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**A SUMMARY OF COMPARATIVE STATE RECOGNITION OF
INDIGENOUS GOVERNANCE**

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I. EXAMPLES OF SUCCESSFUL MODELS

A. Panama

Summary: Panama's laws and constitution provide some protection for Indigenous governance. Panama has a system of Indigenous comarcas that enable Indigenous peoples to exercise a measure of autonomy and self-government. The comarca system has worked well for the Indigenous Kuna. However not all Indigenous groups have been able to achieve effective governance using this model.

1. Legal protection of Indigenous governance in Panama

a. Constitutional protection

The constitution of Panama¹ recognizes Indigenous leaders and facilitates the election of Indigenous representative to the state legislature. It also guarantees Indigenous peoples' rights to lands and to hold property collectively.²

b. The comarca system

Comarcas are semi-autonomous administrative regions that enable Indigenous peoples to exercise self-government.³ *Comarcas* are not completely autonomous. They are still subject to the constitution and the laws of Panama.⁴

There is no general legislation that recognizes all Indigenous *comarcas*. Each *comarca* has to be negotiated individually with the state.⁵ This means that not all groups who want a *comarca* have one. One Indigenous group the Naso-Teribe has been lobbying the government of Panama to establish their own *comarca* since 1973.⁶

c. Shortcomings of the comarca system

One shortcoming of the *comarca* system is that Indigenous peoples have only usufructuary rights to the natural resources on *comarca* lands.⁷ The state maintains the right to exploit such resources. This has led to confrontations between the state and Indigenous groups. In 2010,

¹ Available online (Spanish only): <<http://pdba.georgetown.edu/constitutions/panama/panama.html>>.

² Stefanie Wickstrom, "The Politics of Development in Indigenous Panama" (2003) 131:30:4 Latin American Perspectives 43 at 45.

³ Heraclio López Hernández, "Panama" in *The Indigenous World 2010* (IWGIA) at 127, online: IWGIA <http://www.iwgia.org/graphics/Synkron-Library/Documents/Country%20Profiles/Panama/IW_%202010_Panama.pdf>.

⁴ Lynn Horton, "Contesting State Multiculturalisms" (2006) 38 J. Lat. Amer. Stud. 829.

⁵ IWGIA, "Constitutional Rights Relevant for Indigenous Peoples in Panama," online: IWGIA <<http://www.iwgia.org/sw32479.asp>>.

⁶ IWGIA, "Indigenous People in Panama," online: IWGIA <<http://www.iwgia.org/sw32477.asp>>.

⁷ *Supra* note 2 at 45.

Panama granted mining concessions on the Ngöbe-Buglé *comarca* without compensation, sparking protests.⁸

d. The General Environmental Law

Law 41 of 1998, the General Environmental Law,⁹ would give Indigenous peoples the right to control and develop lands and resources and retain profits from development carried on in *comarcas*. However this law has never been fully implemented.¹⁰

2. The Kuna

a. Traditional Kuna government

The Kuna traditionally governed themselves through a system of communal land management and collective decision making.¹¹ The village was the main unit of political organization. Regional political structures only developed as a response to contact with colonizers.¹²

b. Contemporary Kuna government

The Kuna have maintained their traditional institutions. Even today, many problems are still solved through traditional institutional mechanisms.¹³ The Kuna have also developed new institutions, of which the most significant is the Kuna General Congress.¹⁴

c. The Kuna General Congress

The Kuna General Congress was formed on the initiative of the Kuna themselves in the 1920s.¹⁵ It is comprised of 5 delegates from each of 48 communities.¹⁶ The Kuna General Congress has used its legislative authority to pass a law regulating tourism in the Kuna Yala *comarca*. This enables them to protect the environment and collect tax revenue.¹⁷

d. Kuna development organizations

The Kuna are highly organized, and Kuna organizations play an important role in addressing development concerns.¹⁸ There are around 30 Kuna organizations working on issues such as

⁸ “The Ngabe-Bugle Comarca: Panama's democracy on the line” *Latin America Bureau* (7 November 2010) online: LAB <<http://www.lab.org.uk/index.php/news/66/696-panama-the-ngabe-bugle-comarca-panamas-democracy-on-the-line>>.

