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Indigenous territorial autonomy in Panama: the indigenous comarcas (districts)

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Summary

International law has advanced in recent decades towards the recognition of the right of indigenous peoples to self-determination, expressed in regimes of autonomy or self-government in their territories. In this sense, indigenous territorial autonomy is an agreed regime that allows the peoples concerned to control their own social, political and cultural institutions and their territories, within the framework of the State in which they live.

In the Panamanian case, the figure where indigenous autonomy is concretized is the Comarca. Although it does not have constitutional recognition, it is based on a practice of political negotiation for more than a hundred years. Here we describe the normative structures that make this regime of territorial autonomy possible.

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1. General aspects

The case of territorial autonomy enjoyed by the indigenous peoples of Panama represents one of the oldest experiences in Latin America. The indigenous population of Panama, according to the National Institute of Statistics and Census (INEC) of Panama based on the 2010 population census[1] , represent 12.3%[2] of the Panamanian population, distributed in eight ethnic groups: Kuna, Ngäbe, Buglé, Teribe/Naso, Bokota, Emberá, Wounaan and Bri Bri[3] .

Historically, the Kuna, Ngäbe and Buglé peoples have the oldest ethnohistoric records dating back to the beginning of the colony. Later, in the XVII and early XVIII centuries, the arrival of the Emberá and Wounaan from the current territory of Colombia is observed; followed in the XVIII and XIX centuries by the Teribe/Naso, coming from the current Costa Rica. In the 20th century, new indigenous peoples were recorded, but with less demographic weight, such as the Bri Bri (probably from Costa Rica) and the Bokota[4] .

The indigenous peoples that inhabit the Panamanian territory show a high degree of territorial autonomy, which they obtained early compared to other countries in the region. The legal figure they have developed to carry out this autonomy process has been the Comarca, which recognizes both a territory and an indigenous political-administrative structure[5] .

Currently, there are six indigenous comarcas in Panama. Within these, four comarcas have the level of province[6] , with a comarcal governor, namely: Kuna Yala, Emberá, Ngöbe Buglé and Naso Tjër Di. Two other comarcas have the category of corregimiento, namely: Kuna de Madungandi and Kuna de Wargandi[7] .

The 2010 population census shows another interesting element, as 47% of the indigenous population resides in the comarcas[8] . Another relevant element of the Comarcas is that through Law No. 78 of 2008, the ownership of 2.5 million hectares under comarca administration was recognized, concentrating more than 75% of the country's forests[9] .

Among the characteristics of the Comarca, following Gonzalez (2010[10]), three elements can be mentioned: A) transfer of administrative and decision-making competences to traditional authorities democratically.

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[1] There are no more current figures, as the National Population Census should have been conducted in 2020, but due to the Covid-19 pandemic, it has been delayed to 2022.

[2] National Institute of Statistics and Census (INEC) and United Nations Population Fund (UNFPA). (2011). *Diagnóstico de la Población Indígena de Panamá con base en los Censos de Población y Vivienda de 2010*. Panama: INEC. Available online at: https://www.inec.gob.pa/archivos/P6571INDIGENA_FINAL_FINAL.pdf

[3] Ibid.

[4] Ibid.

[5] United Nations (UN) and International Work Group for Indigenous Affairs (IWGIA) (2019). *Indigenous peoples' rights to autonomy and self-government as a manifestation of the right to self-determination*. Mexico: IWGIA.

[6] Which is equivalent to the regions of the Chilean political administrative division.

[7] Which is equivalent to the provinces of the Chilean political administrative division.

[8] INEC/UNFPA (2011). Op. cit.

[9] UN/IWGIA (2019). Op. cit.

[10] González, M. (2010). Indigenous territorial autonomies and autonomous regimes (from the State) in America. In González, Burguete and Ortiz (coords.) *La autonomía a debate Autogobierno indígena y Estado plurinacional en América Latina*. Quito: Ed. Abya Yala. pp.35-63.

2) political structures of self-government; and 3) delimitation of a territory with collective rights over land and natural resources.

The way in which the traditional indigenous authorities were formed in Panama was from 1968-1969, in the First National Indigenous Congress in Alto de Jesús, where the Ngäbe-Buglé and the Emberá Wounaan organized themselves following the political model of the Kuna people, which consisted of the organization of Congresses and the leadership of General and local Caciques[11] . The Naso/Teribe, on the other hand, adopted a monarchic structure that exercises political leadership (influenced by the Misquitos people of Costa Rica)[12] .

