same Act, the advocates assigned legal aid cases but the Judiciary received remuneration from the general revenue of the United Republic of Tanzania.[54]

Under the new Legal Aid Act (*supra*), the practice of legal aid by the Judiciary has been sustained and extended to all criminal cases as well as civil cases. Moreover, the scope of the "certifying authority" has been extended from Judges and Magistrates to the

[53] Under section 2 of the Legal Aid (Criminal Proceedings) Act, *supra* "certifying authority" meant: the Chief Justice or the Principal Judge of the High Court or the Judge in charge of the District Registry where the proceeding is conducted; and in the case of proceedings before a District Court or a Court of a Resident Magistrate the Chief Justice or the Principal Judge of the High Court or the Judge in charge of the District Registry where the proceeding is conducted. Also, see Section 3 of the same Act, which provides for free Legal Aid by the Judiciary.

[54] Section 4 (1) of the Legal Aid (Criminal Proceedings) Act, *supra*.

Chairpersons of *quasi-judicial* bodies. The adjudicators have been charged with an obligation to ensure that, in any civil or criminal matter, any person who appears to be in need of legal aid and he or she has insufficient means to obtain such aid, he or she receives legal aid for the interests of justice.[55] Under this new Act, advocates' remuneration for taking up legal aid cases as assigned by the Judiciary comes from the Judicial Fund.[56]

4.4 Legal Aid by the Law Society (Tanganyika Law Society)

The Tanganyika Law Society was established in the year 1954 by the Tanganyika Law Society Ordinance (now the Tanganyika Law Society Act Cap 307) as the bar association of Tanzania mainland. Legal Aid services with the Tanganyika Law Society have been taking place since then in different models under the Legal Assistance Committee up to the year 2009 when the Legal Aid Unit was established and entrenched with the Secretariat. Later on, the TLS embarked in training and involving paralegals in the provision of legal aid to areas where the Secretariat legal aid services cannot be frequently extended. The Tanganyika Law Society offers legal aid in fulfilment of its vision which is having a society where justice and the rule of law are upheld and the mission which is to secure access to justice in the country. Also, the TLS provides legal aid in the execution of one of the objectives for its establishment which is to protect and assist the public in Tanzania in all matters touching, ancillary or incidental to the law.[57]

[55] Section 27 and 33(10) of the Legal Aid Act, *supra*.
[56] Section 33 (3), *ibid*.
[57] Section 4 of the Tanganyika Law Society Act, Cap 307 R.E 2002.

4.5. Legal Aid by Non-Governmental Organizations (NGOs) and Civil Society Organizations

These are initiatives to support the government in ensuring access to justice is obtained in the country. Most of these legal aid providers are donor funded and interact with the community at the grass root level. Each of them have its mission and vision as well as special targeted groups. For example; the Tanzania Women Lawyers' Association (TAWLA) permanently offers legal aid to indigent women and children as the priority groups in its established legal aid clinics across the country.[58] However, other community outreach activities and legal assistance is done by TAWLA with no preference as to gender nor age. Examples of such activities are: community conversations, mobile legal aid and community based trainings. Another NGO with preferential targeted group is the Women Legal Aid Centre (WLAC) which provides legal aid to indigent women in its permanent legal aid clinic in Dar es Salaam. Unlike the two foregoing legal aid providers, the Legal and Human Rights Centre (LHRC) offers legal aid in its permanent legal aid clinics in Dar es Salaam and Arusha to everyone who proves to be indigent. Other examples of legal providers are the National Organization for Legal Assistance (NOLA), Arusha Women Legal Aid and Human Rights Centre (AWLAHURIC), Action for Justice in Society (AJISO) and the Kilimanjaro Women Information Exchange and Consultancy Organization (KWIECO).[59]

Some of these offices were registered under different relevant laws like the Non-Governmental Organizations Act 2002[60] and others Societies Act 1954. [61] However, following the recent

[58] TAWLA has established permanent legal aid clinics in Dar es Salaam, Tanga, Mwanza, Arusha and Dodoma regions.
[59] The list is not exhaustive.
[60] Act No. 24 of 2002.
[61] Cap. 337 R.E 2002.

development in the law brought by the Written Laws (Miscellaneous Amendments) (No.3) Act 2019, some institutions registered under the Societies Act have been obliged to change their status from the Civil Societies to Non-Governmental Organizations so as to continue offering legal aid. This is because, as they have been providing legal aid "by default" as part of giving back to the society exceeding their mandate to operate as civil society organizations.[62] The word "society" has been re-defined by the new amendment to mean an association established for the benefits of its members professionally, socially, culturally, economically or religiously.[63]

4.6 Legal Aid by the Paralegals

A paralegal is a non-lawyer, with at least a secondary education or without a secondary education but has served as a paralegal for more than two years,[64] who receives legal training to deliver legal assistance at the grass root level of the community.[65] This group of legal aid providers are not allowed to practice law since they do not hold such qualification nor are they allowed to charge fee for the legal assistance provided to the indigent persons.[66] A nearly similar definition is provided for under the current Legal Aid Act as quoted:

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[62] Section 25 (g) of the Written Laws (Miscellaneous Amendments) (No.3), Act, 2019 amends the definition of an NGO.
[63] Section 35 (b), i*bid*.
[64] Section 19 (1) and (3) of the Legal Aid Act, *supra.*
[65] Mauya Felister, "Improving Access to Justice in Tanzania: The Role of Paralegals," *Zanzibar Year Book of Law*, Volume 2, 2012, page page 407 citing Ishengoma Angela K., *Report on the Legal Reform Process for the Recognition of Paralegals in Tanzania*, Dar es Salaam: Friedrich Ebert Stiftung, 2011, page 2.
Also see section 19 (2) of the Legal Aid Act, *ibid.*
[66] Section 20 (5) & (6) of the Legal Aid Act, *ibid*

A person who is accredited and certified to provide legal aid after completing necessary training in the relevant field of study approved or recognised by this Act (the Legal Aid Act)

Paralegals deliver legal services from their registered paralegal units where initial legal procedures in solving a case may be provided. They also provide legal education at the grass root level; households, streets, schools, markets or village meetings. Paralegals can assist members of the community on the initial steps to be taken in solving matrimonial, probate, land, civil and even criminal cases from the grass root level. They have been trained to assess the facts to the case, identify relevant legal issues to be tackled and advise the indigent person on the pecuniary and geographical jurisdiction of the relevant forums particular cases may be taken to. They may also provide information on the location and services delivered by other legal aid providers nearby or refer clients to such legal aid providers when they cannot fully provide the required services.

In the incidents that cases presented to paralegals attract practical aspects of law like drawing of legal documents or appearing before Courts of law or Tribunals in handling, such paralegals (if operating in an office with no any advocate) play a role in linking the legal aid clients to another legal aid provider with an advocate. Paralegals mostly receive legal trainings and guardianship from other legal aid providers (legal guardians) with competent lawyers like the Tanzania Women Lawyers Association, Women Legal Aid Centre, Legal and Human Rights Centre and the Tanganyika Law Society. Examples of the paralegal units operating in the country are Taswira ya Haki Paralegals Unit, Sauti Zetu Paralegals Unit (Monduli), Azimio Paralegals Unit (Arusha Urban), Equity Paralegals Unit (Karatu), Longido Paralegas Unit[67] Morogoro Paralegals Unit, Mtwara

[67] Trained and work with by the Tanzania Women Lawyers' Association

Paralegal Centre Company Limited (MPCCL), Lindi Women Paralegal Aid Centre (LIWOPAC) and Lindi Women Paralegal Aid Cente (LIWOPAC).

5 Forms of Legal Aid Services

Some forms of legal services delivered by the legal aid providers are spelt by the current Legal Aid Act, (*supra*) to include: legal education and information, legal advice, assistance or court representation.[68] Additionally, other forms are: training of legal aid clients for self-representation before the Courts of law and reconciliation. Below is an expansion of the content of legal aid services provided by legal aid providers in the country.

5.1 Legal Education and Information

The service is termed as legal education as it involves imparting basic legal knowledge that may be relevant to a particular case, for example, certain legal procedures. On the other hand, legal information may contain the details on the location of the legal aid providers or proper forums that handle certain legal matters like the marriage conciliatory boards, social welfare offices, law firms, police gender desks, police stations, Courts of law and Tribunals.

This form of legal aid is usually delivered through community conversations, moot courts, dissemination of tool kits on different legal procedures and trainings. It can also be provided via media outlets such as newspapers, radio, television programs and most of all, social media. The legal education and information disseminated to the society aid the indigent people in accessing proper forums on time or taking the right steps towards accessing justice. Legal education and information activities done by the legal aid providers expressly or impliedly draw the legal

[68] Section 3 of the Legal Aid Act, *supra.*

aid closer to the needy in the society. Expressly in the sense that, it can touch an indigent person directly and impliedly in the sense that, it may reach the person who knows an eligible indigent person and assist him or her in accessing his or her justice via the education and information received.

5.2 Legal Advice and Counselling

This consists of a professional legal opinion by the legal aid providers to the indigent person. It is mostly practiced when a client approaches a legal aid provider seeking for an opinion in certain legal matters. In other circumstances, a legal aid provider may by his or her own initiative provide this service when he or she identifies a need to offer such service. Under this category, a legal aid provider accesses the facts of the case and give his or her advice on the best ways that may bring justice to the needy. By legal counselling, the legal aid provider makes it known to the legal aid client that the chances of his or her success in the case and advise him on the necessary steps to be taken with all important warnings and possibilities. This may happen at the legal aid providers' office premises or through mobile legal aid which is usually provided outside the legal aid providers' office premises in the events of national or international legal celebrations like the law day, legal aid week, international human rights day, and 16 days of activism. Though, the mobile legal aid may be one of the legal aid providers' initiatives to bring the legal services closer to the society even where there is no special occasion to be celebrated.