⁹ Available online (Spanish only): <<http://repository.unm.edu/handle/1928/12321>>

¹⁰ *Supra* note 2 at 46.

¹¹ *Ibid.* at 47.

¹² *Ibid.*

¹³ *Ibid.* at 48.

¹⁴ *Ibid.*

¹⁵ *Ibid.* at 52.

¹⁶ *Supra* note 6.

¹⁷ Stephen G. Snow, “The Kuna General Congress and the Statute on Tourism” (2000) 24:4 *Cultural Survival*, online: *Cultural Survival* <<http://www.culturalsurvival.org/print/3242>>.

¹⁸ *Supra* note 2 at 53.

sustainable development, control of resources and cultural survival.¹⁹ Some examples include the Instituto de Desarrollo Integral de Kuna Yala, a planning organization that implements, coordinates, and directs development within the *comarca*, and the Asociación Napguana, an organization that provides financial, organizational, and legal assistance to community-level development projects.²⁰

3. Influence of the Kuna model on the Ngöbe-Buglé

The Kuna governance structure has been very influential in Panama. Most of Panama's other Indigenous groups have adopted a similar organizational model.²¹ However the other groups have not been as successful as the Kuna.²²

a. Traditional Ngöbe-Buglé government

The Ngöbe and the Buglé used to live in small dispersed communities without a centralized government. Political authority was decentralized and centered on kin-based residential units.²³ Their traditional political culture had few mechanisms for coordinated decision making or regional leadership.²⁴

b. Contemporary Ngöbe-Buglé government

In the 1970s, the Ngöbe and the Buglé adopted a governance model based on the Kuna model. They also created the Ngöbe-Buglé General Congress. In 1997 the state established the Ngöbe-Buglé *comarca*.²⁵

The Ngöbe continue to face serious obstacles to effective governance. There is disagreement about who has the authority to head the *comarca* government. This political wrangling prevents leaders from forming a government to address development concerns.²⁶

B. The United States

Summary: Many US tribes operate under imposed constitutions that do not match the political culture of the tribe. However some tribes, including the Confederated Salish and Kootenai Tribes, and the Navajo Nation, have been able to design their own systems of governance. If the recognized government is a good match for the tribe's political culture, the tribe is more likely to be economically successful.

1. Tribal government in the US

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Supra* note 6.

²² *Ibid.*

²³ *Supra* note 2 at 49.

²⁴ *Ibid.* at 55.

²⁵ *Supra* note 6.

²⁶ *Supra* note 2 at 50.

a. Formalization of tribal governments

In the 1930s US government policy called for tribes to adopt a formal constitution. Many tribes were simply given a model constitution.²⁷ The imposed constitutions did not always match the political cultures of the tribe.²⁸

Today, many US tribes are governed by an executive-centered model. Most tribes have a weak separation of powers, and little provision is made for judicial functions.²⁹ This system is a departure from most pre-contact institutions. While there were a few American Indian Nations with a centralized government before contact, many more communities relied on more decentralized systems with dispersed power.³⁰ The result is that some tribes have highly effective governments that work well for them, and others have governments that are dysfunctional.

2. The Confederated Salish and Kootenai Tribes (CSKT)

a. Contemporary CSKT government

CSKT is composed of three distinct tribes who share a reservation. They have a parliamentary system in which the legislators select a council chair. They also have an independent judicial system. Because this system was chosen by the groups themselves, it has cultural resonance and the support of the people.³¹

b. CSKT and development

CSKT was the first native nation in the US to take over management of every reservation program previously administered by the federal government.³² In the 1980s and 90s CSKT took over management of all federal programs that were previously administered by the BIA and Indian Health Services, including the electric utility, Mission Valley Power.³³ These programs are extremely well-run. Electricity rates are among the lowest in the northwest and their utility system is one of the best maintained. In 2002, CSKT realized annual revenues of over two million dollars from their natural resources and six hundred seventy-seven thousand dollars from land leases.³⁴

²⁷ Felis S. Cohen, *On the Drafting of Tribal Constitutions*, David E. Wilkins ed. (Norman: University of Oklahoma Press, 2006) at xxii.

