

Consultation in Ecuador

Institutional Fragility and Participation in National Extractive Policy

by

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An analysis of five lawsuits against the infringement of the rights to participation illustrates that effective compliance with free prior and informed consultation and popular consultation on extractive projects in Ecuador is compromised by state institutional fragility. While suits on the rights to participation have served as strategies to halt extractive projects that lack prior consultation, extractive activities continue to present great risks to territorial defense and the good-living agenda.

Un análisis de cinco demandas contra la violación del derecho a la participación ilustra que el cumplimiento efectivo de la consulta previa, libre e informada y la consulta popular sobre proyectos extractivos en Ecuador se ha visto comprometido por la fragilidad institucional del Estado. Si bien las demandas en torno a los derechos de participación han servido como estrategias para detener los proyectos extractivos que carecen de consulta previa, las actividades extractivas siguen presentando grandes riesgos para la defensa territorial y la agenda del buen vivir.

Keywords: *Political participation, Popular consultation, Free prior and informed consultation, Extractivism, Ecuador*

Between 2018 and 2019, Ecuador experienced a boom in legal claims motivated by alleged violations of consultation rights involving decisions regarding extractive projects. These suits resulted in rather favorable judgments for the plaintiffs and led to the halting, albeit temporarily, of several of these projects. The boom in consultation-related lawsuits has run parallel to the tumultuous institutional changes promoted since 2017 by the national government of Lenin Moreno. Yet, as in other Latin American countries, consultation is located within a disputed legal field in which citizen participation is highly political (Schilling-Vacaflor, Flemmer, and Hujber, 2018), and the socio-legal field has

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become one of the most visible spaces for political tensions involving extractive projects (Rodríguez-Garavito, 2011: 269). It is therefore important to examine the possible relationship between the boom in lawsuits and the political context in which they took place.

The purpose of this study is to analyze the institutionality of participation in Ecuador's extractive policy through five lawsuits against infringement of consultation rights. We demonstrate that participation in decisions about extractive projects is strongly compromised by the political pressures on and the institutional fragility of the state processes within which the suits are conducted. Our analysis seeks to contribute to the debate on participation in extractive policy as a fundamental aspect of the national proposal of *buen vivir* or good living and to the extensive discussions on the use and control of natural resources, the practice of democracy, and the guarantee of consultation rights in Ecuador.

Here we analyze five lawsuits claiming infringement of participation rights that for the most part resulted in the halting of the related extractive activities. We selected these cases because they were the first to be tried under Moreno's government and the only ones to have followed administrative procedures with sentences that acknowledged the infringement of the right to popular consultation or to free prior and informed consultation. Three cases are located in the Amazon region: the Yasuní and the Waorani of Pastaza cases were both related to oil activities and the A'í Cofán de Sinangoe case to mining. Two other cases were in the southern Andes: the Río Blanco–Molleturo and Loma Larga–Kimsakocha cases both addressed large-scale mining. While new demands for participation in extractive projects have arisen since then, the judicial processes have been dismissed. (Claims of violations of consultation rights for hydroelectric projects that mirror similar processes are not included in this study.)¹ We conducted a document analysis of the verdicts in the five selected lawsuits, the Ecuadorian legislation, press and media reports, and visual materials regarding the cases. Following, we first undertake a theoretical review of political participation in natural-resource governance and participation tools within Ecuador's legal framework. Later, we detail the institutional political context since 2017 and describe the five lawsuits in this context. We conclude by addressing institutional risks on the effective guarantee of democracy and territorial protection in the face of national extractive policies.

POLITICAL PARTICIPATION IN NATURAL-RESOURCE GOVERNANCE

Critical studies on natural-resource governance question the effectiveness of citizen participation in influencing state decisions under the formal institutional framework (Bénit-Gbaffou, 2008; Chess and Purcell, 1999; Coglianese, 1999; Robins, Cornwall, and Von Lieres, 2008; Rodríguez-Garavito, 2011; Stringer et al., 2006; Vela-Almeida et al., 2021). These studies position participation mechanisms within the framework of neoliberal governance, which employs modern state governmentality practices to reproduce hierarchical power relations (Guzmán-Gallegos, 2017; Jaskoski, 2014; Robins, Cornwall,