5.3 Legal Assistance

This involves a legal aid provider going further than just advising and counselling the legal aid client. It involves the legal aid providers' further undertakings to admit and work on the client's case. This entails following up on the clients' case in the Courts of law or other relevant forums, issuing demand notices,

drafting of legal documents such as applications, plaints, written statement of defense, submissions or applications for execution of Court's order, application for the maintenance or custody of children.

5.4 Legal representation

This entails representing clients before adjudicatory bodies including the courts of law, tribunals, labor commissions etc. It is usually done by advocates or paralegals depending on the nature of the forum. Legal aid by the judiciary, practice this form of legal aid largely by involving the Court in assigning legal aid cases to advocates. It remains a challenge for advocates working with legal aid providers who usually have less number of advocates in their offices to appear in court physically. This is due to the fact that, advocates working with legal aid providers (who are expected to represent clients in legal forums) are the same ones depended on in the legal aid clinics to offer legal aid, provide legal guidance to other lawyers and paralegals involved in the provision of legal aid as well as drafting of legal documents. With legal representation, the challenge remains with the time such advocates will have to spend in the Courts of law or Tribunals leaving legal aid activities in their clinics pending their physical presence.

5.5 Coaching for Self –Representation

This kind of legal service involves coaching of legal aid clients who have matters before adjudicatory bodies to represent themselves. This form is resorted to by most of legal aid providers due to insufficient number of advocates who volunteer to work with the legal aid providers. Most legal aid providers cannot afford assigning legal representation to each legal aid client with pending cases before Courts or Tribunals. Therefore, couching such clients for self-representation before courts of law or tribunals comes as the substitute. This is to ensure the rights to

'fair trial' and the indigent persons' access to justice is obtained and not prejudiced by such person's inability to hire private legal services and the legal aid provider's inability to offer legal representation.

5.6 Mediation and reconciliation

Another form of legal assistance offered by legal aid providers is the non-litigation methods of dispute settlement of mediation and reconciliation. In conducting mediation, the party with whom a legal aid client is in dispute is requested to willingly appear at the legal aid clinic whereby a legal aid provider plays a neutral role in solving their dispute without involving Court's procedure. In reconciliation, a legal aid provider will legally explain the facts of the case to the parties to a dispute (one of which is a legal aid client), the pro and cons of embarking on Court's litigation and urge them to reconcile their differences outside the ambits of the Court. Practice has proved success in some of the cases solved by this method mostly in civil, matrimonial and maintenance cases. This method of legal aid assistance creates a peaceful society with the traditional experience of dispute settlement. It also assists the Court of laws and Tribunals in reducing backlog of cases that would have fallen to such forums if the mediation or reconciliation did not take place and succeed. Mediation and reconciliation is usually preferred by legal aid providers but when it fails, further legal aid is provided to the legal aid client to litigate such case in proper forums.

Despite all the efforts to deliver legal aid in the country, probably more than 90% of the legal needs in Tanzania go unmet and a large segment of the population living in rural areas rely on customary law dispute resolution mechanisms. That means, often people living outside the main towns do not have access to the formal legal system. One of the major impediments to access to justice and delays in justice in Tanzania is the fact that very few

people can access legal aid due to among many other factors; lack of information, means and ability to reach out to legal aid providers.[69]

6 Challenges

The legal aid sector in Tanzania faces several challenges including weak systems of accountability, unreliable funding base, uneven geographical coverage, and inadequate regulations and rules in the operationalization of the Legal Aid Act 2017.

A legal aid can be sustained if the entire system is accountable and is driven by a clear vision and mission. In 2001, a study by Crag Cameron concluded that some of the legal aid services providers had developed a tendency of "abandoning their constituencies" and their leaders' assuming the attitude of "money chasers" depending on what the situation was. In this regard, the conclusion was that some of these NGOs and or their leaders were opportunistic with no clear system of accountability to their constituencies. [70] It is not clear whether currently all legal aid providers have sound systems of accountability.

Majority of legal aid providers, and almost all NGOs offering legal aid services, have no independent sources of funding for legal aid work beyond external sources, mostly from development partners or donors. Majority are without membership fees or contribution dedicated for legal aid activities. The donor syndrome and the doubt whether legal aid providers indeed work for the advantaged or disadvantaged are their guinea-pigs needs to be investigated. It is also important to acknowledge the fact that if the government becomes the legal

[69] This comes from the writer's experience of working with a legal aid clinic for more than two years.
[70] Crag Cameron, "Taking Stock of Pastoralist NGOs in Tanzania" [2001] Review of African Political Economy No 87 pages 55 – 72.

aid providers' financier, automatically the government control may not be avoided. A balanced approach is accordingly needed.

Up until recent, most of the legal aid providers in Tanzania are urban based with limited activities in the rural areas. This also applies to the practicing lawyers and advocates. The over-presence of legal aid providers in the cities has been construed by critics as the 'abandonment of their constituencies' and coming closer to the media and donors.[71]

There is also a need for the Bar Association in Tanzania to support paralegals, especially at the time when some practicing advocates are urban–based, not willing to offer *pro bono* or even accommodate non advocates in the legal practice. No wonder, mandatory *pro bono* services is not required under the TLS legal practice and renewal of practice certificate.

The Legal Aid Act 2017 needs to be fully operational by having all regulations and rules needed to be enacted under it. It equally needs to be promoted though awareness to the community and all stakeholders.

7 Conclusion

The practice of legal aid in Tanzania has generally been an area of progress in legal practice both legally and practically. Legally, we have seen in place a comprehensive law enacted to bring coordination and effect quality to the legal aid practice in the country. Practically, we have witnessed mushrooming of the number of legal aid providers including legal recognition of paralegals as legal aid providers in the country to secure access to justice for all citizens. It is an interesting arena, where both the government and non-governmental organizations work with the central objective of guaranteeing equal rights to access justice

[71] Efficacy Report, Mchome/Peter, p. 9.

between those who can hire private legal services and those who cannot. Despite the general achievements of legal aid provision in the country, there still exists challenges facing the legal aid providers and beneficiaries of the same. These includes but are not limited to shortage of personnel and other resources like funds to effectively run and deliver legal aid services to the needy on time. Also, lack of genuine commitment with some legal aid providers and general poor awareness of the whole concept of legal aid by the citizens stands as the major challenge for legal aid in Tanzania.

Additionally, some members of the society hesitate to engage legal aid providers with misleading ideas that such services are expensive and therefore cannot be provided for free. This to a great extent affects the lawyer-client relationship in some cases as the indigent person will throughout his or her case operate with the mindset that he or she has to meet some financial obligations on the way or at the end of the journey. This calls for more awareness raising programs to both legal aid providers and the legal aid beneficiaries.

8 Recommendations

8.1 For Legal Aid providers

i) Legal ethics should be observed at the highest standard possible in discharging legal aid services. Legal aid providers should ensure the quality of legal aid provided meets the standards of those who pay for the same. This is to say, services should be provided in the sense that, the legal aid clients do not feel the gap of their inability to hire private legal services. Also, conflict of interest should be avoided to strengthen an indigent persons' trust in legal aid providers. For instance, one legal aid provider should avoid being involved in both cases from the opposite parties no matter their eligibility criteria. As to the paralegals, they should ensure that they act within the ambits of

their mandate and not engaging themselves in practices prohibited by the law like drafting of legal documents or representing clients in Courts as advocates. This may jeopardize a legal aid client's cases when such practice is noticed. In this incident, clients' documents drawn by a paralegal or a case represented in a Court of law or Tribunal will immediately be stuck out.

ii) Legal aid providers should toughen their dependable relationship with the relevant stakeholders to accelerate access to justice in the society. This includes introducing themselves and their services to grass root level leaderships (local government), the Judiciary, social welfare offices, police stations and gender desks, cultural leaders, religious leaders and women forums to mention a few. This will hasten access to justice to the needy as these stakeholders directly engage with the society in several day to day life incidents, legal issues being one of them. Also, such good relationship will reduce unnecessary barriers or bureaucracy when some legal aid clients are referred to one or more of such stakeholders to obtain further non-legal assistance.

iii) Legal aid providers should strengthen good relationship among themselves to ensure access to justice is attained at high standards without delay. For example, some clients who do not fit some admission criteria to one legal aid provider may be referred by such legal aid provider to another nearby legal aid provider for assistance. This can only be done when a good relationship is maintained among them. Also, a good relationship among legal aid providers will assist them in learning from each other on the best methods possible for offering legal aid to the needy or enable them to conduct joint legal aid activities in the society.

iv) In delivering effective legal aid services, legal aid providers should strictly abide by the law regulating legal aid practice in the country. This includes strictly accessing the indigent persons' eligibility criteria to avoid draining the clients off the private legal practice market. Also, charging of fees to the legal aid clients against legal aid providers' policy should strictly be avoided as it contradicts the law and defeats the whole idea of legal aid. This will balance the scale between private legal practice and legal aid practice in the country, because both practices are authorized by the law.

v) Clients to be educated on the meaning of legal aid and their right to access justice before receiving legal aid. This will ease their interaction with their legal aid providers and enable them to understand and trust that justice will transact their way as if they are being served by private legal practitioners.

vi) At the adjudicatory level, Judges, Magistrates and Chairmen of Tribunals should handle legal aid clients' with care especially those who have been coached to represent themselves before such adjudicatory bodies when they are not afforded legal representations.