²⁸ Manley A. Begay et al. "Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?" in *Rebuilding Native Nations: Strategies for Governance and Development*, Miriam Jorgensen, ed. (Tucson: University of Arizona Press, 2007) at 49-50.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Harvard Project on American Indian Economic Development, "Honoring Nations: 2003 Honoree, Trust Resource Management," online: <http://hpaied.org/images/resources/publibrary/Trust%20Resource%20Management.pdf>.

³⁴ *Ibid.*

In the 1970s, CSKT assumed management of natural resources on its reservation.³⁵ CSKT spends over \$10 million a year on natural resources and land management. It is also the first tribe in the US to designate its own wilderness area.³⁶

3. The Navajo

a. Traditional Navajo government

Traditional Navajo government dispersed power among independent bands. However there was also some use of centralized leadership.³⁷

b. Contemporary Navajo government

The modern Navajo Tribal Council was initially created by the US government in 1923.³⁸ Later the Navajo voted not to reorganize their government under the Indian Reorganization Act. They have never adopted a written constitution. The Navajo Nation Code defines a 3 branch structure of government, with separation between legislative, executive and judicial branches.³⁹

c. The Navajo and development

The Navajo still face economic problems, such as high unemployment rate, lack of infrastructure, poverty. However, they also have a strong welfare program that serves as a social safety net.⁴⁰ The Navajo Nation owns and operates 13 tribal enterprises, including public utilities, an arts and crafts enterprise, and a newspaper.⁴¹

II. EXAMPLES OF PROBLEMATIC MODELS

A. The United States

1. The Oglala Sioux

a. Traditional Oglala government

Before contact, the Sioux were a loose association of seven divisions, and each division was made up of several tribes, of which the Oglala were one.⁴² There was little political organization above the tribal level.⁴³

³⁵ *Ibid.*

³⁶ Online: Confederated Salish & Kootenai Tribes <www.ckst.org>.

³⁷ Raymond Austin, *Navajo Courts and Navajo Common Law* (Minneapolis: University of Minnesota Press, 2009) at 9.

³⁸ *Ibid.* at 13.

³⁹ *Ibid.*

⁴⁰ Division of Economic Development, *2009-2010 Comprehensive Economic Development Strategy* (Navajo Nation) at 19, online: Navajo Business <http://www.navajobusiness.com/pdf/CEDS/CED_NN_Final_09_10.pdf>.

⁴¹ *Ibid.*

⁴² Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache" (1995) 33:3 *Economic Inquiry* 402 at 411.

The extended family was the most important unit of political organization. Extended family units were governed by a council consisting of all respected males in the community. Chiefs were chosen by the council.⁴⁴ There was also a council at the tribal level (i.e. all Oglala), but it functioned only intermittently, such as when the extended family units came together, and it was not responsible for making major decisions.⁴⁵

b. Contemporary Oglala government

The Oglala Sioux currently operate under an imposed constitution. This constitution creates a centralized government. It provides for a directly elected tribal president and a one-house legislature.⁴⁶ Whereas traditionally the council was the most powerful governmental institution, the current government structure creates a powerful executive branch.⁴⁷

The Oglala government has been characterized by instability and frequent crisis.⁴⁸ There are frequent impeachment proceedings and constitutional crises. In 1973 there was an armed insurrection between the central tribal government and dissident tribal factions. In 60 years, only one tribal president has been re-elected.⁴⁹

c. The Oglala Sioux and development

The ineffectiveness of government hurts economic development. Small business owners have complained that they cannot rely on the government to protect their economic interests. It can also be difficult to get a business license.⁵⁰

The Oglala Sioux reservation includes the poorest county in the US as of 1995. As of 1989, the unemployment rate on the reservation was 75%.⁵¹ Median household income is \$11,260 and 63% of people live below the poverty line.⁵²

d. An alternative model?

Cornell & Kalt have argued that a parliamentary system would be more consistent with Sioux political norms.⁵³ The Lower Brule reservation is the only Sioux reservation with a

⁴³ *Ibid.* at 412.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 413.

⁴⁶ *Ibid.* at 408.

⁴⁷ *Ibid.* at 414.

