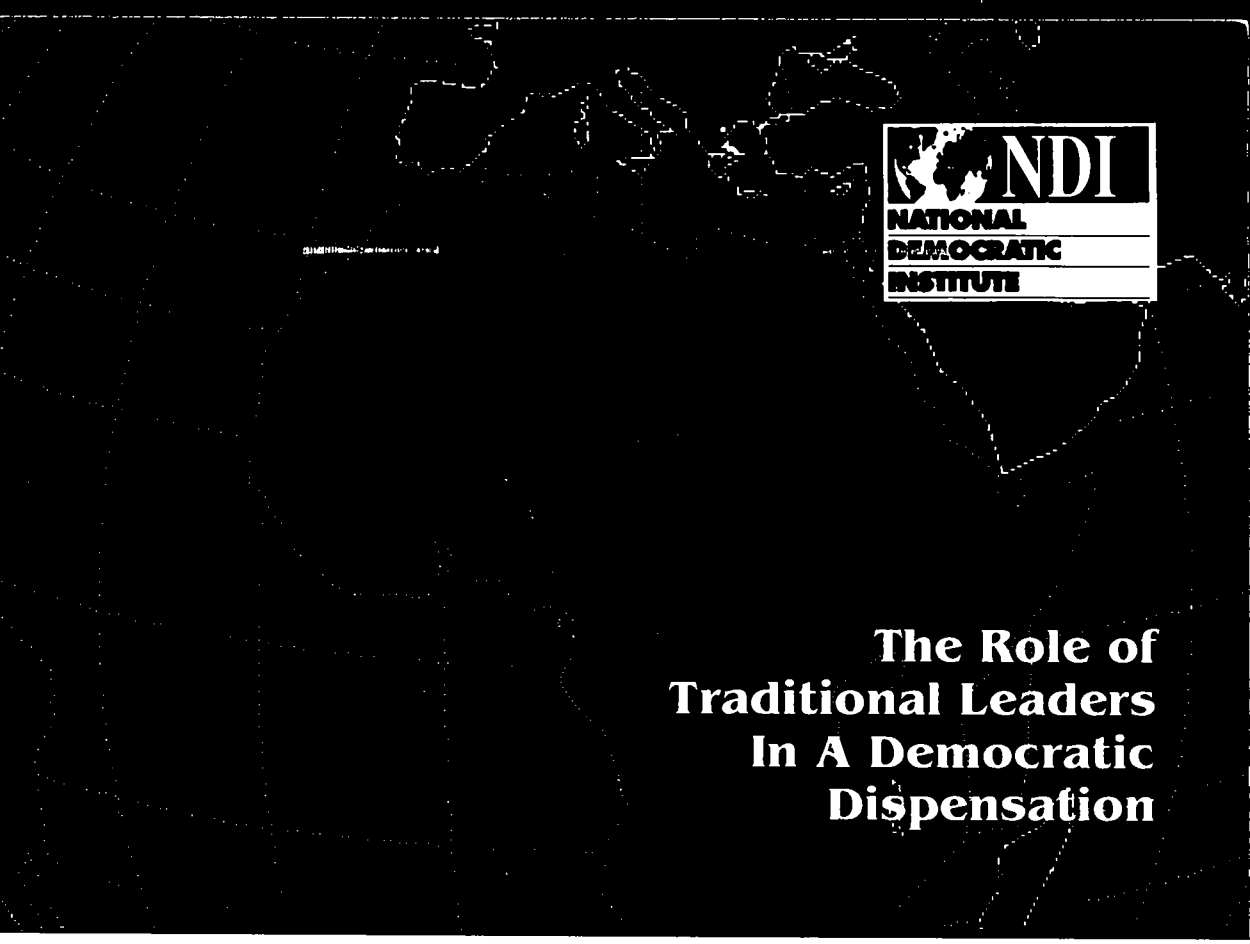

The Role of Traditional Leaders In A Democratic Dispensation

A SELECTION OF INTERNATIONAL EXPERIENCES

Foster S. Mijiga

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Foreword

The General Assembly of the United Nations declared the period 1995 - 2004 as the decade of the World's Indigenous People.[1] In this regard the UN has decided to place indigenous matters on the international agenda. While the UN and its member states now undertake the initiative to improve the living standards of indigenous people, there is a great challenge to the indigenous people and traditional institutions themselves to be active players in this process.

The UN declaration comes at a time when a new apparatus of democratic governance is being developed in many countries, bringing with it presidents, premiers, legislators, councilors, judges and other elected officials. The composition of the modern government and the traditional system of government differ in that modern governments have elected representatives while some structures within traditional institutions are inherited.

With these societies struggling to achieve representative and accountable systems of government, there are no universal strategies for embodying traditional cultural identity into democratic governments. This demand becomes complicated by the fact that in some cases what is considered to be colonial or pre-colonial cultural identity today is in actual fact a cultural identity constructed by the colonizing settlers for their indigenous people.[2] In some cases, these colonial cultures became very powerful and substantially modified the pre-colonial traditional reality.