8.2 For Legal Aid Beneficiaries

i) Legal aid clients should ensure that they understand their cases well and present the same comprehensively to the legal aid providers so as to access the relevant assistance needed. Incomplete information or misrepresentation of ones' case so as to "appear more vulnerable" may ruin every chance the client had to access his or her justice.

ii) Clients should familiarize themselves with the kind of legal assistance they are receiving in order to avoid future confusion or misunderstanding with the legal aid providers. For instance, if the kind of legal aid a client is receiving is based on drafting of

legal documents, a legal aid client should assure him or herself that, that is the only aid he or she has been offered by the legal aid provider. This will assist the adjudicators in figuring out the modalities of conducting the cases that legal aid clients are involved. For example, when a case calls for submission before the Court, the Judge or Magistrate will know whether to opt for written or oral submissions.

iii) Legal aid clients should maintain their trust and good relationship with their legal aid providers. This will make it easier for them to attain the justice they seek. This includes taking and abiding by all the advice and instructions they are given by their legal aid providers. In this regard, clients should also avoid forum shopping (moving from one legal provider to another to law firm and law students seeking for legal opinions on the same matter that is already handled by an initial legal aid provider.

8.3 For the Society

i) Members of the society should not hesitate to direct the indigent people to places where they may receive immediate legal aid as this service has been brought even closer to the society via recognition of paralegals' legal aid activities by the new Legal Aid Act. Most importantly, this service should not be misused by those who may afford retaining private legal services. This will widen the number of indigent persons receiving legal aid in the country.

ii) Every citizen should take it as an obligation to educate him or herself on legal related issues. This will serve as a breakthrough in penetrating and implementing the objective of offering legal aid in the country.

VICTIMS OF CRIMINAL JUSTICE SYSTEM – THE NEED FOR RADICAL APPROACHING ADVANCING JUVENILE JUSTICE.

***Matilda T. Philip**

Abstract

This Article assesses the victims of criminal justice system who are not parties in criminal proceedings but they play vital role in the criminal justice process. Their testimony is very important to the prosecution's case against the accused person. The juvenile justice system on the other hand is a structure of the criminal legal system that deals with offences/crimes committed by children usually between the ages of 10 and under 18 years of age. The juvenile justice system is separate from the criminal justice system, and one of the features setting the juvenile system apart from the adult system, is the procedure and that the sentencing differences between adult and juvenile cases is significant. The objective on sentencing in juvenile justice system is rehabilitation and reintegration and custodial sentence as a measure of last resort. Finally, the article concludes by emphasising on amendment of the LCA to incorporate diversion measures and a strong enforcement mechanism that ensures implementation of the laws related to children cases.

Key words: *Criminal justice, Victims, Juvenile, Legal framework*

1. Introduction

Criminal justice system refers to a process through which an accused pass through until his accusation is disposed of or is punished. The criminal justice system consists of three main parts: (1) law enforcement (police); (2) adjudication (courts which include magistrates/judges, prosecutors, defence lawyers); and (3) corrections (prisons, probation officers, and parole officers). In a criminal justice system, these distinct agencies operate together under the rule of law and are the principal means of maintaining the rule of law within society.

The first contact an offender has with the criminal justice system is through police who investigates a suspected crime or commission of an offence and make an arrest. Next is the court, where disputes are settled and justice is administered. In Tanzania the guilt or innocence is decided through the adversarial system. With coming into force of the Law of the Child Act we are witnessing departure from adversarial system to an informal and made by enquiry system

This article will therefore attempt to take you throughthe salient features of the victims of the criminal justice system and in particular children as the vulnerable groups and how the Juvenile Justice System is child rightscompliant and focusses on prevention, diversion, rehabilitation and reintegration rather than retribution and deterrence. Finally taking you through changes made to-date and some of the key provisions and procedure provided under the Law of a Child Act (LCA)[1].

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[1] Law of a Child Act No,21 of 2009

2. *Victims Of Criminal Justice System*

In Tanzania likemost legal systems, a victim is simply a complainant who initiates the criminal justice system by making a complaint or bringing evidence and information about commission of crime to the police. The police conducts investigations once investigation is completed the case will be ready for prosecution If it is decided that there is a realistic prospect for conviction, the victim then plays an additional role as a witness for the prosecution and helping the State to give evidence in court in support of the offence the accused is charged with.

Victims of criminal justice system are basically the injured parties through a commission of an offence. Many people in our communities fall victim of all kinds of crime from minor to serious ones. A big percentage of these crimes are not reported, some crimes the offender are not identified and if a crime is reported and investigated the crime is at times not prosecuted for lack of evidence. This in itself leaves victims very vulnerable if not frustrated and often in need of assistance.

How does the criminal justice system respond to victims in Tanzania? Undoubtedly, things have improved in recent years. We have witnessed a number of changes in our criminal justice system. It is important to remember before the civilianization process in 2008 the bulk of the criminal prosecution was conducted by the police, now the Directorate of Public Prosecutions has taken over prosecution from the District in six regions in Tanzania and probably with time police prosecutors would gradually be phased out, the police have no longer role in continuing prosecution beyond the stage of arrest and investigation. The National Prosecution Service Act (NPSA) is a

law that is applicable to all criminal prosecutions and the coordination of investigations of crimes in Tanzania mainland[2].

The DPP has now the legislative mandate to direct police or other investigative organs to investigate any matter of criminal nature that has come to his knowledge as spelt out in sections 16 and 17 of the NPSA. The DPP office admits that the prosecution led investigations has not addressed all the challenges in administering criminal justice. One of the key function of the DPP offices is to represent victims of crimes commonly referred to as complainants and they daily listen to many victims/complainants, their families and representatives or receive letters of complaints from them. The most vulnerable victims in our criminal justice system are children, women, people with disabilities and in particular people with albinism (mostly women and children and due superstitions or beliefs of witchcraft) and the elderly, again here women are specifically targeted. On suspicion of being witches simply because they have developed red eyes these killings take place in Shinyanga, Mwanza and Tabora regions. From the several research conducted on Violence against children VAC, Gender Based Violence and studies or written findings on killings of the elderly and people with albinism being vulnerable, harmful traditional practices, superstition and beliefs of witchcraft are among the factors that they are victims of all forms violence from murder, grievous harm/assault, sexual violence and emotional/psychological violence.

3. Legislations

Several legislations have been enacted to rectify the harm and injuries caused by ensuring the vulnerable are protected by the Criminal Justice system by criminalizing various acts and

[2]See Sections 2 and 4(3) of the NPSA No. 10 of 2008.

imposing stiffer sentences to personal violence's that target the weaker group in our communities. Such laws are the Sexual Offences Special Provision Act[3] which amended several laws such as the Penal Code, the Evidence act and the Criminal Procedure Act with the intention of offering more protection to women and children. Some of the new offences created in the Penal Code included Trafficking of Persons Sexual exploitation of children, Cruelty to Children(criminalizing Female Genital Mutilation to persons under eighteen years) Statutory rape, sexual harassment and marital rape(being his wife who is separated from him without her consenting to it at the time of the sexual intercourse)[4]. The amended provisions in the TanzaniaEvidence Act tookinto account our adversarial system by removing the requirement for corroboration in sexual offences[5] similar provision is also included in the Law of a Child Act[6]. Notwithstanding the good work that has gone into improving the way victims of physical or sexual violence are dealt with, many if not most still do not have sufficient confidence in our criminal justice system even to reportwhat has happened to them. The reasons for not doing so varied, but many cited fear of not being believed or a feeling that the criminal justice system would be ineffective in prosecuting the offender. In response to the vulnerable and to avoid re-victimisation.

In 2019 the Chief Justice of Tanzania developed the Judicature and application of Laws (Practice and Procedure in cases involving vulnerable Groups) Rules, 2019 in order to accelerate cases involving vulnerable groups, children are inclusive.

[3] Chapter 101 (R.E. 2002).
[4]See Section 130(2)(a) The Penal Code as amended.
[5]See Section 127(7) TEA as amended.
[6]See Section 115(3) LCA.

In 2008 the Police introduced the Gender and Children desks (GCD) with the intention of having them in all police stations. This is to ensure both women and children feel safe to report incidences of violence and abuse in confidential and supportive environment. In response to the vulnerable and to avoid re-victimisation, in 2008 the Police introduced the Gender and Children desks (GCD) with the intention of having them in all police stations. This is to ensure both women and children feel safe to report incidences of violence and abuse in confidential and supportive environment.

4. International Instruments-Standards

We should also be mindful of some of the non-binding instruments that provide for standards of addressing victims and witnesses; (1) the UN Guidelines on the Role of Prosecutors 1990; (2) Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Resolution 2005/20), the 2009 UN Guidelines for the Alternative Care of Children and the 1997 Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines).