⁴⁸ *Ibid.* at 409.

⁴⁹ *Ibid.*

⁵⁰ Andrew Aoki and Dan Chatman, *An Economic Development Policy for the Oglala Nation* (Harvard Project on American Indian Economic Development, 1997) book 3 at 6.

⁵¹ *Supra* note 42 at 408.

⁵² Christine Bucholz and Mark Gustafson, *Local Governance for the Oglala Sioux Tribe: A Return to Local Empowerment* (Harvard Project on American Indian Economic Development, 2000) chapter 2 at 8.

⁵³ *Supra* note 42 at 414.

parliamentary form of tribal government. Lower Brule also has the highest per capita income and the lowest poverty rate of any Sioux reservation, according to the 1980 census.⁵⁴

2. The Hopi

a. Traditional Hopi government

The Hopi tribe is made up of 12 villages.⁵⁵ Traditionally villages were politically autonomous and they remain relatively autonomous today. Traditional Hopi political organization was structured according to a matriarchal clan and village system.⁵⁶

b. Contemporary Hopi government

Traditional leaders continue to govern the villages, but their authority is not recognized by the US.⁵⁷

Today all 12 villages of the Hopi tribe are officially governed by a single tribal council.⁵⁸ Representatives to the council may be elected by their village, or they may be appointed by a village leader. The website of the Hopi tribe indicates that currently only 4 of the 12 villages are represented at the council.⁵⁹ It does not indicate whether this is by design or whether it is a result of conflict between the villages and the council.

c. Political instability

The Hopi have experienced significant political instability stemming from the conflict between the unrecognized village governments and the central government. In 2010 the tribal chairman requested that the appointed representatives from two villages, Mishongnovi and First Mesa, step down because they had not been democratically elected.⁶⁰ First Mesa had held an election, but the village leader removed the elected representatives and replaced them with appointed representatives. Mishongnovi villagers wanted to hold an election, but they have been prevented from doing so the village leader. The appointed representatives refused to step down.⁶¹

3. The Crow

a. Traditional Crow government

⁵⁴ *Ibid.*

⁵⁵ Kerry R. Venegas, *Excellence in Tribal Governance, An Honouring Nations Case Study, The Two-Plus-Two-Plus-Two Program: Building an Educational Bridge to the Future for the Youth of the Hopi Tribe from High School to College and Beyond* (Harvard Project on American Indian Economic Development, 2006) at 2.

⁵⁶ *Ibid.*

⁵⁷ *Supra* note 28 at 50-1.

⁵⁸ *Supra* note 55.

⁵⁹ "Tribal Government" online: The Hopi Tribe <<http://www.hopi-nsn.gov/>>.

⁶⁰ "Hopi Council reps asked to step down" *Navajo-Hopi Observer* (5 March 2010) online: Navajo-Hopi Observer <<http://navajohopiobserver.com/main.asp?SectionID=74&subsectionID=393&articleID=12318>>.

⁶¹ *Ibid.*

The Crow tribe was traditionally governed by strong clans and hierarchies of chiefs.⁶²

b. Crow government, 1948-2001

From 1948 until 2001, the Crow operated under an imposed constitution that made every adult a member of the tribal council.⁶³ Political factions formed along family lines, making consensus decision making difficult.⁶⁴

c. The Crow tribe and development

Despite having access to a wealth of natural resources, the Crow tribe lacked the institutional capacity to take advantage of these assets. The decision making process was unstable and unpredictable. As a result, they experienced high unemployment, poverty, inadequate health care, below standard housing, and insufficient education.⁶⁵

d. Recent reforms

Today the Crow tribe has initiated reforms to bring their institutions in line with political culture as it exists today. In 2001 they repealed the 1948 constitution and replaced it with a constitution designed to provide for strong separation of powers between the executive, legislative and judicial branches.⁶⁶ The legislature consists of 3 representatives from each of the 6 districts. This reflects the fact that today people have strong district loyalties.⁶⁷

Under the old model, the judicial branch was not sufficiently independent and the lack of confidence in the Tribal Court made economic development difficult. It is hoped that these reforms will encourage a business friendly environment and foster economic development.⁶⁸

B. Canada

Summary: The Gitksan in Canada continue to use their traditional system of governance, despite the fact that it is not recognized by Canada. Negotiations with Canada have been unsuccessful so far.