A unique element of the process of creating a political-administrative territorial autonomy regime is that it did not take place in a process of unification of the struggles of indigenous peoples at the national level that questioned the country's political regime, nor was it the result of a change of political regime. What existed were diverse political contexts in which each indigenous people negotiated their autonomy with the State, taking as a model the process of territorial autonomy of the Kuna people[13] . In this process, the policies of alliance and political support were different, and responded to the capacities of agency of each people[14] , which explains the differentiated characteristics of the models of territorial autonomy of each Comarca.

This heterogeneous character of the autonomy processes has led some researchers, such as Assies (2005[15]), to point out that the indigenous territorial autonomy system is not equally satisfactory to the autonomy demands of all the comarcas. For while the Kuna Yala manifest a high degree of political and cultural control and consolidated structures of self-government, other comarcas have not been able to reach those levels of control[16] , expressing a pessimistic balance[17] . In this sense, Jordán (2010[18]) points out that the government has excluded the indigenous peoples from the processes of political negotiation and state decision-making, especially with regard to the exploitation of natural resources.

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[11] INEC/UNFPA (2011). Op. cit.

[12] Ibid.

[13] Martínez Mauri, M. (2011). La autonomía indígena en Panamá: la experiencia del pueblo kuna (siglos xvi-xxi). SENACYT, Panama-Editorial Abya Yala, Quito-Ecuador.

[14] Van Cott, D. L. (2001). Explaining Ethnic Autonomy Regimes in Latin America. *Studies in Comparative International Development, 34*(4). pp. 30-58.

[15] Assies, W. (2005). Two Steps Forward, One Step Back. Indigenous Peoples and autonomies in Latin America. In M. Weller and S. Wolff (eds.). *Autonomy, Selfgovernance and Conflict Resolution. Innovative Approaches to Institutional Design in Divided Societies*. pp. 180-212. New York & London: Routledge.

[16] Bretón, V. & Mantínez, M. (2015). Identity, autonomy and indigenous sovereignty in Panama and Ecuador: a comparative look from political anthropology. In: Martí i Puig, S.; Bretón, V.; Martínez, M. & Aparicio, M. (eds). *La sobirania dels pobles*. Universitat de Girona, Univeresitat de Lleida and Universitat Rovira i Virgili: Girona, Lleida, Terragona, pp. 33-80. p. 40.

[17] González, M. (2010). Op. cit.

[18] Jordan, O. (2010). In during the day and out at night: power relations, environment and indigenous peoples in a globalized Panama. In González, Burguete and Ortiz (coords.). *La autonomía a debate Autogobierno indígena y Estado plurinacional en América Latina*. Quito: Ed. Abya Yala. pp. 509-561.

2. Constitutional and Legal Framework for Indigenous Territorial Autonomy in Panama

Taking advantage of the spaces created by the new constitution promoted by General Omar Torrijos in 1972, the indigenous peoples were able to achieve a fairly high level of autonomy[19] . The 1972 Political Constitution of the Republic (CPR) of Panama, in its Article No. 90, states that it "recognizes and respects the ethnic identity of the national indigenous communities"[20] , and provides that the State must establish programs aimed at the development of these cultures and their protection. Likewise, in its Article No. 127, the CPR guarantees the indigenous communities the reservation of the lands necessary for their economic and social well-being, based on a structure of collective ownership of those lands[21] .

The Constitution divides the country administratively into provinces, districts (or municipalities), and corregimientos[22] . Notwithstanding this, and in accordance with the aforementioned constitutional provisions and Article 5, which authorizes the creation of other political divisions with special regimes, the legislator has created six indigenous districts that represent more than 20% of the national territory[23] , although their establishment preceded the Constitution, as we will see below.

While there is no legal definition of an indigenous comarca, Herlihy describes it as:

> [...] an indigenous terroir with semi-autonomous political organization under the jurisdiction of the national government. Although it is both a geopolitical division and an administrative system with geographic boundaries and internal regulations, it is not independent of the State. [...] Within the boundaries of this geopolitical-administrative region, the indigenous people, for the most part, govern themselves under their own political system, but still maintain allegiance to the State[24] .