5. Challenges

5.1 Court decisions

They are very few cases mentioned in this article that have had the LCA tested in the court of law, suffice it to say the area of case law has not sufficiently developed with regards to juvenile justice. At this juncture it is quite important to mention conflicting decisions of the Court of Appeal on Section 127 of the Evidence on the issue of **competency test or in other words voir dire that is relevant to children cases as accused and victims.**About 10 decided Court of Appeal decisions that have taken the position that the misapplication of or non-compliance

with section 127(2) of the Evidence Act in conducting a *voir dire* brought the child's evidence to the level of unsworn evidence, which required corroboration to sustain a conviction. Other 7 Court of Appeal decisions are of the opposite stand that mis-application of or non-compliance with section 127(2) of TEA rendered the child's evidence no good as evidence and it must be discarded, discounted or expunged from the record, conviction was quashed and sentence was set aside. This resulted in convening a full Bench of the Court to resolve the legal and testimonial issue at stakeas in the case of *Kimbute Otiniel V. Republic*[7]**.** The Courtsitting as a full bench was of the opinion that section 127(1) and (2) of the Evidence Act may have outlived their original purposes. It was finally the Court opinion that reform is urgently required in the law of evidence by the concerned authorities. In 2016, Section 127 of Tanzania Evidence Act was amended by deleting subsection (2) and (3) and substituting it with a new subsection (2) that states '*A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise to tell the truth to the court and not to tell any lies. Renumbering subsections (4) (5) (6) (7) and (8) as subsection (3) (4) (5) (6) and (7) respectively'*[8]. Several Court Appeal decision have already upheld decision made under the above quoted provision, such as was in the case of *Geofrey Wilson Vs Republic*[9]. A consequential amendment is undoubtedly required in Section 115 (1) and (2) of the LCA which is similar to the deleted subsections (2) and (3) of the Evidence Act referred above.

[7]Criminal Appeal No. 300 of 2011.CAT (unreported).
[8] Written Laws (Miscellaneous Amendments) Act No. 4 of 2016.
[9]Criminal Appeal No. 168 of 2018 CAT (unreported).

5.2 Non-enforcement of laws or lack of implementation

An example of failings in the criminal justice system is the response to **Female Genital Mutilation (under 18 years).** This abhorrent form of sexual violence has been criminalised in our laws since 1998. It is a criminal offence under the Penal Code and the Law of the Child Act, however very few cases are brought in Court and reasons are quite obvious the practice is still deep rooted in some parts of our communities. To enforce this law, the authorities should not sit back and expect a little girl to walk into a police station and report to a strangerwhat her parents had allowed someone to do to her. The likelihood of that happening is very low indeed, a proactive response is called for, with the enactment of the LCA, FGM is now a child protection concern.

The Law of the Child Act gives a duty to any member of the community to report infringement of children rights; on the other hand the local government authority has a statutory duty to safeguard children within their area[10]. Currently in Tanzania mainland we have set up multi-disciplinary structures or team in more than 8 Districts to care and protect children suffering harm or at risk of suffering harm (abuse, violence, neglect or exploitation). It is important to know that most of the work and activity surrounding child protection happens outside of the Courts, the detailed reporting mechanism and necessary interventions are set out in the child protection regulations[11]. However, where it involves interference with parental rights, Court orders will be sought. Section 18(1) of the LCA states *'a court may issue a care order or an interim care order on an application by a social welfare officer for the benefit of a child* 'Section 18(2) of same states *'the care order or an interim care order shall remove the*

[10] See Section 94 of the LCA.
[11] Law of the Child (Child Protection Regulations) GN. No. 11 of 2015.

child from any situation where he is suffering or likely to suffer significant harm and transfer the parental right to the SWO'.

The importance of child protection/privacy is seen in several provision of LCA that intends to protect the identity of children who come before the Juvenile Court. Section 99(1) ((b) of the LCA provides that proceedings before the Juvenile court shall be held in camera. Rule 11 of Juvenile Court Rules sets out how confidentiality should be maintained when hearing children cases. Section 33 of the LCA prohibits publication of information or photograph that may lead to identification of a child in any matter before the court. This provision applies to all courts and such publication attracts hefty fine upon conviction. Section 158(1) (d) of the LCA also prohibits publication of information which is prejudicial to the best interest of a child, a very wide provision than can mean almost anything.On the same spirit similar protection was already provided for in the Criminal Procedure Act of 1985(R.E 2002) and I quote:-

> "S. 186. Court to be open court
>
> (1) The place in which any court is held for the purpose of inquiring into or trying any offence shall unless the contrary is expressly provided in any written law, be deemed an open court to which the public generally may have access so far as the same can conveniently contain them, save that the presiding judge or magistrate may, if he considers it necessary or expedient–
>
> (a) In interlocutory proceedings; or
>
> (b) In circumstance where publicity will be prejudicial to the interest of –

(i) Justice, defence, public safety, public order or public morality; or

(ii) The welfare of persons under the age of eighteen years or the protection of private lives of persons concerned in the proceedings,

Order at any stage of the inquiry into or trial of any particular case that persons generally or any particular person other than the parties thereto or their legal representative shall not have access to or be or remain in the room or building used by the court."

Despite the above provisions in 2018the Chief Justice of Tanzania issued adetailed direction[12]to all the District Courts, Resident Magistrates Courts, High Courts and Court of Appeal. The direction was on the protection of identities of children in any matter before the court; of parent and guardian of the child in adoption proceedings; and of victims of sexual offences of whatever age.

Compensation as a payment to victim of crimeis provided in both the Penal Code[13] and Criminal Procedure Act[14].How often are these orders of compensation awarded to victims of violence, the answer to that question is very rare this is subject to whether convicted person can afford to pay and may also depend on the sentence imposed by the court.

Legal representationis another challenge that will be discussed later in this article and the various laws that have been enacted and published to ensure accused children and victims are provided with legal or other appropriate assistance before the

[12]CJ Direction No. 2 of 2018.
[13] See Section 31 of the Penal Code [Chapter 16 R.E 2002]
[14]See Section 348 of the Criminal Procedure Act [Chapter 20.R.E 2002]

juvenile court.Unfortunately, the LCA guaranteed this right to cases before the Juvenile Court only. With the coming into force of the long awaited Legal Aid Act[15]and the Legal Aid Regulations,[16] and The Legal Aid(Remuneration of Advocates) Rules, 2019 GN No. 109 of 2019 this shortcoming has now been rectified.

5.3 Corporal punishment

Corporal punishment is still a form of physical punishment in Tanzania Mainland and it is provided in the Corporal Punishment Act[17], the Penal Code and the Education (Corporal Punishment) Regulations[18]. When the United Republic of Tanzania was submitting its third to fifth periodic report[19] to the Committee of the United Convention on the Rights of a Child(CRC) on 15-16th January 2015 the following were some of the observation and recommendations made by the Committee, the right of a child to freedom from all forms of violence[20] and CRC Committee recommended the repeal or amendment of legislations providing corporal punishment to explicitly prohibit corporal punishment as "justifiable" correction or discipline.

In Tanzania they are differing views about corporal punishment, and it is still practiced as a form of discipline. We can however agree with UN Committee recommendations made after submitting our 3rd-5th periodic report, that we should accordingly sensitize and educate parents, guardians and professionals working with and for children, particularly teachers, by carrying

[15] No. 11 of 2017.
[16]GN. No. 44 of 2018.
[17] The Corporal Punishment Act No. 17 (R.E 2002).
[18]G.N. No. 294 of 2002.
[19] URT 3rd, 4th and 5th Reports onthe implementation of the Convention of the Rights of the Child. 2005-2011 submitted to CRC Committee on 15th January 2015.
[20]See CRC General Comment No. 13 (2011).

out educational campaigns and awareness raising about the harmful impact of corporal punishment.

6 Juvenile Justice System

One of the main differences between the juvenile/child and adult justice systems lies in their overall aim. The term juvenile justice is generally used to describe policies, strategies, laws, procedures and practices applied to children who are over the age of criminal responsibility. It applies to children who are alleged to, accused of committing a criminal offence. For the juvenile justice system, the main aim is to rehabilitate and reform the child/juvenile offender so that they can resume functioning normally in society. Since 1937 the administration of juvenile Justice was administered by a very archaic and colonial piece of legislation the Children and Young Persons Act[21].

Other legislations regulating the Juvenile Justice include; the Probation of Offenders Act[22], the Corporal Punishment Act, the Penal Code the Criminal Procedure Act and the Magistrate Courts Act[23]. In 2009 the Children and Young Persons Act was repealed and replaced by the Law of a Child Act (LCA).Under theLCA a person below the age of eighteen years shall be known as a child[24]. They are two categories of children under the LCA, a child in contact with the law (child victim and witness in both civil/child protection and criminal case) and a child in conflict with law (the accused child). Both categories of children require and are provided with care and protection under the LCA. Children who are in conflict with the law the focus is more on alternative sentences or non-custodial sentences, and custodial sentences only as a measure of last resort the appropriate

[21] Chapter 13 [R.E 2002].
[22] Chapter 247 [R. E 2002]
[23] Chapter 11 as amended.
[24]See Section 4(1) of the LCA.

sentences include absolute or conditional discharge, probation orders, fine, compensation and cost and diversionary measure.

We all know that children have the capacity to hurt other people and their property and they should be responsible for their action a child from 10 years and under 18 years is criminally responsible in Tanzania Mainland[25]. Undoubtedly we all agree children donot have the full legal responsibilities of an adult, and are still in the process of learning about these responsibilities and how to exercise them. Under the Penal Code a person who is 10 years but below 12 years of age is not criminally responsible unless it is proved that at the time of doing the act or making the omission had capacity to know that he or she ought not to do the act or make the omission (referred to as rebuttable presumption). A male person under the age of twelve years is presumed to be incapable of having sexual intercourse.