The Constitution of South Africa recognizes the institution, status and role of traditional leadership. The Constitution further provides for the establishment of a **National House** of traditional leaders in terms of national legislation and **Provincial Houses** of traditional leaders in terms of provincial legislation. These structures are meant to maximize the participation and involvement of traditional leaders and their communities on matters of governance, particularly those relating to traditional communities and customs.

In response to a request from the Ministry of Constitutional Development and Provincial Affairs, NDI conducted an international study on the role of traditional leaders in democratic governance. This information is intended to supplement the Ministry's on-going effort to develop a white paper on traditional leaders in South Africa. NDI began this study by supporting a workshop on the Role of Traditional Leaders in Democratic Governance in August 1997 in Pretoria, South Africa. This was followed by the introduction of the Amakhosi Talk newsletter.

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[1] *According to the UN declaration, the term "Indigenous People" does not necessarily refer to Traditional Institutions, it refers more specifically to the "first people or the aborigines." However, traditional institutions are directly linked to the indigenous people: See "Authors Note" on page 4.*

[2] *Pelonomi Venson, (1995): The Commonwealth Local Government Forum and the Institute for Local Governance and Development: Traditional Leadership in Africa, pp. 20 - 21*

Deputy Director General in the Department of Constitutional Development, Mr. Khalipile Sizani, selected 10 countries for this study. Each of these countries recognizes traditional institutions in some form and provides specific roles for traditional leaders, their institutions and customs.

The study takes a case study approach focusing on a particular aspect of traditional leadership, community and custom. It does not seek to prescribe answers, but rather to provide perspectives from different international models and experiences that can stimulate debate on policies that will affect traditional leaders and their communities in South Africa.

Introduction

Traditional systems in the countries covered by this study existed in their pristine form before colonialism, during which they enjoyed uncontested authority over their communities. They represented a unique system of government that was disrupted by a succession of colonial regimes.[3]

During this study, it was discovered that there are significant variations within traditional systems from one geographical area to another and from country to country. In some areas, traditional institutions were strategically molded and tailored to serve objectives of the colonial mission, and in some places, these traditional institutions still exist in the disrupted form.[4]

However, the extent of the disruption varies among the different traditional groups and cultures. In addition to colonization, other factors such as urbanization, migration and industrialization have also significantly contributed towards the changes in the traditional setup.

Research on political transformations worldwide has shown that modern societies and systems of government are constantly changing. In some cases, traditional institutions have not kept pace with other political and social transformations. This has often created a perspective of traditional institutions being "old fashioned." Whether or not this perception is true, research shows that traditional institutions have been under constant pressure to change.[5]

Throughout this study, it is evident that traditional leaders play a vital leadership role in traditional communities just as elected representatives play a vital role in a democratic dispensation. However, in countries where the functions and duties of elected representatives and traditional leaders are not harmonized, the conflicts and overlap of their activities have become extremely detrimental to the local communities.[6]

To address this issue, countries such as Zimbabwe and Ghana opted for harmonization of the role of traditional leaders and elected representatives. This was done in recognition of the fact that both authorities have distinct and specialized roles that must co-exist.

For each country covered by this study, there is a specific focus area, except for Ghana where the research covers two aspects of traditional institutions: their role in government and the application of customary law. Below is a categorized list of countries in this study:

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[3] *Pelonomi Venson (1995): The Commonwealth Local Government Forum and the Institute for Local Government and Development: Traditional Leadership in Africa, pp. 69 - 73*

[4] *Williams, F N (1991): Pre-colonial Communities of Southern Africa. A history of Owambo Kingdoms 1600 - 1900.*

[5] *Manfred O Hinz (1995): The "Traditional" of Traditional Government. Traditional Versus Democracy-Based Legitimacy*

[6] *See: Chaponda D.P (August 1995): The Role of Chiefs in Local Government and Development. A paper presented to Zimbabwean Parliamentary Delegation to Zambia on the role of traditional leaders in Local Government, 23 August 1995*

Participation of Traditional Leaders in Government and Politics:

- Namibia
- Zimbabwe
- Botswana
- Ghana

Customary Law and Customary Law Courts:

- Ghana
- Kenya
- Papua New Guinea

Mechanisms for Aboriginal Claims:

- New-Zealand
- Canada

Special Cases:

- United States: Relationship between the Native American Tribes and government
- Malaysia: The System of Kings