The paradigmatic character of the Kuna Yala Comarca for the rest of the comarcas makes it necessary to briefly describe its emergence and consolidation process. The occupation of the Kuna territory by the Panamanian State at the beginning of the 20th century was carried out under the model of "civilization of indigenous people", first through a policy of evangelization and education, to later occupy the territory politically and administratively, either by state institutions or through a process of colonization[25] . This process was carried out with great violence on the part of the Panamanian State, so that in 1921 protests began to rise up, which was called the "Kuna Revolution", which led to the "Kuna Revolution".

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[19] Beaucage, P. (2015). Prologue. In: Martí i Puig, S.; Bretón, V.; Martínez, M. & Aparicio, M. (eds). *La sobirania dels pobles*. Universitat de Girona, Univeresitat de Lleida and Universitat Rovira i Virgili: Girona, Lleida, Terragona, pp. 7-18. p. 12.

[20] Article 90° CPR of Panama. Available at: https://ministeriopublico.gob.pa/wp-content/uploads/2016/09/constitucion-politica-con-indice-analitico.pdf (January, 2022).

[21] Article 127° CPR of Panama. Available at: https://ministeriopublico.gob.pa/wp-content/uploads/2016/09/constitucion-politica-con-indice-analitico.pdf (January, 2022).

[22] Article 5° CPR of Panama. Available at: https://ministeriopublico.gob.pa/wp-content/uploads/2016/09/constitucion-politica-con-indice-analitico.pdf (January, 2022).

[23] ECLAC/IDB. (2005). *Atlas sociodemográfico de los pueblos indígenas de Panamá*. [pdf] Available online at: http://bcn.cl/2vfnh (January, 2022).

[24] Herlihy, P. H. (1995). Panama's quiet revolution: comarca lands and indigenous rights. *Mesoamerica, 16*(29). pp. 77-93. p. 88.

[25] UN/IWGIA (2019). Op. cit. p. 17.

declaration of independence in 1925[26] . The government reacted by sending repressive forces, "but the Kuna skilfully opted for diplomatic negotiation and entered into talks with the United States military forces stationed in the country, as well as with the representative of the League of Nations. In this way they sign the peace treaty on March 4, 1925"[27] .

The Kuna rebellion of 1925 and U.S. intervention forced the delimitation of the San Blas reserve through the laws of 1930 and 1938[28] . In 1945, the government and the Kuna authorities agreed to an Organic Charter that established a regional government led by caciques and the existence of periodic democratic congresses to which indigenous delegates had to attend .[29]

This charter was recognized in Law No. 16 of 1953[30] , which elevated the reservation to the category of Comarca (indigenous) of San Blas, reserving all its uncultivated lands to indigenous families, establishing that only the Kuna Congress can award them to third parties under certain circumstances[31] and determining that the owner of exploration or exploitation of mines within it must compensate any damage[32] . In addition, it recognized the Kuna General Congress and the Congresses of the People and tribes in accordance with their tradition and the Organic Charter, insofar as they were not incompatible with the Panamanian legal system[33] and without prejudice to handing over the superior administrative authority of the Comarca to the Intendant[34] . It also recognized the jurisdiction of the *Sahilas* (except in criminal matters)[35] .

The Kuna political organization and the comarca as an administrative entity were progressively adopted as a model for the relationship between the State of Panama and the country's indigenous peoples. In this way, the different native peoples of Panama have been agreeing similar statutes with the State, which have resulted in the creation of new comarcas, each with its respective constitutive law, which establishes rights and obligations (some more restrictive than others), and its Organic Charter agreed with the Executive, which determines the details of the attributions of the indigenous authorities and their relationship with the State authorities.

Thus, Law No. 22 of 1983 created the Emberá de Darién comarca, delivering the lands included in it (excluding those of private property) to the collective patrimony of the *Emberá* and *Wounan* indigenous people, prohibiting their private appropriation and alienation[36] and establishing the priority of the comarca municipalities to acquire the lands that are alienated in their territory and those that are abandoned for two or more years.[37] In addition, it recognizes, among other traditional authorities, the General Congress of the Comarca as the highest decision-making and expressive body of the *Emberá* people and, together with it, the Regional and Local Congresses and the Council of *Nokoes* as a consultative body to the Congresses and the Council of *Nokoes* as a consultative body to the Congresses and the Council of Nokoes.