6.1 The International Juvenile Justice Framework

The most important international instruments for the administration of Juvenile Justice are the United Nation Convention on the Rights of a Child (UNCRC)[26]or commonly referred to as CRC, the International Covenant on Civil and Political Rights (ICCPR)[27] and the African Convention on the Rights and Welfare of a Child (ACRWC)[28]. The CRC sets out the basic principles that should be included in a juvenile Justice system. It is worth noting that the United Republic of Tanzania had not made any reservation to the above mentioned treaties. Apart from these international and regional instrument there are four main supporting juvenile justice instruments: The UN

[25]See Section 15 of the Penal Code [Chapter 16 R.E 2002].

[26] UNCRC came in to force 1989 and Ratified by URT on 10th June 1991.
[27] ICCPR came into force 23rd March 1976 Acceded by URT 11th June 1976.
[28] ACRWC came into force 1999 and ratified by URT on 16th March 2003.

Guidelines for the prevention of Juvenile Delinquency (Riyadh Guideline), UN Standard Minimum Rules for the Administration of Juvenile Justice(Beijing Rules) adopted in 1985, UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) and General Comment No. 10 (2007) of the Committee on the Rights of the Child on Children's rights in juvenile justice. Other non-binding instruments that provide for standards of addressing victims and witnesses are; (1) the UN Guidelines on the Role of Prosecutors 1990; (2) Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Resolution 2005/20) and the 2009 UN Guidelines for the Alternative Care of Children.

The CRC Committee General Comment No. 10 of 2007 is one of the most crucial and important comments made by the committee on juvenile justice and in particular children in conflict with the law. The objective of the comment is for States parties to develop and implement a comprehensive juvenile justice policy. This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37[29] and 40[30] of CRC, but should also take into account the general principles enshrined in articles 2[31], 3[32], 6[33] and 12[34], and in all other relevant articles of CRC, such as articles 4[35] and 39[36].

[29]On Torture and Deprivation of Liberty.
[30]On Administration of Juvenile Justice.
[31] On Discrimination.
[32] On Best interest of the child principle.
[33]On Right to life survival and development principle.
[34]On Right to be heard principle.
[35]On Implementation of rights by states.
[36]On Rehabilitative care.

For the purpose of this article it is important to refer to paragraph 10 of the CRC General Comment No. 10 which states:-

> "In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require adifferent treatment for children. The protection of the best interests of the child means, forinstance, that the traditional objectives of criminal justice, such as repression/retribution, mustgive way to rehabilitation and restorative justice objectives in dealing with child offenders. Thiscan be done in concert with attention to effective public safety".

International Standards requires a Juvenile Justice System that has:

1. Separate system for Juveniles; and

2. It includes legislations, norms, standards, guidelines, policies procedures, provisions institutions and bodies specifically applicable to children in conflict with the law and who are over the age of criminal responsibility.

3. Establishment of children units within the police, prosecution, the judiciary, the court administration and social service.

7 ***Steps The Government Has So Far Undertaken To Implement Rights Provided To Children In Conflict With The Law As Enshrined In The Crc[37] And Acrwc[38]. These Steps Include Legislative, Administrative And Other Measures.***

a) A component of administration of Juvenile Justice was introduced in the Quick start project within the legal sector reform programme: Medium Term strategy and action plan 2002-2005. This resulted before the enactment of the LCA in training in administration of Juvenile Justice to court staff, police officers, prisons officers and probation officers conducted by the University of Dar-es-Salaam.

b) In 2009 Parliament passed the above mentioned Law of the Child Act. The LCA is the main piece of principal legislation that covers all issues relating to children, including children in need of care and protection (civil/ child protection cases) and children who are in conflict with the law (criminal cases).

c) In 2016 The Law of the Child (Juvenile court Procedure) Rules, was promulgated to govern the procedure of adjudicating children cases in Juvenile Courts.

d) In 2011, by the Ministry for Constitutional and Legal Affairs, in collaboration with UNICEF Tanzania, with the support of Coram Children's Legal Centre and the National Organisation for Legal Assistance (NOLA) conducted two researches: "Analysis of the Situation of Children in Conflict with the Law in Tanzania" and "Assessment of the Access to Justice System for Under-18s in Tanzania".

8. Some of the key findings from the two studies were;

[37] Article 37 and 40 of the CRC.
[38] Article 17 of the ACRWC.

a) **The children who were consulted demonstrated a lack of awareness of**:
   - Their legal rights;
   - Who to turn to when they need help; and
   - How to access justice if their rights are violated?

b) The children who were consulted appeared reluctant to access the different justice systems, because of:
   - Fear of reprisal;
   - A perception they will not be believed;
   - Distance and logistics in reaching Courts, or other parts of the Court system;
   - A lack of trust in the system, long delays in police stations; or
   - A feeling that they should not complain.

c) Risk factors for coming into conflict with the law noted;
   - Poverty, a lack of parental care, poor parenting or neglect; and
   - Poor educational attainment. The same risk factors were found in the Report by the Commission for Human Rights and Good Governance (CHRAGG) that conducted inspection in detention facilities in 2011. The same finding in the National Prosecution Service report on inspection conducted from the 24th June -17th July in 2013 in 23 regions of Tanzania mainland in remand homes, prisons, police lockups to facilitate protection of Juveniles and adherence and compliance of the Law of the Child Act.

d) Types of offences committed by children;

- Theft and other minor property offences, including simple theft, pick-pocketing and being in the possession of stolen goods were the most common types offence for which children are arrested in Tanzania (50% according to data from three police stations);
- Sexual offences were the second most common type of offence for which children were arrested (21% according to data from three police stations);
- Public disorder offences, such as vagrancy, loitering, touting or for 'disrupting passengers' also accounted for a large proportion of arrests. (18% according to data from three police stations); this type of offence is common in the cities and in Dar-es-Salaam. Similar offences were also found in the report by the Commissioner of Human Rights and Good Governance on inspection conductedprisons, remand prison and remand homes in Tanzania mainland.
- From 2013, there has been a significant shift of type of offences that are more prevalent for example at the Kisutu Juvenile Court almost 65% of the criminal cases instituted are sexual offences(rape, indecent assault and unnatural offences) followed by theft, homicide P.I. stage, assault (causing grievous bodily harm) and few armed robbery cases. This shift was also observed in Mbeya region from 2015-2017
- From 2012 we witnessedthe emergence of gang related offence in particular armed

robbery in the City of Dar-es-Salaam and they are given various names such "panya road", "mbwamwitu" etc. Children have been arrested and chargedwith armed robbery and some charged jointly with adults. The number of offenders in cases where children are charged jointly with adults vary between 3 to a maximum of 11 accused persons this according to Women and Legal Aid Centre(WLAC) (an NGO that has been providing legal representation to children charged at Kinondoni, Ilala and Temeke District Courts and the Kisutu Juvenile Court). It has been noted by WLAC and Court rulings that in some cases accused children are just victims of circumstances, they just happened to be at wrong place in the wrong time and probably being associated with the wrong person/s. These cases are mostly withdrawn by the prosecution and some cases are dismissed by the court for lack of prima facie and the court rules that accused has thereof no case to answer. To give an example in 2015 according to WLAC data base they were 4 armed robbery cases at Kinondoni District Court, 3 case at Ilala District Court and 2 armed robbery cases at Temeke District Court. At the Kisutu Juvenile Court they were 4 ongoing armed robbery cases.

i. **In 2011 new set of rules with regards to children in conflict with the law were developed.**

The Law of the Child (Approved School Rules) not yet signed and the Law of the Child (Retention Homes) Rules[39].They are6 Retention Homes (Arusha, Moshi, Dar-es-Salaam, Tanga Mbeya and Mtwara which is not yet operational) that remand accused children pending-trial aged 10-under 18 years of age.Unfortunately, we have only one institution that a child convicted with an offence can be sentenced to a custodial sentence and this is the Approved School in Irambo Mbeya region.

ii. **InApril 2011 the Ministry of Constitutional and Legal Affairs established the Child Justice Forum**.

This Forum is an inter-agency group comprised of key national state and non-state actors and is mandated to develop recommendations and strategies to reform the child justice system of which they have been doing including the recommendation for diversion programme to be discussed below in this article.

iii. **Legal aid for children in conflict with the law**.

Between 5th and 30th June 2012 UNICEF in collaboration with Women's Legal Aid Centre (WLAC) conducted a mapping exercise in three detention centres in Dar-es-Salaam (Keko Remand Prisons, Segerea Remand Prison and Upanga Retention Home); the purpose of undertaking the mapping exercise was to provide a baseline for the Legal Aid programme. Women and Legal Aid Centre (WLAC) was contracted to provide a three tier legal assistance; (a) provision for general legal information, (b) provision for legal advice and (c) legal representation. At the first

[39] GN No. 151 of 2012.

year of the project of the Legal Aid Programme 2012-2013 WLAC provided legal representation only to children in conflict with law charged at Kisutu juvenile Court. In 2013the legal representation was extended to three additional Courts due to demand of children in the detention centres visited by WLAC. These Courts are the District Courts at Kinondoni. Ilala and Temeke where children in these Courts are jointly charged with adults.

iv. Diversion Project/Programme

In 2012 the Child Justice Forum recommended the development of pilot diversion and community rehabilitation projects in Temeke District in Dar-es-Salaam Region. Temeke was identified as an area of high juvenile offendingand therefore an area of greatest need and demand for the programme. However, in order to introduce the diversion programme through community rehabilitation programmes recommended, on 26th November 2012 the Commissioner for Social Welfare issued a circular pursuant to the authority given under section 16(q) of the Law of a Child Act and recognized that the group/category of '*children in conflict with the law* 'and children at risk of offending (e.g. children working and living in the streets) **as children in need of care and protection.**

The programme was piloted in two wards of Temeke with a view of replicating the same nationwide, as part of the wider reform of the juvenile justice system.Similar rehabilitation programmestarted in Mbeya in November 2014. The two Temeke diversion programmes were implemented by the Salvation Army Tanzania in partnership with two communities' centres- Youth Counselling and Rehabilitation Centre at Kigamboni (YCRC) and the Kigamboni Community Centre (KCC). The purpose of this programme was to demonstrate the effectiveness of dealing with children in conflict with the law in

the community as an alternative to prosecution and custodial measure as part of wider strategy for child justice and child protection reformin Tanzania mainland. Diversion is consideredas a less stigmatising response to child offending than punitive sentences.