Context of the International Study by Country

Country	Constitutional and Statutory Provisions
Namibia	Namibia for a long time was part of South Africa and shares similar ethnic diversity, resources and constitutional ideals. The Namibian Constitution recognizes the institution of traditional leaders and customary law. Traditional institutions are required by the Constitution to support the policies of government, regional councils and local authority councils.
Zimbabwe	The Constitution of Zimbabwe recognizes the institution of traditional leaders and provides for the establishment of a Council of Chiefs to represent traditional communities.
Botswana	The Constitution of Botswana provides for the establishment of a National House of Chiefs. The House of Chiefs has an advisory role to the executive and the legislature.
Ghana	The Constitution of Ghana provides for the establishment of the National House of Chiefs and Regional Houses of Chiefs that have functions more or less similar to the National House of Traditional Leaders and the Provincial Houses of Traditional Leaders in South Africa. The Constitution of Ghana recognizes customary law and traditional courts as part of the country's judicial system.
Kenya	The Judicial System in Kenya recognizes and applies customary law in magistrate courts. Customary law in Kenya is accepted and recognized in courts unless disputed and proved in a court of law to be non-existent. When the validity of a particular customary law is being disputed, the judiciary consults scholars and traditional leaders to authenticate the validity of the particular law.
Papua New Guinea	The Constitution of Papua New Guinea recognizes customary law and provides that customary law should be enforced by all courts in the country so long as the particular law is consistent with other legislative provisions or with justice in the public interest.
New Zealand	In New Zealand a treaty was signed between the government and the tribes to facilitate tribal claims. The treaty, known as the "Treaty of Waitangi" provides for mechanisms to hear, assess and make recommendations on tribal claims.

Canada	The Canadian government has developed several policies to address the issue of indigenous claims. These policies address outstanding claim issues and unfulfilled treaty provisions signed between the indigenous people and the government. The government either settles these claims by granting land or cash compensation.
United States of America	The Constitution of the United States recognizes the sovereign status of the Indian Tribes as "domestic dependent nations." In an effort to protect the Native American Tribes, the United States government established a federal trust responsibility by instituting a government-to-government relationship with the Native American Tribes. However, Native American Tribal sovereignty is subject to the US Congress' plenary power to regulate Native American Affairs. This exceptional power is regulated by the federal government's trust responsibility.
Malaysia	Malaysia has a "Conference of Rulers" that has the constitutional responsibility of choosing a member of the conference to act as the country's Head of State for a period of 5 years. The conference of rulers consists of Tribal Heads from the various states in Malaysia. The Malaysian system of succession is similar to that of South Africa in that leadership revolves around the royal family. The successor to the throne has to be a member of the royal family with the consent of the family members and elders within the particular traditional community.

Participation of Traditional Leaders in Government and Politics: Namibia, Zimbabwe, Botswana and Ghana

Namibia

The Constitution of Namibia recognizes the institution of traditional leaders and provides traditional leaders with the powers to ascertain the customary laws applicable to traditional communities. Traditional leaders also have the constitutional responsibility to uphold, promote, protect and preserve the traditional cultures of the various traditional communities and to perform traditional ceremonies and functions.

Article 19 of the Namibian Constitution protects the cultural heritage of Namibians and their traditional leaders. This recognition and protection by the Constitution has Traditional Leaders paying allegiance to and accepting the authority of the current modern state. Article 102 (5) of the Namibian Constitution states that there shall be a council of traditional leaders established by an act of Parliament. Its responsibility is to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice.

However, besides the advisory role, members of the council of traditional leaders are not allowed to participate in party politics. The Traditional Authorities Amendment Act of 1996 states that where a person who holds the traditional office of chief purports to take up a political office, such person shall be deemed to have relinquished that office with effect from the date on which that person takes up the political office.

According to the Act, persons who are qualified to be members of the council of traditional leaders are Namibian citizens who are not members of the National Assembly, National Council or Regional Council, nor executive members of both registered and non-registered political parties. However, despite the constitutional provisions, the council of traditional leaders has not yet been established in Namibia.

In Namibia, there exists central government with regional and local structures together with regional traditional authorities and their local structures. Namibia has regional governors with town and village councilors, as well as Kings, Queens, Paramount Chiefs, Kapteins, headmen, ward headmen and traditional councilors at different levels with each one drawing legitimacy from a different source.

However, the Constitution provides that in the performance of their duties and functions, traditional institutions should give support to the policies of the (central) government, regional councils and local authority councils, and that where the powers of traditional institutions conflict with the powers of either the (central) government, regional councils or local authority councils, the powers of the (central) government should prevail.

The colonial government in Namibia allowed conformist traditional leaders or those appointed by the regime to exercise certain functions within their communities. This was done to prevent the development of power vacuums at the bottom level of the colonial structures.[7]

This significantly contributes to the current rejection of appointees of the colonial authorities as traditional leaders and has caused many communities to appeal for the re-instatement of their original traditional leaders. Hence the current discussion about the re-instatement of the Kwanyama and Kwambi Kings in their respective Owambo regions, and the internal discussion among the Hereros regarding their Paramount Chief should be understood within this context.

Recognizing the important role that traditional institutions have played over time and the struggles they have gone through, the writers of the Constitution at the time of independence in 1990, provided that both the customary law and the common law of Namibia in force at the date of the country's independence, remain valid to the extent that the particular customary or common law does not conflict with the Constitution of Namibia or any other statutory laws

The Constitution further provides the following powers to traditional authorities:

- ascertain the customary laws applicable to traditional communities;
- uphold, promote, protect and preserve the culture, language, traditions and traditional values of respective communities;
- preserve and maintain cultural sites, works of art and literary works;
- perform traditional functions and ceremonies;
- promote affirmative action among members of the community;
- register practicing traditional healers;
- assist the police and other law enforcing agencies in the prevention of crime, apprehension of offenders within their jurisdiction and;
- assist and co-operate with organs of central, regional and local government in the execution and implementation of policies.