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[26] Ibid.
[27] Ibid. pp. 17-18.
[28] Idem.
[29] Idem.
[30] Articles 11, 12 and 13 Law No. 16 of February 19, 1953. Available at: http://bcn.cl/1o955 (December, 2021)
[31] Articles 1.III and 21 Law No. 16 of 1953.
[32] Article 23 Law No. 16 of 1953.
[33] Article 13 Law No. 16 of 1953.
[34] Article 3 Law No. 16 of 1953.
[35] Article 12 Law No. 16 of 1953.
[36] Article 2 Law No. 22 of 1983. Available at: http://bcn.cl/1o999 (December, 2021).
[37] Articles 3 and 5 Law No. 22 of 1983.

of the Caciques[38] . Law No. 22 innovates with respect to its predecessor, by providing that the Treasury will finance the administration, investment and development expenses of the comarca, according to the plans and programs that will be prepared in coordination with the indigenous authorities[39] . It also establishes that for the exploitation of the natural resources of the Comarca, prior authorization is required from the General and Regional Cacique and the National Directorate of Natural Resources[40] . Regarding subsoil resources belonging to the State, the State must guarantee the participation of the community in the economic and social benefits derived from the exploitation[41] . Regarding public works, the State is empowered to carry them out, in consultation with the Emberá authorities[42] . The destination of these resources is decided in accordance with the provisions of the Organic Charter[43] . Finally, a bilingual education plan is established, whose planning and execution is carried out in coordination between the indigenous and ministerial authorities .[44]

Law No. 24 of 1996, which created the Kuna de Madugandi Comarca, follows the guidelines of the previous ones, recognizing the collective ownership of the land and the indigenous authorities in the territory, the subjection of the government to an Organic Charter agreed with the Executive, and the state's obligation to finance the development of the comarca, including education and health in coordination with the Kuna General Congress[45] . The use of natural resources is subject to legal norms and the Constitution[46] . In addition, special provisions are established to guarantee the operation of the Bayano Hydrographic Plant and the Pan-American Highway .[47]

Law No. 10 of 1997, which created the Ngobe-Buglé Comarca, innovated by establishing an inter-ministerial commission, also composed of indigenous authorities, to plan and promote the integral development of the comarca[48] . Unlike previous laws, this one contemplates the possibility of resettlement due to development projects, which must be preceded by consultation and participation of the communities and their authorities[49] . On the other hand, the exploitation of natural resources is authorized after prior consultation and environmental impact assessment, notwithstanding the fact that the Organic Charter establishes that concessions must have the prior approval of the communities, and their participation in the planning, execution and benefits of the project must be guaranteed[50] . Finally, a Tourism Development Commission and a Tourism Development Zone for concession to private companies[51] are created.

Law No. 24 of 2000, which created the Kuna Wargandi Comarca, follows the general guidelines followed until 1996. In addition, it requires the General Congress of the Comarca to prepare a plan for the management and development of natural resources.

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[38] Article 10 Law No. 22 of 1983.
[39] Article 16 Law No. 22 of 1983.
[40] Article 19 Law No. 22 of 1983.
[41] Article 20 Law No. 22 of 1983.
[42] Article 24 Law No. 22 of 1983.
[43] Article 20 Law No. 22 of 1983.
[44] Article 21 Law No. 22 of 1983.
[45] Law No. 24 of January 15, 1996. Available at: http://bcn.cl/1o9ho (December, 2021).
[46] Article 8 Law No. 24 of January 15, 1996.
[47] Chapters V and VI Law No. 24 of January 15, 1996.
[48] Article 46 Law No. 10 of 1997. Available at: http://bcn.cl/1o9ir (December, 2021).
[49] Article 47 Law No. 10 of 1997.
[50] Article 228 Carta Orgánica Administrativa de la Comarca Ngäbé Büglé. Available online at: http://bcn.cl/1o9o2 (December, 2021).
[51] Article 49 Organic Administrative Charter of the Comarca Ngäbé Büglé.

culturally appropriate that must be approved by the National Environmental Authority[52] . Additionally, it prohibits intensive logging and any other activity that threatens the biodiversity of the area[53] . It also innovates by establishing an *ad hoc* transitory commission for the demarcation of the Comarca .[54]