The piloted diversion programmes areimplemented mainly by social welfare, and police. Social Welfare officer have the overall of supervising implementation of the community rehabilitation programme. They are also responsible for providing psycho-social support to children and families to address behavioural problems of both an accused child and a child at risk of offending within there are of jurisdictions. A guide was developed on the establishment and implementation of the Community Rehabilitation Programme (CRP). The guide spelt out the criteria for referring a child to the CRP and they include; age 10-17, type of offence mostly non-serious offence e.g. theft, public disorder offence, statutory rape etc. a child must be resident in the programme area and a child must admit the offence alleged to have committed. The police and prosecutor involvement commence once a child is accused or arrested for having committed an offence. However, the overall consideration is whether the project is suitable for the child.

The Court can also "divert" a very familiar procedure in our legal system and it is done after anaccused child has beenconvicted and during sentencing, by imposing non-custodial sentences or alternative sentences to be discussed later. Reference to the community rehabilitation programme has been done by the Kisutu Juvenile Court and other courts in Dares-Salaam and Mbeya where CRP have been established by Department of Social Welfare under Section 119(2) (c) of the LCA.

It is worth mentioning probably for future consideration that the Children Act of No. 6 of 2011 of Zanzibar. The said Act provides explicitly for diversion, type of offences that can be diverted by the police and the Director of Public Prosecution. It also clearly spells out the circumstances of which the Children Courts in Zanzibarcan also divert a child during the course of criminal proceedings, if the court is of the opinion that the child is need of care and protection and it is only desirable to deal with the child as such.[40]The glaring omission of diversion inthe Mainland Law of the Child Act isone of the challenges and it is very unfortunate bearing in mind diversion was one of the recommendations made by the law Reform Commission in theirreport of 1994 on the Law relating to Children.The two pilot diversion programmes in Dar-es-Salaam and Mbeya havegenerated documented success stories on positive behavioural changes reported by participants and their families.

The government though the Child Justice Forum recommended the roll out of Community Rehabilitation Programme and its implementations in all the Local Government Authority (LGA) in the country from July 2017. A review of the 2015 guide to the establishment and implementation of the CRP was done with a view of incorporating a standardized rehabilitation practices. They are now new CRP in7 councils, in Kasulu, Dodoma, Tanga, Hai, Mbarali, Iringa and Kibondo, these are all areas with a designated Juvenile Court and a Police Gender and Children Desk which is a prerequisite for an integrated approach.

9. Juvenile Court Rules

In September 2014 the Juvenile Court Rules made by the Chief Justice[41]was gazetted andreferred to as Law of a Child (Juvenile

[40] Refer to Section 43 (5) (a) of the Children Act No. 6 of 2011 of Zanzibar .
[41]See Section 99(1) of the LCA.

Court Procedure) Rules[42].This wasa significant achievement from the repealed Children Young Person Act which did not have an operational procedural law that is child friendly and in compliance with the principle of the best interest of the child. Section 4(2) of the LCA provides *'The best interest of the child shall the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, court or administrative bodies'*. However, these rules were revoked by the now applicable Law of the Child (Juvenile Court Procedure) Rules[43].

9.1 Juvenile Court

9.1.1 Establishment

It is unfortunate that for so many years we had only one premise that sits exclusively as a Juvenile Court, the Kisutu Juvenile Court established in 1997 through Chief Justice's Circular No. 4 of 1997. Almost 17 years later on 26th July 2017 the second Juvenile Court that not only sits exclusively but is a separate building was launched in Mbeya City.

Section 97(1) of the LCA provides that there shall be established a court to be known as the juvenile Court for purposes of hearing and determining matters relating to children. Section 97(2) provides the Chief Justice may, by notice in the Gazette designate any premises used by a primary court to be a Juvenile Court. Subsection (3) of the same section provides a Resident magistrate shall be assigned to preside over the Juvenile Court.In December 2016 the Chief Justice of Tanzania designated a total of 130 Primary Courts as Juvenile Court, one in every District by (Designation of Juvenile Courts)[44].The2016 notice was consequently revoked by the Law of the Child (Designation of

[42] GN. No. 251 of 2014.
[43]G.N. No.182 of 2016.
[44] GN No, 134 of 2016.

Juvenile Courts)[45]. According to this notice we have now a total of 141 designated Juvenile Courts in Tanzania including the Kisutu Juvenile Court in Dar-es Salaam and the Mbeya Juvenile Court. Following the designation of 130 Juvenile Courts, the Department of Social Welfare in collaboration with the respective local government authorities (LGAs) appointed Social Welfare Officers (SWOs) to work in 119 Juvenile Courts. Early 2017 a circular was issued by the Commissioner for Social Welfare that clarified and set out the roles of probation officers and SWOs in relation to child offenders and those at risk of offending.

9.1.2 Jurisdiction of the juvenile Court

The Juvenile Court has the power to hear and determine among others criminal charges against a child except cases that the High Court has original jurisdiction (Sections 98(1) (a), 103 as amended by Act No 4 of 2016 and 104 of the LCA).In the past the repealed Children and Young Persons Ordinance Chapter 13 did not have a separate procedure for conducting criminal proceedings against a child and young persons, the procedure used was the Criminal Procedure Act. Under the LCA the procedure for conducting proceedings by the Juvenile Court is provided under Section 99 of the LCA which shall be in accordance with the rules made by the Chief Justice.The mandatory requirement for that procedure is to a great extent a major departure from adult procedure under the current CPA. The following are the mandatory requirement for procedure in the Juvenile Court under Section 99 and include: -

a) juvenile court sits as often as necessary
b) proceedings shall be held in camera;

[45] G.N. No. 158 of 2019.

c) proceedings shall be informal as possible, and made by enquiry without exposing the child to adversarial procedure;

d) a social welfare shall be present; This requirement is mandatory and the absence of a SWO is incurable and nullifies the proceedings as held in the **case** of *Furaha Johnson V. Republic Criminal Appeal no. 452 of 2015(CAT) (unreported),*Following the designation of the first 130 Juvenile courts in 2016 social welfare officers were also appointed to work in the 119 Juvenile Courts

e) right of parent or guardians to be present;

f) Several the child shall have right to representation by an advocate etc.

Since the enactment of the Act and the coming into force of the Juvenile Court Rules Several directions, circulars and instructions have been issued by the Chief Justice, the Commissioner for Social Welfare and Director of Public Prosecution in enforcing the requirement made under some of the provisions under the LCA these include sections under Sections 97(2), 99(1), 16(q) and 103(1) and are crucial to ensure the LCA is not a dormant but a vibrant piece of legislation.

9.2 Legal representation/assistance of an accused child

This is one of the key requirements of the two international and regional instruments ratified by the United Republic of Tanzania. The Convention on the Rights of the Child CRC[46] and the African Charter on the Welfare and Rights of the Child (ACRWC)[47]

[46] Article 40(2)(b)(ii) to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

[47] Article 17(2)(b)(ii)(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

provides for right to legal or other appropriate assistance. Section 99(1) (f) of the LCA provides that a child shall have a right to representation by an advocate. We are all aware of the shortage of qualified advocates even with the increase of enrolled and registered advocates the vast majority are in urban areas and mostly to mention just few are in Dar-es-salaam, Arusha, Mwanza, Mbeya, Dodoma and Moshi. Some regions have no advocates at all or just or two or three advocates based in those regions. It goes without saying that the situation in the Districts ismuch worse. The group of experts appointed to develop the Juvenile Court rules took into consideration the several Court of Appeal decisions on the word"shall" which was used in section 99(1) (f) of the LCA that states *'a child who is a party to proceedings in a criminal or civil case shall have a right to legal and other appropriate assistance'*. As a resultan attempt was made to remedy this shortcoming by including into the developed JCR a Rule 15(1) that provides:-

> "where a child cannot afford to pay for legal representation, and it is not practicable to provide free legal assistance to a child, and a parent or guardian[48] is not able to provide effective representation for the child, the magistrate presiding at the hearing shall ensure that a child who is charged with a criminal offence is provided with appropriate assistance in the form of guardian ad litem".

Guardian ad litem (GAL) under the rules is defined as "a personwho takes on the responsibility or is appointed to represent and protect the interests of a child in a Juvenile Court proceeding and who has received training in working with and representing children in a court setting".A Guardian ad litem

[48]See Section 108(2) of the LCA.

scheme was developed in 2016 and final revised version of2019is adopted. The guide tothe scheme sets out inter alia the role of GAL, their selection and recruitment, training of GAL, a list of GAL available in the District including code of conduct for GAL. They are already 30 trained Guardian ad litem deployedto the Juvenile Courts in Ilala District, KisaraweDistrict and Mbeya District.