Zimbabwe

Soon after Zimbabwe attained self governance, the new government tried to dismantle the inherited legal dualism to create what was described as a single, politically unified, non-tribal nation. In 1981, the Zimbabwean Customary Law and Primary Courts Act stripped the Chiefs of their judicial functions leaving them explicitly as symbolic cultural figureheads.

The 1981 Courts Act elicited an outcry from traditional communities demanding the reverse of the past pattern of cultural hegemony. To address this issue, the government drafted a cultural policy in 1993 that specified the government's

[7] *See: Koyana D.S (1995): The Administrative Functions of Traditional Leaders. A paper presented at a workshop on "Traditional Authorities in the nineties - Democratic Aspects of Traditional Government in Southern Africa"*

acknowledgment of the need to strengthen the institution of traditional leaders with regard to its economic, social, religious and political status. The policy further tried to achieve equity among competing cultural claims.

The Constitution of Zimbabwe provides that Chiefs can be nominated and elected by other Chiefs to serve on the National and Provincial Chiefs Councils, both of which are very influential bodies. The National Chiefs Council is constitutionally entitled to have 10 of its members form part of the 150 member National Assembly. At the local level, the Minister of Local Government has the constitutional power to appoint more than half of the total number of chiefs to the Rural District Councils. Currently out of the country-wide total of 264 Chiefs, 151 have been appointed as councilors. Traditional leaders are also responsible for the administrative implementation of the decisions and policies of the District Councils.

In addition to the participation in matters of governance, Chiefs in Zimbabwe are allowed by law to stand for election on political party tickets or as independent candidates.

Botswana

The Constitution of Botswana provides the institution of traditional leadership with a judicial, ceremonial and developmental role. The Constitution further provides for the establishment of a House of Chiefs that is an advisory body to the National Assembly and the Executive.

The House of Chiefs consists of 15 members: eight ex-officio members being chiefs from the eight tribes recognized by the Constitution, four elected members, being sub-chiefs elected by their fellow sub-chiefs from the four settlement districts of Botswana and three specially elected members, being members elected by the ex-officio members of the house.

There are two levels at which governance takes place in Botswana, the national and district levels. At the district level there are four institutions; three local authorities and a department of district administration. The local authorities comprise the Tribal Administration, District Council and the Tribal Land Board. The four institutions have equal status and work harmoniously in implementing rural development programs.

Of the four levels of local institutions, Tribal Administration is the oldest. During the colonial days Tribal Administrators worked closely with District Administrators. Before Botswana attained its independent rule in 1966, Tribal Administration was responsible for primary health care, provision of primary education, settlement of disputes, water supply and road maintenance. These functions are currently being coordinated by government departments in collaboration with the Tribal Administration.

The colonial government created Tribal Councils in 1956 in which Chiefs and Sub-Chiefs were given the role of presiding over the Tribal Councils. The introduction of

democratic governance altered the powers and functions of Chiefs to accommodate specialized central government structures such as ministries and departments.

Within the new dispensation, a special role and function of chiefs was created and the Constitution provided for the establishment of the House of Chiefs as an advisory body to the new apparatus of government. The House of Chiefs in Botswana does not have legislative powers. However, the following specific bills cannot be passed by Parliament without consulting the House of Chiefs:

- any bill that would alter any provision of the Constitution;
- any bill that would affect the designation, recognition or removal of powers of Chiefs, sub-Chiefs or Headmen;
- any bill that would affect the organization, powers or administration of customary law, and;
- any bill that would affect tribal organization or tribal property.

The National Assembly is required to refer the above Bills to the House of Chiefs 30 days before they can be passed by the National Assembly.

The Constitution further provides for the establishment of customary courts that are presided over by Chiefs. These courts handle almost 80 percent of all criminal cases in the country, applying statutes such as the penal code, the Stock Theft Act. etc. The customary court system is popular in Botswana for several reasons: its free application (no fees), its use of indigenous languages and the populace's familiarity with the applicable laws.

The Tribal Administration in Botswana is an autonomous department on its own, and it manages and controls its own budget. The government provides logistical support, offices, vehicles and equipment to enhance the effectiveness of the Tribal Administration.

Ghana

The Constitution of Ghana provides for the establishment of the National House of Chiefs, Regional Houses of Chiefs and traditional councils. Each Regional House elects five paramount Chiefs to represent the Regional House in the National House of Chiefs, and where there are fewer than five paramount Chiefs in a particular region, the constitution allows divisional chiefs to make up for the required representation in the National House. The number of Chiefs represented in the Regional Houses and the functions and roles of the Regional Houses are determined by an Act of Parliament.

The different structures within the Ghanaian traditional hierarchy have the constitutional mandate of advising the executive and the legislature on all matters affecting the country's traditional institutions and customary law.

During the colonial period, Chiefs were elected by their own people to serve on either one of the houses or the traditional council, however, the British government

exercised substantial political authority in the country. When the British introduced the first legislative council in Ghana, they appointed three Chiefs and three ordinary people to the council.