However, this autonomous status has not prevented the existence of tensions and conflicts between the state authority and the indigenous peoples. Particularly in the case of the Ngäbe Buglé Comarca, where there is pressure to proceed with mining and hydroelectric projects. In this context, a conflict has arisen due to the fact that the President of the Republic unilaterally modified the Organic Charter in 1999, changing the mechanisms for the election of traditional authorities and granting the central government the power to intervene in them. In addition, the government reportedly drafted a new Mining Code, which was the subject of controversy. Finally, on March 22, an agreement was reached, approving Law No. 415, agreed between the parties, which revoked all mining concessions in Ngäbe Buglé territory and established the need for the consent of the General Congress for the construction of hydroelectric projects[55] . This modification of the Administrative Organic Charter of the Ngäbe Buglé Comarca, implied a legal vacuum of almost a decade regarding the official recognition of its authorities, which was remedied by the issuance of Executive Decree No. 256 of September 14, 2021, by which, in a participatory process of the indigenous communities and representative organizations, it was agreed that the highest regulatory body and ethnic and cultural expression is the Ngäbe Buglé General Congress[56] , which is composed of traditional authorities, leaders and local delegates, renewable every 5 years.

In 2018, the Panamanian Parliament enacted Law No. 656, by which it created the Naso Tjër Di Comarca, a decision that was vetoed by the President of Panama, Juan Carlos Varela, on December 14 of the same year 2018, based on the concerns of environmental sectors, since a protected area (national park) cannot be conformed as an indigenous comarca, as it would conflict with the constitution. This conflict was resolved by a judicial decision of the Supreme Court of Justice (CSJ) of Panama in November 2020, which stated that such recognition does not enter into constitutional conflict[57] . Therefore, on December 4, 2020, Law No. 188[58] was enacted, creating the Naso Tjër Di Comarca, which constitutes a special political division separate from the district of Changuinola, in the province of Bocas del Toro, with an area of 1,606.16 km², of which 91% of the territory is protected areas such as parks.

[52] Law No. 34 of July 25, 2000. Available at: http://bcn.cl/1o901 (December, 2021).
[53] Article 13 Law No. 34 of July 25, 2000.
[54] Article 22 Law No. 34 of July 25, 2000.
[55] Indigenous Territory and Governance. Ngäbe-Buglé: The exercise of their rights to their own institutions and to Free, Prior and Informed Consultation and Consent. Available at: http://bcn.cl/1o9p9 (December, 2021).
[56] Executive Decree No. 256, September 14, 2021. Available online at: https://app.vlex.com/#vid/876015214 (January, 2022).
[57] Judicial Branch (November 12, 2020). *The Plenary of the CSJ reiterates that the indigenous regions are part of the historical heritage of our nation*. Available online at: https://www.organojudicial.gob.pa/noticias/el-pleno-de-la-csj-reitera-que-las-comarcas-indigenas-son-parte-de-la-herencia-historica-de-nuestra-nacion (January, 2022)
[58] Law No. 188, December 4, 2022, https://app.vlex.com/#search/jurisdiction:PA/comarca+county/WW/vid/852746683 (January, 2022)

natural[59] . As in the cases of the previously described comarcas, the ownership of the land is of a collective nature (Article N° 3), however, private property rights prior to the sanction of this law are recognized (although it establishes the preferential option of purchase of the same by the General Naso Council, granting 90 days to resolve, and the seller cannot offer them or make the sale for an amount lower than the amount offered to the Council). The traditional authorities are recognized as legitimate sources of power and administration, but it establishes that they must be regulated by means of an Organic Charter, where a Naso General Council must be formed, which will have as its main authority the Naso King (and his alternate) and the elected delegates of each community. In addition, the Assembly of the Naso People is created, which will meet once a year, and can be called extraordinarily by the Council. The Organic Charter will also determine the legal powers and competences of the traditional authorities. The authorities, on the other hand, will be able to develop projects of self-management of development and investment that improve the welfare of its inhabitants, in the same way, the exploitation of natural resources by private or the State in the region, may not endanger the culture, biodiversity, survival and social peace of the Naso people, so that any project must be consulted and approved by them.

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[59] Newspaper La Prensa. 28 from February 28 from 2019. Available at online at: https://www.prensa.com/impresa/panorama/Nueva-protegidas-Bocas-Toro-Chiriqui_0_5247225312.html (January, 2022).

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