Before the guardian ad litem became operational and in the absence of any functioning legal aid services, in 2012 to 2015 UNICEF came into partnership with Women and Legal Aid Centre (WLAC) to provide Legal Aid to children. In October 2014 similar agreement was also entered between UNICEF and Tanganyika Law Society to provide legal information/assistance and advice to Ruanda Remand Prison and the Mbeya Retention Home and to provide legal representation to children in conflict with the law to the Juvenile Court, the Resident Magistrate and the District Courts in Mbeya City until December 2018.

While the above mentioned legal aid programmes were ongoing, in2014 the government made an effort to address the challenges of the legal aid and developeda **Legal Aid (Criminal Proceedings) Rules[49].** These Rules were made under the Legal Aid (Criminal Proceedings) Act[50] and had a short life span. There was no data on record that showed how this act ever benefited accused children or if at all enforced by our courts. The Legal Aid (Criminal Proceedings) Rules is now repealed Legal Aid Act.The Legal Aid Act was followed by the Legal Aid Regulations. This Act now makes legal assistance and representation for children in criminal proceedings mandatory as was in the case of homicide cases in the repealed Legal Aid (Criminal Proceedings) Act. Hopefully this is going to be the

[49] GN No. 353.
[50]See Section 7 of Legal Aid (Criminal Proceedings) Act [Chapter 21 R.E 2002].

case, the Legal Aid Act has includeda new cadre of paralegalsto provide legal assistance to the indigents and children The question now is what would be the role of guardian ad litem, they are those who say theywill be redundant and others say they will remain as ancillary. Under the Rule 15(1) of the JCR guardian ad litemhave specific role they are expected to provide legal assistance to an accused child who is not legally represented and who has not been provided with free legal assistance. In Rule 15(4) of the JCR the court shall also permit guardian ad litemto assist a victim or witness of crime who is giving evidence in court.

Under the Legal Aid Act, the first intervention that ensures children are provided with legal aid services falls on the police or those charged with the duty of supervising the welfare of an accused child undersections 35 and 36 of the Legal Aid Act. It is premature at this point to assess the effectiveness of the Act; however, we have already witnessed signs of non-compliance of the two sections referred to above in some areas. Cases against accused children do proceedin the absence of any form of legal assistance or representation, this was observed by members of the Tanganyika Law Society during the Legal Aid week of2018visited the Arusha Retention Home and observed that out of the 8 cases of children reviewed and ongoing in court only one case involving 3 boys had legal representation as a pro-bono case[51]. Given the fact that operationalization of the Act had just started one cannot make any meaningful assessment on its implementation.

9.3 Arrest of accused child

Section 103 of the LCA as amended by 4 of 2016 provides that a prosecutor shall not bring a child to court unless investigation

[51]Tanganyika Law Society- Arusha Chapter.

has been completed or the offence requires committal proceedings. This requirement is elaborated in detail in the Juvenile Court Rules and the 24-hour rule is applicable. According to sections 35 and 36 of the Legal Aid Act and regulation 23(2) of the Legal AidRegulations, once a child is arrested and in police custody the police officer in-charge s of a station the police office shall cause such child to obtain legal aid immediately or shallensure or because persons detained to access legal aid service. Section 56(1) of the CPA of 1985 had also provided a requirement to a police officer to notify parents or guardian of a child once a child is under arrest.

The Police General Order (PGO)No. 240regarding treatment of Juveniles allowed and continue to allow police officer to give verbal warning for minor offences. The minor offences are not defined or listed. It may be prudent to have a definition of what constitute a minor offence for purposes of uniformity and consistency throughout the Country. The PGO was reviewed in light of the current LCA and stipulate the role of police when handling children in conflict with the law by limiting the use of formal criminal justice system of detention and instead resort to diversion measures.

Delay of children cases is discouraged Section 103(1) of the LCA as amended by Act No. 4 of 2016 clearly provides that "the prosecutor shall not bring a child to the court unless investigations are completed or the offence requires committal proceedings". On the other hand, Rule 34 the Juvenile Court Rules provides that '*any criminal case triable by the court shall be completed within six months after the child has first appeared on the charge before the court*'.

9.4 Age determination

Age determination is one of the biggest challenges during arrest for children/young people. Children in the three detention centres that WLAC visit regularly complain that police make up their age and record an incorrect age in the charge sheet even when the child knows their age. The ages of 18 to 19 reflected in most charge sheets is the age that is mostly denied by accused persons. In some cases, accused have been able to bring birth certificates in courts issued before the commission of the offence. There is also the possibility for persons between the ages of 18-21 to claim them under 18 so as to benefit from the Juvenile Justice System and in particular protective procedures and sentences available to children. Age determination will continue to be a challenge since most of children who arrested come from poor and broken families, or children living in the streets and most of them do not have birth certificates, these children are also not likely to be believed by the police. The Rules have provided some procedure implementing Section 113 of the LCA on age determination with guidance provided in the case of Elizabeth Michael Kimemeta@Lulu Vs RepublicMisc. Criminal Application No. 46 of 2012 ((unreported) HC. There is a list of things the court may enquire in determining age stated Rule 12 of the JCR it includes primary school recordsor certificates, immunisation records, medical evidence etc.

The practice in Mbeya and the TLS legal aid records from 2015-2018 already discussed above have shown that the primary school enrolment register submitted in court are not only reliable evidence but conclusive evidence of age. However, the same Rule states

> "Where the enquiry is inconclusive on the matter of age, but there is cause to believe that the person may

be a child, it shall be presumed that the person is a child under the age of 18 and shall be treated as such".

10. Hearing Of Juvenile Cases

Preliminary hearing (PH) in the Juvenile Court is conducted as per rule 37 of the Juvenile Court Rules[52]. The main purpose is to determine matters that are agreed upon and witnesses will be summoned for only the disputed facts. The objective of PH is to reduce the number of witness and accelerate the hearing. There is however an additional requirement before PH is conducted before the Juvenile Court.Andthis is the duty for prosecution to disclose prosecution case under Rule 36. This Rule require the prosecution to submit a copy to the Court of prosecutor material which includes the charge sheet, Statement of facts, record of previous conviction and any document or extract on which the case will be based on. Hopefully with the passage of time after the coming into effect of the Juvenile Court Rules in 2016 the copies of charge sheet arenow given to the defence without undue delay.It is also important to bear in mind that the timescale for cases before the Juvenile Court is six months with a possibility of an extension of 3 more months given by the court.

Proceedings before the Juvenile Court are supposed to be **informal, friendly to the child and made by enquiry without exposing a child to adversarial procedure** Section 99(1) (c) of the LCA and Rule 8 of the juvenile Court Rules. To ensure the above is adhered to rule 7 of the Juvenile Court Rules sets out the court environment, uniforms or formal robes are not allowed in the Juvenile Courtand, the seating arrangement is also arranged in a manner that a child will be comfortable and at ease so as to ensure his full participation during hearing of his case. Another

[52]See Rule 37 of the Juvenile Court Rules.

condition on court environment requires parties to the proceedings to sit on the same level including the presiding Magistrate.A child shall not be placed in a dock or other raised structure and shall be allowed to sit throughout the court proceedings this includes an accused child, a victim and witnesses. Both accused and child victims/witnesses will be allowed short breaks. The child shall be allowed to communicate with his advocate or guardian ad litem at any time during proceedings.

11. Punishments/Sentences Available

As mentioned above deprivation of liberty pre-trial[53] and post-trial[54] should only be used as a measure of a last resort.

Imprisonment is prohibited to children, the amended Section 119(1) of LCA[55] reads as follows '*notwithstanding any provision of any written law a child shall not be sentenced to imprisonment*'. The only available custodial sentence to juveniles convicted is an approved school order. Committal to an approved school is done on the following conditions as provided under rule 54(1) of the JCR where a child is convicted-

(a) of a serious offence of violence or as a result ofthe conviction he is determined to be a persistent offender, and the offence which he has committed would, if committed by an adult, be punishable bya custodial sentence; and

(b) the court believes there is a significant risk of harm to members of the public, the court may, as a matter of last resort, and inaccordance with JCR Form 14A as set out in the Third Schedule of LCA, make orders that the child be committed to

[53] See Rule 29(1)(b) Law of the Child (Juvenile Court Procedure) Rules 2016.
[54]Ibid. Rule 54(1)(d).
[55] Written Laws (Miscellaneous Amendment) Act No. 4 of 2016.

custodyat an approved school for a period of time not exceeding threeyears or until he is eighteen, whichever is the earlier.

Approved School is basically a reformative institution with the purpose ofproviding children care, protection, education and vocational skills, and to assist the child to live a socially constructive and productive life.There is a challenge on this order that may need some intervention. If an accused child was 17½ years old during the commission of the offence of armed robbery and his trial is finalized when he has just turned 18 years old. During sentencing the court will be in dilemma armed robbery is indeed a serious offence that could justify a custodial sentence of approved school. However, since during sentencing the boy has reached the age of majority approved school order or other custodial sentences for adults are not only inappropriate but illegal. The only remaining and available sentence for such a child would only be either probation order or conditional discharge. This may raise some eyebrows taking into account the seriousness of the offence and whether the two remaining options will have any rehabilitative value to the child convicted of armed robbery.

Other sentences provided in the Act arenon-custodial or alternative and referred to as:

1. Absolute and conditional discharge[56];
2. Repatriation order to a child home or district of origin at the Government expense[57];
3. Probation order[58];

[56] See Section 119(2) (a) and Rule 50 JCR GN. No 182 of 2016.
[57] See Section 119(2)(b) of the LCA.
[58] See Section 116 of the LCA.