The inclusion of Chiefs in the legislative council influenced the pattern of the local government structures. Villages **elected** their own councils of Chiefs and elders who were almost exclusively responsible for the immediate needs of individual localities, including traditional law and order and the general welfare of their communities.

Today, the Constitution of Ghana recognizes traditional institutions, together with their traditional councils, as established by customary law. The Ghanaian Parliament has no power to enact any law in any way that detracts or derogates from the honor and dignity of the traditional institution.

The National House of Chiefs and the 10 regional houses of Chiefs represent more than 32,000 recognized traditional rulers. These institutions exercise considerable influence throughout Ghana. As trustees of communal lands and natural resources, chiefs are usually the pivot around which local and social-economic developments revolve. Although Chiefs are forbidden from active participation in party politics, one third of the district assembly members consists of Chiefs or their representatives to ensure that district developments are in line with national policies.

The traditional political structure in Ghana has been referred to as a "domestic democracy" by British anthropologist, Robert S. Rattray[8]. In Ghana, Chiefs are usually selected from the senior members of the lineage or several lineages that are considered to be among the founders of the community or a particular ethnic group. With extensive executive and judicial authority, decisions on critical issues are based on wide discussions and consultations with adult representative groups of both sexes. Traditionally, legislation has not been the primary issue in Ghana, for the rules of life are largely set by custom. Discussions are usually focused on the expediency of concrete actions within the framework of customary rules. Decisions, when taken by chiefs, are normally taken by chiefs-in-council and not by lone dictatorial decree. The legitimacy of traditional authority in Ghana has therefore been based on public consensus sanctioned by custom and the interest of common people.

Where the process of selecting advisors to the Chiefs is not given directly to the populace, it is automatically vested in representatives of kin or local residence groups, elders or other types of councils. These groups have substantial authority that helps to balance the powers of the Chief. It is such checks and balances within the traditional scheme of authority relations that has influenced the modern government to recognize and maintain the traditional institutions.

[8] *Rattray S. Robert (1929): Ashanti Law and Constitution*

Customary Law and Customary Law courts: Kenya, Ghana and Papua New Guinea

Kenya

Customary law is recognized as any other common law as long as the law provides a reason or justification for individuals or collective action to come up with a framework for authoritative decision making in the particular community.[9] This recognition applies regardless of whether the law is a result of a legislative enactment, judicial pronouncement or the cultural history of the particular society. This becomes the basis for the recognition of customary law in Kenya.[10]

The British colonizers introduced western common law in Kenya. Based on the doctrines of equity and the statutes of general application in force in England on 12 August 1897, British courts were set up in Kenya, staffed by British magistrates and judges appointed by the colonial office.

Because the British Magistrates and judges were not familiar with Kenyan Customary Law, traditional institutions in Kenya maintained a separate judicial system called the African Court System.

At the beginning of the 20th century, the separate African Court system was abolished and incorporated in the former British judicial system. This was followed by the Reinstatement of African Customary Law Project of 1961 - 1963, which strove to record customary laws. In 1967, after recording most of the customary laws in Kenya, the government embarked on a separate project to integrate customary law with other systems of law in Kenya.

For any particular customary law to be recognized and applied in Kenya, the particular law must be recognized as emanating from a community whose custom has been practiced in Kenya since "time immemorial."[11] This requirement is unique in a sense that the term immemorial means time so remote that no living human being can remember it or give evidence concerning it. It therefore becomes the responsibility of the person who disputes the validity of the particular law to argue its antiquity. If a particular customary law is not recognized by the judiciary, the courts require that the particular law should be proved by evidence or expert opinions offered by the parties. The party alleging the existence of customary law is required to make references to books or documents written by renowned authors and experts. In the absence of books or any written records, Traditional Leaders play a role in substantiating the customary law in question.

The Kenyan Judicature Act No. S 3(2) outlines the applicability of customary law in the Kenyan Courts. It clearly states that the High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which

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[9] *See: Okoth-Ogendo H.W.O: Customary Law in the Kenyan Legal System: An Old Debate Revived*
[10] *Harrey W.B: Introduction to Legal System in East Africa.*
[11] *See: Ojwan'g J.B and Mugambi J.N.K: Windshield on Customary Law; Okoth-Ogendo H.W.O: Customary Law in the Kenyan Legal System;*

one or more parties are subject to it or affected by it, so far as the relevant customary law is applicable and not repugnant to justice and morality or inconsistent with other existing written laws.

In general, customary law applies to individuals coming from traditional communities who are affected by the nature of the particular law, however, in cases where a person from a traditional community is involved in a transaction with another person from outside the traditional communities, customary law is extended to that particular person.

Ghana

Since independence in 1957, the Chief Justice in Ghana has been the head of the Judicial System. The judicial system in Ghana is based on the Constitution, Ghanaian common law, statutory enactments of Parliament, and customary (traditional) law.

