



Customary law in Tanzania and criminal justice

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Introduction

- In Tanzania customary law is one of the sources of law according to the Judicature and Application of Laws Act.
- Other sources includes The Constitution, Acts of Parliament, Case laws etc.
- However the JALA diminishes the role of the customary law.



Introduction cont..

- Historically, customary law and institutions have played a very significant role in both control of crimes and administration of criminal justice in Tanzania.
- However that role has been diminished considerably by the JALA.
- Section 11 of JALA recognizes applicability of customary law but then declares that customary law SHALL not apply to matters of criminal nature.



Introduction cont...

- In 1963 a more drastic and radical step was taken when the MCA was enacted and which categorically abolished criminal customary law.
- In effect this means that customary law can neither create criminal offences nor prescribe punishments.



Impact of customary law

- Despite the abolition of customary criminal law, standards and principles of customary criminal justice have a direct impact on the administration of criminal justice in primary courts.
- The primary courts retained some of the trappings of the previous native courts.
- Involvement of assessors in the administration of justice is one such feature.



Impact cont...

- In all civil and criminal proceedings a primary court is to be presided over by a magistrate and assessors.
- Any decision to be made by the primary court has to take into account the opinion of the assessors.
- Assessors are not trained in English-rooted common law principles and their wisdom of adjudication is chiefly drawn from customary style.
- It is in this indirect way that customary disputes comes into play



Impact cont..

- While criminal customary law is outlawed, inclusion of assessors in primary courts has made it possible for customary ways of life to influence administration of criminal justice.
- However it is uncertain whether this sort of administration of justice will continue in a considerable future time.
- The pressure is currently mounting in the direction of abolition of the institution of assessors



Impact cont...

- It is the individuals who conduct criminal trials in primary courts.
- Advocates and prosecutors are prohibited in from appearing in primary courts.
- Thus the customary system which allows all individuals, including victims of crimes to actively participate in the process is reflected.
- Customary law has no similar impact in Districts and Resident Magistrates Courts.



Impact cont..

- In most cases the law does not require magistrates to sit with assessors.
- The only exception is where there is an issue of Islamic or Customary law.
- At this level magistrates are not bound by the opinion of assessors unlike in the primary court.
- The situation is different in the High Court.



Impact cont..

- The law requires all criminal trials before the High court to be conducted with the aid of two or more assessors.
- The Judge is not obliged to conform to the opinions of assessors in deciding the case.
- The most active role played by the customary law through the assessors in the High Court is in respect to the defence of provocation.



Diminished role of customary law- EFFECTS

- In principle, the role of customary criminal law is more or less obsolete.
- The effect is that the marginalization of customary law in the judicial administration of criminal justice alienates the official criminal justice process from the people.
- The above has far reaching effect.
- Any law, and indeed any institution and its collateral system, can not thrive if it is not embedded in the customs of a society in question.



Effect cont..

- Most Tanzanians are alienated from the official criminal justice regime because its systems and procedures are significantly more complicated, lengthy, expensive and technical than the customary justice system.
- Research indicates that in some places people prefer to report their cases to the traditional militia “sungusungu” than ordinary police because of the complicated investigative and judicial processes which to them is unnecessary.



Policy implications

- The disconnection between the official justice system and customary notions has its own policy implications in the sense that there exists, parallel to the official system, a criminal justice regime which operates largely beyond state control and supervision.
- Punishing suspected witch without benefit of the principles of fair trial is the case in point



Recommendation