1. The Gitksan

a. Non-recognition of traditional Gitksan government

⁶² Supra note 28 at 51-2.

⁶³ Andrew Purkey, *Crow Tribal Courts and Economic Development* (Harvard Project on American Indian Economic Development, 1988) at 4.

⁶⁴ *Ibid.* at 5.

⁶⁵ *Ibid.* at 1.

⁶⁶ Supra note 28 at 51-2.

⁶⁷ Supra note 28 at 51-2.

⁶⁸ "Tribal Government" *Official Site of the Crow Tribe Apsáalooke Nation*, online: Crow Tribe <<http://www.crowtribe.com/govt.htm>>.

The traditional hereditary system of the Gitksan is still in place today. However it is not currently recognized by the Canadian government.⁶⁹ This has caused conflict and tension between the traditional hereditary system and the Indian Act band council system.⁷⁰ The Gitksan believe that the imposition of Canadian legislation has caused dependency and impoverishment.⁷¹

b. Conflict over fisheries management

The Gitksan have taken the position that authority for fisheries management resides with the hereditary chiefs.⁷² In the early 1980s, the Council attempted to create a by-law that would have authorized the hereditary chiefs to form an advisory body on fisheries management, but the Ministry of Indian and Northern Affairs disallowed the proposed by-law.⁷³

c. Negotiations with the Canadian government

So far, the Gitksan and the Canadian government have made little progress in their ongoing negotiations.⁷⁴ Val Napoleon has argued that the BC treaty process is problematic because it advocates treating bands as self-contained nations.⁷⁵ Napoleon argues that this is an unreasonable approach because no community can be entirely self-contained.⁷⁶

D. Apartheid South Africa

I. Black self-government under apartheid

a. The homeland system

One of the features of apartheid was a system of supposedly autonomous reserves for black South Africans, called homelands.⁷⁷ In fact, the existence of homelands predated the rise of apartheid. The borders of homelands were fixed as early as 1913.⁷⁸

⁶⁹ Val Napoleon, "Who Gets to Say What Happened? Reconciliation Issues for the Gitksan" in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 176 at 189.

⁷⁰ *Ibid.*

⁷¹ "Self Determination" online: Gitksan <<http://www.gitksan.com/>>.

⁷² Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (Concord, Ontario: Captus Press Inc., 1994) at 53.

⁷³ Peter Grant, "Recognition of Traditional Laws in State Courts and the Formulation of State Legislation" in *Commission on Folk Law and Legal Pluralism, Papers of the Symposia on Folk Law and Legal Pluralism* (Vancouver: XIth International Congress of Anthropological and Ethnological Sciences, August 19-23, 1983) at 71.

⁷⁴ See e.g. "Gitksan break treaty mould with 'new plan'" *The Vancouver Sun* (28 July 2008) online: Vancouver Sun <<http://www.canada.com/vancouversun/news/westcoastnews/story.html?id=9ffe43c3-919e-41be-bb62-8b5189cd7359>>.

⁷⁵ *Supra* note 69 at 189.

⁷⁶ *Ibid.*

⁷⁷ S.F. Khunou, "Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid" (2009) 12:4 Potchefstroomse Elektroniese Regsblad 81 at 82.

⁷⁸ *Ibid.* at 84.

In 1959, the apartheid government adopted the Promotion of Black Self-Government Act.⁷⁹ This act gave powers of self administration to the homelands, then called Bantustans.⁸⁰ In 1971, the Self-Governing Territories Constitution Act⁸¹ gave legislative powers to the homelands.⁸²

b. Flaws in the homeland system

Black self-government under apartheid was not a reflection of African culture. Under apartheid, traditional leaders were accountable to the apartheid government, not to their people.⁸³ Homelands were not effectively independent. Homeland leaders could only pass legislation with the permission of the apartheid government.⁸⁴

The homeland system worsened living conditions for black South Africans. Poverty, malnutrition and corruption were widespread.⁸⁵

III. EXAMPLES OF MIXED OR UNPROVEN SUCCESS

A. Democratic South Africa

1. Legal protection of customary law

a. Constitutional law

The 1996 Constitution of South Africa⁸⁶ limits the applicability of African customary law only insofar as it is inconsistent with the purpose and values set forth in the Bill of Rights. The constitution also states that the Bill of Rights does not deny the existence of rights emanating from customary law.⁸⁷ Section 39 of the 1996 Constitution states:

39. Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

⁷⁹ Act 46 of 1959.