In 1971, the National Assembly of Ghana passed the Courts Act of 1971 that defined the structure and jurisdiction of the judicial system in Ghana. The 1971 Act established the Supreme Court, the Court of Appeal with two divisions, the ordinary bench and the full bench, and the High Court. In addition, the 1971 Act established the so-called inferior and traditional courts. This court hierarchy, which derives largely from the British system of justice, ensures that the structure and power of the judiciary remain independent from all other branches of government.

Until 1993, the circuit courts, the Magistrate Courts and the Juvenile Courts constituted the inferior courts. However, in mid-1993, the Ghanaian National Assembly passed the Courts Act of July 6, 1993 that created a new system of lower courts, consisting of circuit and community tribunals to replace the former circuit courts and the district magistrate courts. The July 6, 1993 Act also established the National House of Chiefs, the Regional Houses of Chiefs and Traditional Councils, without executive or legislative powers. However they were given the responsibility to advise on all matters affecting the country's chieftaincy and customary law, to undertake a progressive study, interpretation and codification of customary law and an evaluation of traditional customs with the view of eliminating customs that are socially harmful.

The Act provided that every House of Traditional Leaders elects a Judiciary Committee, which together with judiciary committees from other houses forms the Traditional Courts system of Ghana. The Act gave the judiciary committee exclusive powers to adjudicate any cause or matter affecting traditional institutions as defined by the Chieftaincy Act of 1971.

All matters concerning traditional communities are exclusively adjudicated by the judiciary committee. The committees provide access for the public to participate actively in judicial decision making. They also have the responsibility of correcting perceived deficiencies within modern courts when it comes to matters relating to customary law. However, the judicial system in Ghana provides the right to appeal in a higher court against any verdict of the traditional courts.

The involvement of traditional leaders in judicial matters and the recognition of the Ghanaian customary law, together with their traditional courts is a result of a long history of traditional leader's active participation in the welfare of traditional communities.

Papua New Guinea

The Native Custom (Recognition) Ordinance of 1963 gives courts in Papua New Guinea powers to enforce customary law. However, in practice, customary law plays a procedural rather than a substantive role, in that although most disputes usually go through a series of traditional processes, they finally end up in the modern courts.

The very taking of a dispute to another court rather than a traditional court amounts to an admission by the parties that the dispute between them could not be resolved by customary procedures that are usually mediation and conciliation processes that seek an amicable compromise. However, there are cases where customary law provides for the application of punishments and fines if necessary.

The problem that arises in Papua New Guinea when a traditional dispute is taken to the courts as provided by the Village Courts Bill of 1973, is that, except in few rare instances, the courts do not provide for compromises, but instead make binding judgments.

To address this problem, an Act of Parliament called the Village Courts Act of 1973 combined traditional dispute procedures with the court's system. The bill specifically allows for mediation and permits the courts to apply any relevant traditional custom.

In Papua New Guinea the government and the native groups have been working together to decide methods by which customary law would be recognized. The government passed the Council for Aboriginal Reconciliation Act (1991) which signaled the intent of Parliament to deal with the issue of aboriginal people who regarded any law other than customary law to be irrelevant to the village and tribal communities.

In forming the Council for Aboriginal Reconciliation, the government of Papua New Guinea acknowledged the effectiveness of customary laws in maintaining law and order in traditional communities. This acknowledgment meant that aboriginal control over laws was maintained and that secret aboriginal matters were protected.

In implementing recommendations from the Council for Aboriginal Reconciliation, the judiciary system in Papua New Guinea developed the following criteria to apply to any justice mechanisms in the country:

- an aboriginal defendant should be allowed to give unsworn evidence unless the court finds that he or she will not be disadvantaged by giving sworn testimony;
- courts should have specific powers to hear evidence in camera, to exclude certain persons from the court or to take other steps to protect secret information about aboriginal customary laws where this is necessary, and;
- aboriginal customary law should be taken into consideration where relevant in determining criminal intent and judgment thereof.

Mechanisms for Aboriginal Claims: New Zealand and Canada

New Zealand

In New Zealand specific mechanisms were introduced to address the issue of aboriginal claims. A significant mechanism was the signing of the "Treaty of Waitangi" between the aboriginal tribes and the British monarch in 1840. The treaty was signed by more than 500 chiefs and representatives of the British monarch. The treaty provided for three major components:

- that a national government should be formed (separate from the British monarch);
- that the aboriginal people should retain their lands and cultural treasures, and;
- that the Maori people should enjoy equal rights with all other New Zealanders.

One major component of the treaty was the land claims process. In addressing this process, the treaty provided for the establishment of a "Native Land Court." The courts main task was to individualize communal and tribal land titles.

The Maori viewed this provision as a double edged policy that provided theoretical legal protection for the aboriginal land owners but undermined the communal nature of their land holding and social structure by exposing the aboriginal people to commercial land purchasing agents.[12] From the late 19th century, a series of commissions of inquiry attempted to investigate, analyze and rectify the aboriginal land grievances.