4. Order the child to he handed over to the care of to a fit institution or fit persons named in the order and willing to undertake the care[59];

5. Fine and compensation[60]; and

6. The LCA does not explicitly provide for the sentence of corporal punishment.This punishment unfortunately is still available in other laws already discussed above.

After a conviction and before a child is sentenced a Social Welfare Officer is required to submit to the Court a detailed Social Inquiry report. The report shall contain details of the child, which includes-

(a) the child's background and other material circumstances likely to be of assistance to the court;
(b) present family circumstances and the home life experienced by the child;
(c) whether the child attends school or any training programme or is employed;
(d) the child' state of health;
(e) any previous offences the child may have committed;
(f) assessment of the chances of the child re-offending or causing serious harm; and
(g) Recommendations on the appropriate sentence taking into account that the purpose of a sentence shall be rehabilitative and to assist the child to be a constructive member of his family and community.

The Juvenile Court is expected to take into account the social inquiry report when passing sentence and will give reasons for not considering the recommendations made. Judgements of the

[59] See Section 119(2) (c) of the LCA.
[60] See Rule 51 of the JCR.

Juvenile Court shall be pronounced in court within twenty-one days after the conclusion of the proceedings.

Notwithstanding the shortcomings of the approved school order we deserve an applause for prohibiting imprisonment to children before the Court. We have without any doubt exceeded the requirements Article 37(b) of CRC that states:-

> "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; "

12. Conclusion

There is still a lot to be done in addressing the issue of victims of Criminal justice and this includes enacting a specific law on victims with remedies that will assist and provide support to victims. The DPP power to prosecute is discretionary although he is guided by established criteria for prosecution provided in the prosecution general instruction (PGI). These are Public interest, sufficiency of evidence and realistic prospect of conviction. DPP office has reviewedits PGI and developed Standard Operating Procedures to incorporate the key principles of the LCA. The directivesand instructions are intended toensure prosecutors adhere to the function of prosecution provided in the National Prosecution Service Act.[61]. The big question here is what remedy are available to victims if the Director of Public Prosecution decides not to institute a criminal case.

It is also important to put in place the use of child-friendly procedures to protect children from hardship during the justice process, including the use of special interview rooms designed

[61]See Section 18 of the National Prosecution Service Act [Full Citation of the law].

for children, screens and child-sensitive methods of questioning and reducing the number of interviews, statements and hearing.

More efforts should be made to avoid delay of children cases and reduce the number of children in pre-trial detention and shorten their time in detention. This will be achieved if the police will comply with section 36(1) of the Legal Aid Act and Legal Aid Regulation 23(1) that states *'persons in lawful custody include persons detained in police station or prisons'* and regulation 23(2) that states **'***subject to the Act, a police officer in-charge of a police station or prison officer in-charge of a prison shall ensure or cause persons detained to access legal aid service".*

Dissemination and training on the Law of the Child Act and its related subsidiary legislation is so vital to ensure adherence to the requirement of these laws and to ensure the LCA does suffer the same predicament the Children and Young Persons Act had as law that was known due to lack of dissemination and not adequately enforced.

More emphasis should be placed on diversion programmes as an alternative measure to address child offending which has more rehabilitative value and less stigmatising. Diversion and restorative justice approaches should be incorporated in the LCA and form part of the ongoing reform of the Criminal justice system and be included in the criminal justice policy. The pilot project in Temeke District in the two wards that started in 2012 are now a model that demonstrate how effective the programme is in dealing with children in conflict the law in the community as an alternative to prosecution and custodial measure.

We should increase the number of adequately trained professionals working in the juvenile justice system. Designate specialized magistrates and social welfare officers for children and ensure their appropriate education and training and ensure

sufficient specialized Juvenile Court facilities and procedures with adequate human technical and financial resources. There is a considerable effort in the training of the key stakeholders handling cases involving children since 2013. Those trained included juvenile court personnel (SWOs, Prosecutor's/State Attorneys and Resident magistrates). Training is on ongoing basis, implemented by the Institute for Judicial Administration in Lushoto (IJA) in collaboration with Judiciary and UNICEF have conducted training to juvenile justice frontline workers in 2017-2018 (100 Resident magistrates, 74 State Attorneys/ Public Prosecutors, 77 SWO and 18 advocates)[62]. The financial year 2018-2019 by July 2019 an additional training was conducted to Arusha and Dar-es-Salaam zones to 47 Resident Magistrates, 44 State Attorneys/public prosecutor, 40 SWOs and only (1) one advocate.

Despite the enactment of various laws, many of the existing legal provisions that offer some protection are simply not implemented. There are loopholes in the laws and lack of strong enforcement mechanisms as observed and referred to often in this article. Adopting newlaws and amendments, and making additions to existing laws is not sufficient to create a protective environment for children. Administrative measures, such as the development of standards, regulations, and guidelines should be taken for effective enforcement of existing legislation. Institutions, systems and processes related to child protection need to be revised and made more child rights-based. This will ensure that the objective of juvenile justice is achieved which is rehabilitation and reintegration into the community.

[62] IJA annual project implementation report on capacity building to Juvenile Justice frontline workers 2017-2018.

THIS TANZANIA LEGAL AID JOURNAL IN-HOUSE STYLE

A. General

1. All title headings for the articles, case comments and book reviews should be in capital letters and bolded.
2. Subtitles should be in Arabic numbers e.g. *1. Introduction if the article does not have subtitles within the titles and if there are sub titles then it should be e.g.:*

   3.0 An Overview on Criminal Law

   3.1 Tanzania Penal Code

   3.2 Criminal Procedure Code
3. Name of the author should be capitalized in each first letter of the name with a* after the name.
4. There should be an abstract on each paper and should not exceed 250 words. This does not apply to case notes and book reviews.
5. The heading of the abstract should be in italic form and bolded and indented on the left side below the name of the author.
6. The abstract should be in Book Antiqua with 11 font size.
7. There should be four Key Words for every article manuscript below the abstract.
8. The manuscript shall be typed in Book Antiqua, (Font size 12 and for footnotes it should be font size 10), 1.5 line spacing.

B. Word Limit and Specific Criteria

1. Comment articles

Manuscripts for comment articles analyzing and commenting on recent cases, legislation and other topical matters must range between 1500 and 3000 words. No footnote shall be allowed in comment articles. References, case citation, legislation and relevant literature should appear in brackets in the main text. All comment articles should be accompanied by a short abstract not exceeding 50 words. The comment must bear the following headings:-

- Title (descriptive)

- Name/Citation of relevant case/legislation/material
- Legal context
- Facts
- Analysis
- Practical significance

2. Full-length articles

Manuscripts for full-length articles must range between 5000 and 10,000 words (including footnotes). Each submission must be accompanied by an abstract of between 150- 250 words indicating briefly the overall argument of the author. Four key words must be written immediately below the abstract and footnotes must be kept to the minimum.

3. Book Reviews

Book reviews may range between 1500 to 4000 words although review articles could be much longer. The title of any book review must take the following format:-

Author/Editor Name, Book Title, Publisher, Year of Publication, ISBN, Number of Pages, Price.

Book reviews should be clear and objective and in particularly address these points:-

- The intended audience of the book
- The main argument and objective of the book
- The soundness of the argument and the research methods used
- The strength and weakness of the book as a scholarly piece of work

C. Mode of Reference/Citation of Sources

i. Reference to sources shall be done by using footnotes only.

ii. Cases shall be cited as: Joseph Warioba v Stephen Wassira & another [1997] TLR 272. Cases names within the text shall be italicized.

iii. Books should be cited starting with author's surname followed by

initials. The title of a book should follow, edition, with publisher, place of publication, and year of publication, finalized by page number Example: Shivji, I. G, Pan-Africanism or Pragmatism? Lessons of the Tanganyika Zanzibar Union, Mkuki na Nyota, Dar es Salaam, 2008, p.14.

iv. A chapter in an edited book should be cited in the following format: Author's name followed by title of chapter in italics with the word 'in' then the names of editors, title of the book, publisher, place and year of publication followed by pages of chapter.Example: Roos, A, 'Data Protection' in van der Merwe, D et al, Information and Communications Technology Law, LexisNexis, Durban, 2008, pp. 313-397, at p.356.

v. A journal article should be cited starting with the name of the author as in books, followed by article title in italics, then journal's name, year of publication, volume and issue number, followed by page numbers of journal covering the article.Example: Makulilo A.B, Likelihood of Confusion: what is the yardstick? Trademark jurisprudence in Tanzania, Journal of Intellectual Property Law and Practice, 2012, Vol.7, No.5, pp.350-357.

vi. Where a particular paper is cited and is not published, it shall be indicated as unpublished.

vii. The use of 'op cit', 'loc cit', or other such abbreviations, other than 'ibid' (next to the work cited immediately above) are not acceptable.

viii. Cross-references should be done in the following manner 'Makulilo (n 7) p.14'.

ix. Citation of internet based materials should always indicate the link and the date when it was accessed.

x. Where abbreviations are used, they shall be written out in full for the first time and then abbreviated when used for the next and subsequent time (s)

xi. Consistence shall be maintained in the use of numbers, symbols, and other characters e.g. dates. Quotations within the text shall be in quotation marks, indented and in font size 10. Quotation marks should always be double, but within a quotation only single quotation mark is required. Up to two lines of quote may be included

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