⁸⁰ Supra note 77 at 85.

⁸¹ Act 21 of 1971.

⁸² Supra note 77 at 88.

⁸³ *Ibid.* at 82.

⁸⁴ *Ibid.* at 89.

⁸⁵ *Ibid.* 89-90.

⁸⁶ Online: South African Government <<http://www.info.gov.za/documents/constitution/index.htm>>.

⁸⁷ George Mukundi Wachira “Applying Indigenous Peoples Customary Law in Order to Protect their Land Rights in Africa” (2010) 1-2 *Indigenous Affairs* 6 at 10.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The constitution also recognizes the institution of traditional leadership. Section 211 states:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

b. Recognition of traditional leadership in statute

When South Africa made the transition to multiparty democracy, it faced the problem of what to do with the institution of traditional leadership that had been carried over from the apartheid era. Some argued that the continued recognition of hereditary leadership was contrary to the democratic principles enshrined in the new constitution.⁸⁸

In the early years after democratization, South Africa enacted a number of pieces of legislation in order to modernize the system of traditional leadership.⁸⁹ The Traditional Leadership and Governance Framework Act⁹⁰ recognizes traditional communities and provides for the establishment and recognition of traditional councils. The purpose of the Act is to resuscitate the powers of traditional leaders.

Another significant piece of legislation is the Communal Land Rights Act (CLRA).⁹¹ The CLRA provided for the registration of individual land rights within communally owned land. It also allowed tribal councils to act as a land administration committee for communal land.⁹² Both this act and the Traditional Leadership and Governance Framework Act have been criticised for re-entrenching the old homeland system.⁹³ In 2010, the Communal Land Rights Act was held to be unconstitutional.⁹⁴

2. Legal recognition of traditional courts

a. Customary chiefs' courts

⁸⁸ Supra note 77 at 104.

⁸⁹ *Ibid.* at 112.

⁹⁰ Act 41 of 2003.

⁹¹ Act 11 of 2004.

⁹² Ben Cousins, "More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy" (2007) 7:3 *Journal of Agrarian Change* 281 at 287.

⁹³ "Let rural ruling be the start of new tradition" *AllAfrica.com* (19 May 2010) online: allafrica.com <<http://allafrica.com/stories/201005190414.html>>.

⁹⁴ *Ibid.*

Traditional chiefs' courts play a significant role in the administration of justice, especially in rural South Africa.⁹⁵ Chiefs' courts administer justice on the basis of customary law. Their operation is governed by several statutes dating from before South Africa became a democracy.⁹⁶

b. Possible reform of customary courts

The South Africa Law Commission had identified a need to modernize customary courts in order to bring them in line with the values underlying the 1996 constitution.⁹⁷ The Law Commission has recommended that South Africa adopt legislation that would recognize customary courts.⁹⁸ Customary courts would have jurisdiction over civil matters arising out of disputes involving customary law, and they would also have jurisdiction over criminal matters.⁹⁹ They would decide cases on the basis of the common law and statutory law as well as customary law.¹⁰⁰

B. Kenya

Summary: In 2010 Kenya adopted a new Constitution that appears to give greater protection to Indigenous peoples. Indigenous lands were insufficiently protected under the old regime, but Indigenous groups are hopeful that things will improve.