In 1975 legislation was passed establishing the "Waitangi Tribunal." The Tribunal's mandate was to hear and report on aboriginal people's grievances against the British monarch under the Treaty. The task of the Tribunal was to receive the claims for Treaty breaches, report on historical findings of fact, and make recommendations for resolutions of grievances where the cause of action arose after 1875. In 1985, the Tribunal's jurisdiction was expanded to enable it to hear grievances dating back to 1840.

In 1995 the New Zealand government changed the 1988 Treaty of Waitangi Policy Unit to become the Office of Treaty Settlements within the Department of Justice. This office is responsible for the negotiating and implementation of claim settlements.

In order to facilitate the land claims process, the government of New Zealand put in place protecting mechanisms that recognize three categories of land:

- non-substitutable sites of special historical, cultural or spiritual significance;

[12] *Oliver W.H (1991): Claims to the Waitangi Tribunal*

- land of special importance essential for claim settlement; and;
- land not falling into either categories but particularly sought by claimants and that will facilitate settlement claims.

The treaty further regulates the selling of land by the British Monarch and commercial agencies. The Waitangi Tribunal as established by the Treaty has powers to make recommendations only, however, there are exceptions whereby certain statutory provisions enable the Tribunal to make recommendations that are binding on the Monarch.

The recommendations require that certain state enterprises, tertiary educational institutions and licensed forests transferred to the Monarch be re-purchased by the state for transfer to the aboriginal people to redress a valid Treaty grievance.

There is additional statutory protection for land owned by the state that is considered to be sacred land. This sacred land may be reclaimed by the Monarch on application by the aboriginal tribes through an order in council and returned to the tribe. An application under this process exists independently of any Treaty grievance and does not require the involvement of the Waitangi Tribunal.

Canada

Canada, just like any other country covered in this study, has had a tumultuous relationship with the indigenous peoples who live within its borders. For many decades, Canadian policy towards the indigenous populations was marred by inequalities, land appropriation, and violation of basic human rights. However, reform in this area was brought about by a series of court challenges to existing laws.[13]

Drastic change began to occur in 1973 when the Supreme Court of Canada instituted the common law concept of indigenous rights in the precedent setting *Calder* case. In this decision, the Nisga people of British Columbia sought a legal declaration on their rights to traditional territory. Six of the seven judges who heard the case acknowledged the existence of indigenous title in Canadian law but ruled against the Nisga on a technical point of law.

Despite the court's ruling against the Nisga, common law precedent had been set, and in 1979 a legal test for continuing indigenous rights was established by the Federal Court of Canada in the *Baker Lake* case. This ruling brought about a structure for the negotiations of comprehensive land claims.

When the Canadian Constitution was revised in 1982, the concept of indigenous rights was recognized in Section (35) of the Constitution Act. This served to guarantee the existing indigenous treaty rights in Canada.

[13] *Indian and Northern Affairs Canada, Federal Policy for the Settlement of Native Claims*

It was not until the 1990 *Sparrow* case that the Supreme Court of Canada provided analysis of the implications of Section 35 (1) of the Constitution. The Court ruled that a member of the Musqueam Band in British Columbia had a constitutionally protected right to fish in waters at the mouth of the Fraser River. This was a landmark ruling guaranteeing indigenous peoples specific rights within the existing constitutional framework of Canada.

With this decision, the court also made clear that indigenous rights fell within the boundaries of the Constitution in that they could be regulated by the government. The court then established a strict set of tests to determine if government interference with Section 35 rights was justified in specific cases.

Although the Canadian Supreme Court and Constitution guarantee indigenous rights, there remains a degree of ambiguity surrounding the content and definition of these rights. In legal terms, indigenous rights remain *sui generis*, or unique to each indigenous group, because these rights were established by common law. They are not codified and remain the source of controversy and debate.

As a result of the *Calder*, *Baker Lake*, and *Sparrow* decisions, Canada has worked through the court system and the Department of Indian Affairs and Northern Development to initiate a legal framework for indigenous claims and grievances. In order to meet its commitment, the Canadian government has accelerated and reformed the process a number of times in recent years, and is taking positive steps toward the resolution of hundreds of indigenous claims.

As recently as February 1998, the Canadian Supreme Court ruled that the settlement legends and stories of Gitxsan people were legally binding evidence that could be used, along with other histories, to support Gitxsan land claims in British Columbia.

This monumental ruling validates indigenous claims to land even where treaties and titles do not exist, and may redefine how the Canadian government deals with the indigenous people across the country. Coupled with other recent actions, namely the Liberal government of Prime Minister Jean Chretien's 1997 historic apology to the indigenous people for 150 years of paternalistic and racist treatment, the court's ruling seems to reflect a sharp shift in governmental attitudes in the treatment and rights of the indigenous people.

In 1991, the government created a special task team called the Indian Claims Commission. The idea of the commission dates back to 1947 when two parliamentary committees on Indian affairs recommended its creation. From its inception, the commission has focused on research, mediation and liaison to discover relevant historical facts about the indigenous people. The results of this research are expected to assist the government in developing policies relating to the indigenous people.

