

REVIEW OF CUSTOMARY LAWS IN THE LEGAL SYSTEM OF TANZANIA

Law Reform Commission of Tanzania is reviewing Customary laws of Tanzania in phases. Customary law was formally recognized as a source of law in 1961 by the Judicature and Application of Laws Act (JALA). This piece of legislation recognizes customary laws to be one of the sources of laws to be applied by the courts of Mainland Tanzania. As a source of law juxtaposed within other sources of laws, customary laws has over the years continually diminish in application as more pieces of legislation are expanded to cover areas hitherto under customary laws and practices.

Customary law may be applied by courts only in matters of civil nature. Customary laws of civil nature may be applied with respect to cases:

- (i) between members of a community in which rules of customary law relevant to the matter are established and accepted, or
- (ii) between a member of one community and a member of another community if the rules of customary law of both communities make similar provision for the matter.

Where the courts find that customary law may be applied to any matter before them, the court concerned are required to apply the customary law prevailing within the area of the local jurisdiction of the court, or if there is more than one such law, the court will apply the customary law applicable in the area in which the act, transaction or matter occurred or arose. It is the District Councils that are given the task of identifying customary laws prevalent in their areas of jurisdiction and recommending to the Government which of those customary laws should be declared as laws to be applied by courts within areas of District Councils.

Customary Laws are not static

The customary laws of any community in Tanzania are built upon experience of that community and will naturally alter to meet new circumstances as these new circumstances arise. Changes taking place in Tanzania or changes from outside which affect Tanzania also affects the customary laws, in that these external factors may put existing customary laws out of date. In time these changes on customary laws pass into law by reason of being the accepted view and the old rules are tacitly abandoned.

Judicature and Application of Laws Act, 1961 is so arranged as to allow changes taking place in the society to be accommodated within customary laws. Changes in customary law may occur owing to new conditions of life, superimposed on the people by outside influences, which create new legal possibilities. Changes may come from the changing of a basic principle owing to modern influences of Bill of Rights, gender equality and equality before the law.

Role of District Councils to Incorporate Changes in Customary Laws

Judicature and Application of Laws Act, 1961 allows District Councils to carry out periodic studies of customary laws to from time to time to declare what in the opinions of District Councils is their local customary law relating to any subject matter as applying throughout the area of relevant District Council. None of the District Councils of Tanzania have recorded what constitute customary laws of their respective areas. This uncertainty permeates all other areas still governed by the customary law.

Judicature and Application of Laws Act, 1961 envisages a situation where District Councils identify and codify applicable rules of customary law and hence give the customary laws some degree of certainty.

Purpose of Review of Review of Customary Laws

Many changes have taken place in Tanzania since Customary Law Declaration Orders were made way back in 1963. Apart from many pieces of legislation that have been enacted, Tanzania has a Constitution which has Bill of Rights. All these societal changes have impacted on customary laws. Despite these changes, customary laws remain the only law nearest to the people especially in rural Tanzania. In addition, mainstream statutory law has many things to learn from customary laws.

Law Reform Commission has completed the first phase of this Project which involved a thorough review of Customary Law (Declaration) Orders of 1963. This review identified some of the customary laws orders that are clearly repugnant to the Constitution and Bill of Rights provisions. Law Reform has compiled a report to the Minister of Constitutional Affairs and Justice with recommendations to delete from Customary Law Orders all those customary law orders that are repugnant to the Constitution and Bill of Rights. The Report will be submitted to the Minister in March 2009.

Second Phase- Review of Matrilineal Customary Laws- 2008/2009

This second phase of the Project is designed to carry out further studies on customary laws with close collaboration with District Councils, traditional leaders and experts in customary laws. During this second phase of the review of Customary Laws, Law Reform Commission will:

- assess how the Customary Law (Declaration) Orders, 1963 have - operated so far;
- study customary laws of the matrilineal tribes who were not covered by the existing Customary Law (Declaration Orders) of 1963 and gauge their compatibility with the Constitution, Bill of Rights, written laws and policy guidelines; and
- propose for enactment of revised edition of Customary Law (Declaration) Orders to be applied by courts in the areas of District Councils subjected to this survey.

Areas of Matrilineal Communities Survyed During the second phase (2008/ 2009):

In the second phase of the project, the Commission will conduct field research on customary laws of the matrilineal societies in the following Regions and District of Tanzania:-

1. **Lindi Region** :- Lindi District Council, Nachingwea District Council and Liwale District Council,
2. **Mtwara Region**:- Mtwara District Council, Masasi District Council and Newala District Council

3. **Morogoro Region:**– Morogoro District Council, Kilosa District Council, Kilombero District Council and Mahenge District Council.

After field research the Commission will come up with a report on matrilineal customary laws , thereafter the Commission will convene workshops in respective regions and district to gather stakeholders views and comments in order to enrich the Commission report.

The Commission will prepare specific reports containing proposed Customary Laws Declaration Orders of matrilineal communities from each of the District Councils under review.