1. Protection of Indigenous customary law before 2010

a. Constitutional protection

The constitution that was in force from 1963 to 2010 gave some limited protections to Indigenous peoples.¹⁰¹ The 1963 constitution contained a provision that limited the recognition of customary law to only those laws that were not “repugnant” to written law. The clause read: “no right, interest, or other benefit under customary law shall have effect ...so far as it is repugnant to any written law”.¹⁰² The effect of this clause was to make customary land tenure subordinate to individual land tenure.¹⁰³

b. The Kenya Land Adjudication Act

In 1968, the state enacted the Kenya Land Adjudication Act, which provided for the recording of customary land rights under a group ranches scheme. This turned out to be a failure.¹⁰⁴ Kenya's

⁹⁵ South African Law Commission, *Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90 (21 January 2003) online: Department of Justice and Constitutional Development <http://www.justice.gov.za/salrc/reports/r_prj90_tradlead_2003jan.pdf> at 1.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at xi.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* at xii.

¹⁰¹ *Supra* note 87 at 8.

¹⁰² Sec 115 (2) of the Repealed Constitution of Kenya 1963, cited in *ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

legal system gives primacy to individual land tenure, and the Act failed to protect communal lands against incursion by non-Indigenous individuals.¹⁰⁵

The scheme was ostensibly based on Maasai customary laws. However it was criticised for ignoring community traditions.¹⁰⁶ Instead of fostering communal landholding, the Act resulted in widespread subdivision of Maasai land.¹⁰⁷

2. Protection of Indigenous customary law under the 2010 Constitution

a. Repugnancy clause

Under the 2010 constitution, the repugnancy clause is limited so that it only applies to customary laws that are inconsistent with the constitution, not all written laws. The section reads “Any law, including customary law, which is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”¹⁰⁸

b. Communal land ownership

Section 63 of the 2010 constitution deals specifically with communal land. It provides that communal land shall be vested in the community. This is a departure from the previous system, under which communal land was held in trust.¹⁰⁹

The language of s.63 reads:

- (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
- (2) Community land consists of—
 - (a) land lawfully registered in the name of group representatives under the provisions of any law;
 - (b) land lawfully transferred to a specific community by any process of law;
 - (c) any other land declared to be community land by an Act of Parliament; and
 - (d) land that is—
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).
- (3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

¹⁰⁵ *Ibid.* at 8-9.

¹⁰⁶ *Ibid.* at 8.

¹⁰⁷ *Ibid.*

¹⁰⁸ Constitution of Kenya, 2010; section 29(4) quoted in *ibid.* at n. 35.

¹⁰⁹ *Ibid.* at 9-10.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this Article.

c. Indigenous support for the 2010 constitution

It is too soon to tell what the effect of the new constitution will be, but Indigenous groups are optimistic. The Samburu Women for Education & Environment Development Organization (SWEEDO) has said the Kenya's new constitution "is a clean break with the past and provides several avenues for the pursuit and strengthening of Indigenous peoples' personal and collective rights."¹¹⁰

C. Malaysia

Summary: Indigenous peoples in Malaysia enjoy some legal protection. However laws protecting Indigenous autonomy are not adequately enforced.

1. Indigenous population of Malaysia

Around 12% of the population of Malaysia is Indigenous.¹¹¹ There are Indigenous peoples who are native to the Malaysian Island of Borneo as well as some who are native to peninsular Malaysia. In Borneo, Indigenous inhabitants comprise 50% and 60% of the populations of the states of Sarawak and Sabah, respectively.¹¹²

2. Legal protection of Indigenous governance in Malaysia

a. Conflict between formal and customary law

Malaysia has had a dual legal regime since before independence.¹¹³ There is both a formal set of codified laws and an informal set of laws based on the customary practices of Indigenous community. This has led to conflicting land tenure systems, and, as a result, Malaysia has frequently experienced conflicts with Indigenous communities over land and resources.¹¹⁴

b. Legal protection in Sarawak and Sabah

¹¹⁰ "Kenya's New Constitution Benefits Indigenous Peoples" *Cultural Survival* (12 August 2010) online: Cultural Survival <<http://www.culturalsurvival.org/news/kenya/kenyas-new-constitution-benefits-indigenous-peoples>>.

¹¹¹ "Malaysia" International Working Group for Indigenous Affairs, online: IWGIA <<http://www.iwgia.org/sw18355.asp>>.

¹¹² *Ibid.*

¹¹³ "Central Issues" International Working Group for Indigenous Affairs, online: IWGIA <<http://www.iwgia.org/sw18360.asp>>.