Relationship between Tribes and the Government: United States of America

United States of America

In the United States a special relationship exists between the federal government and the indigenous tribal authorities. The US recognizes tribes as domestic independent nations but also acknowledges that they are subject to federal law. Tribal affairs are administered by the federal government as a means of protecting the tribes from other states and their citizens.[14] However, the evolution of this relationship into its current form has taken place slowly over a long period.

The Constitution of the United States contains no implicit delineation of a relationship but it grants self governing powers to the tribes and authorizes the role of the federal government as a trustee. The Constitution further recognizes indigenous (Native American) sovereignty by classifying treaties made with indigenous peoples among the "supreme law of the land," and has established indigenous affairs as a unique aspect of federal law.

The relationship between the Tribal governments and the federal government has been the standard "government to government" relationship. Tribes are recognized as sovereign entities, capable of self government, while holding a dependent status within the federal powers of the United States.

Although policy regarding Native American affairs is often case (tribe) specific, in early treaties with indigenous Americans, the US pledged to "protect" tribes. This established a paternalistic relationship that called for a federal trust responsibility in government-to-government relations with the tribes. These principles continue to dominate federal US policy toward indigenous Americans.

The US-Indigenous relation is based on a number of basic principles such as: 1) the US Constitution vests Congress with plenary power over indigenous affairs; 2) indigenous tribes retain significant sovereign power over "their members and their territory," yet are subject to the plenary power of Congress; 3) the US has a trust responsibility with the tribes, which guides and often limits the federal government's dealings with indigenous Americans

Working closely with tribal leaders, the Department of Justice (DOJ) in conjunction with the Bureau for Indian Affairs (BIA) oversees many of the judicial aspects of reservation life. For example, the DOJ reviews proposed legislation, administers funds to tribes for capacity building in preventing crime, provides essential law enforcement, and reviews programs and procedures to ensure the federal government adheres to principles of respect for indigenous tribal governments. The

[14] *Reed J.B and Zelio J.A. (1995): States and Tribes, Building New Traditions*

DOJ also represents both the federal government and indigenous tribes in legal matters that may arise against either body.

The Bureau of Indian Affairs, a division of the Department of the Interior (DIO), was established in 1824 and has historically been the Federal Government's administrative body overseeing the reservation system. Having undergone numerous changes and reforms over the last fifty yeas, the BIA serves to administer some 56.2 million acres of land held in trust by the US for indigenous Americans. The BIA also works closely with tribes in developing lands, leasing mineral rights, riparian allocation, and general resource management.

In conclusion, the US has a unique legal relationship with indigenous American tribal governments, as set forth in the Constitution, treaties, statutes, and court decisions. This relationship, while at times turbulent and strained, is attempting to build a more effective day-to-day working relationship between the US and the indigenous people.[15]

[15] *Reed J.B and Zelio J.A. (1995): States and Tribes, Building New Traditions*

System of Kings: Malaysia

Malaysia

Malaysia is a federal system of 13 states under a constitutional monarchy. The Constitution of Malaysia provides for the qualified election of a head of state, the King, for a single term of five years. The Head of State is chosen by the conference of rulers that consists of hereditary representatives from the nine traditional Malay States and four other states.

The King exercises the powers of a constitutional monarch in a parliamentary democratic system of government. The executive power of the government rests in a democratically elected prime minister and his cabinet.

The Kingship of Malaysia, which assumes the role of the Head of State, rotates among the traditional state rulers every five years. After completing the five year term, the King is relieved of his duties as Head of State and resumes the position of a ruler his original state. During the transition, the conference chooses another ruler to take over as Head of State for another five year term. State rulers are chosen among the senior members of the royal family in consultation with the tribal councils.

The legislative branch of government in Malaysia consists of a Senate and House of Representatives. The Senate consists of 70 members elected every six years, however, 44 members are appointed by the King. The House of Representatives has 192 members from the various regions, who are elected by universal adult suffrage every five years.

Although the federal government and the states of Malaysia are governed by parliaments, the institutions of traditional leaders are instrumental when it comes to striking a balance between tradition and modernity. Traditional rulers also facilitate the consultation process in the formulation and implementation of public policies, district level development plans and any other projects and programs meant for rural development.

In recognizing the significance of traditional rulers in imparting justice on customary lines, the Constitution of Malaysia gives the King powers to designate judges for the Federal Court and the High Courts.

In most of the countries covered in this study, judicial functions within traditional communities have remained firmly in the grasp of traditional leaders. Since different traditional institutions have different customary laws, the authority to interpret and understand customary law within a particular institution is vested in the traditional leader. In some countries covered by this study, traditional leaders play an active role in customary courts, while in countries like Kenya, customary laws are recognized and matters arising thereof are adjudicated in the modern magistrate and high courts.

In either example, the body of knowledge vested in a traditional leader has allowed modern legal systems to incorporate customary law. In a multi-ethnic society, the integration of customary law into modern law has allowed equal representation under the law to gain a new and often important meaning.

In conclusion, NDI hopes that this study will be useful in understanding the roles and nature of traditional leaders in other societies. It is our sincere hope that this study will provide different perspectives relevant to the policy debate around traditional leaders in South Africa.

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