¹¹⁴ *Ibid.*

In Sarawak and Sabah the British introduced several laws recognizing customary law and customary land rights during colonial rule.¹¹⁵ One such law in the state of Sabah is the Rural Administration Ordinance¹¹⁶ which outlines the powers and duties of native chiefs and village heads.¹¹⁷ These laws are still in place but they are not enforced, meaning that Indigenous rights are frequently violated in practice.¹¹⁸

c. Legal protection in peninsular Malaysia

The Aboriginal Peoples Act¹¹⁹ recognizes some rights of the Orang Asli, who are native to peninsular Malaysia. However it gives the government of Malaysia the final say in all matters.¹²⁰ Malaysia has frequently interfered in the traditional government of the Orang Asli. Malaysia has the final say in who becomes the community head and can prescribe election procedures. This interference has caused division within communities.¹²¹

D. Columbia

Summary: Columbia has a system of Indigenous resguardos. However, little information about Columbia's resguardo system is available in English.

1. Columbia's Indigenous reserve system

Columbia has a system of Indigenous reserves, or *resguardos*. This is a system of private collective land ownership. Between 85-90% of Indigenous peoples in Columbia have received collective title to their land. *Resguardos* have legal personality and Indigenous peoples have a right of self-government and internal autonomy. They also have a right to use, exploit and preserve the natural resources on their territories.¹²²

E. Bolivia

Summary: The 1994 Law of Popular Participation is intended to include Indigenous peoples in local government. The results of the law have been mixed.

1. Law of Popular Participation

a. Purposes and effects of the law

¹¹⁵ "The Political System and Government Policy" International Working Group for Indigenous Affairs, online: IWGIA <<http://www.iwgia.org/sw18359.asp>>.

¹¹⁶ Online: <<http://www.sabahlaw.com/rural.html>>.

¹¹⁷ Supra note 115.

¹¹⁸ Jannie Lasimbang, "Malaysia" in *The Indigenous World 2009*, online at <<http://www.iwgia.org/graphics/offentlig/pdf/Malaysia.pdf>> at 327.

¹¹⁹ The text of this Act is not readily available online.

¹²⁰ Supra note 115.

¹²¹ Supra note 118 at 328.

¹²² Gladys Jimeno Santoyo, *Possibilities and Perspectives of Indigenous Peoples with Regard to Consultations and Agreements within the Mining Sector in Latin America and the Caribbean: Thematic Exploration* (Ottawa: The North-South Institute, 2002) online: <http://www.nsi-ins.ca/english/pdf/colombia_final_report_eng.pdf> at section 3.3.

Bolivian society has historically been very divided and Indigenous peoples have been marginalized.¹²³ The Law of Popular Participation¹²⁴ aims to address these issues by including Indigenous peoples in the democratic process.¹²⁵

The effect of the law of Popular Participation is to divide rural areas into democratic municipal governments. The law created 311 new municipal governments and devolved many functions to them.¹²⁶

b. Shortcomings of the law

The law was designed without consultation with Indigenous groups and many aspects are problematic.¹²⁷ Some have argued that the reason that the law have not been very successful at involving Indigenous peoples is that the law promotes a Western system of representative democracy that does not fit with the system of social organization in Indigenous villages. There is a difference in values and interests between the urban mestizo society and the rural Indigenous society. As a result, the elected councillors do not effectively represent the Indigenous population and there as a lack of accountability.¹²⁸

¹²³ Orjan Bartholdson et al., *Popular Participation in Bolivia, Columbia and Peru: A Synthesis of Three Studies* (Stockholm: Swedish International Development Agency, 2002) online: <<http://www.kus.uu.se/SAdelstudie.pdf>> at 5.

¹²⁴ The text of this law is not available online.

¹²⁵ Vibeke Andersson, "Popular Participation in Bolivia: Does the law 'Participación Popular' secure participation of the rural Bolivian population?" (1999) CDR Working Paper 99.6, online: <http://www.diis.dk/graphics/CDR_Publications/cdr_publications/working_papers/wp-99-6.htm>.

¹²⁶ Supra note 123 at 14.

¹²⁷ *Ibid.* at 7.

¹²⁸ Supra note 125.