and Von Lieres, 2008; Schilling-Vacaflor and Flemmer, 2015). Political participation thus becomes an efficient mechanism for state control by expanding bureaucratic action in natural-resource management without necessarily introducing effective political deliberation (Colpari, 2011; Schilling-Vacaflor, Flemmer, and Hujber, 2018; Swyngedouw, 2010; Wilson and Swyngedouw, 2014). In fact, several studies argue that the centralized state minimizes people's ability to influence decisions by employing exclusionary bureaucratic processes and identifying actors and practices that weaken social organization (Cooke and Kothari, 2001; Kirsch, 2007; Schilling Vacaflor, Flemmer, and Hujber, 2018; Williams, 2004). Formal participation mechanisms do not necessarily allow for effective questioning regarding access to and control of natural resources, peoples' or communities' right to self-determination, or distributive decisions because they engage in restrictive administrative language that seeks solutions through solely improved procedures and technical expertise (Merino, 2018; Perreault, 2015; Rodríguez-Garavito, 2011). Political ecology situates participation within the field of power unbalance and examines the implications that political decisions have over the use and control of natural resources (Machado et al., 2017; Merino, 2018; Schilling-Vacaflor, 2017; Weitzner, 2017).

In Latin America, participation in extractive projects has been framed in terms of the right to free prior and informed consent, which is the result of historical demands for self-determination of indigenous peoples (Hansen and Stepputat, 2006; Leifsen, Sánchez-Vázquez, and Reyes, 2017; McNeish and Logan, 2012; Potes, 2006). This framework is presented as part of an issue of local sovereignty over ancestral territories and decisions about the use of natural resources (McNeish, Borchgrevink, and Logan, 2015). Free prior and informed consent lies outside the protectionist state perspective in that local populations exercise self-determination with regard to the material and symbolic governing in their territories. It has been a benchmark for participation in extractive policy for many years. For example, the communities of Comitancillo and Sipacapa in Guatemala became in 2005 a global symbol of indigenous resistance to mining and promoted some 85 consultations across the country involving about a million people in the process (Dougherty, 2019). However, this mechanism of participation is constantly manipulated by several central states and has been implemented as a weak version of the International Labor Organization's Convention 169 on indigenous and tribal peoples in the form of consultation but not consent. This is the case in Peru, which pioneered the development of a law for the implementation of free prior and informed consultation in 2011 and in turn inspired consultative processes in Colombia, Chile, and Argentina. The use of free prior and informed consultation in Peru is, however, limited to Amazonian indigenous communities even though many mining projects are located in the Andes (Svampa, 2019).

At the same time, demands for participation also take place in peasant populations lacking the opportunity for free prior and informed consent. Indeed, the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas stipulates the right to consultation under prior-informed-consent-like principles for these populations. Yet, because this mechanism is not institutionalized, rural populations require mechanisms such as popular consultations (McNeish, 2017). Several participatory community

consultation exercises have been successful in dismantling extractive interests. The case of Colombia's Piedras de Tolima District became symbolic in 2003 as the first binding popular consultation against the La Colosa mine. This initiative set an important precedent regarding rights for direct democracy in the country (McNeish, 2017). In 2003 residents of Esquel in Argentina participated in a plebiscite in which 81 percent of voters opposed gold exploitation, and a mining moratorium was therefore established in the municipality (Urdinez, 2007: 1). These actions led to extensive discussions on extractivism at the national level and inspired mobilizations outside the country in favor of increasing consultation processes (Dietz, 2018; Hoetmer, 2010; Rasch, 2012; Walter and Urkidi, 2017). Perhaps the most important milestone was the historic ban on metal mining in El Salvador, which was partially motivated by the Cinquera popular consultation in February 2017 (Goodfriend, 2020).

These examples illustrate that indigenous populations, peasants, and social organizations have gained political influence through consultation. Despite their limitations, participation processes represent opportunities to influence decision making and make territorial struggles visible (Flemmer and Schilling-Vacaflor, 2016; Gustafsson, 2017; Leifsen, Sánchez-Vázquez, and Reyes, 2017; Schilling-Vacaflor, Flemmer, and Hujber, 2018). Therefore, it is critical to examine the roles that popular demands for participation and the institutionality of the Ecuadorian state have in influencing decision making on national extractive projects and to ponder the implications of those demands for the halting of extractive projects in the country.

PARTICIPATION IN ECUADOR'S LEGAL FRAMEWORK

Calls for participation of indigenous and peasant populations in Ecuador have historically been framed in terms of the struggle for local autonomy based on the philosophy of *buen vivir* or *sumak kawsay* (Hidalgo-Capitán and Cubillo-Guevara, 2017). *Buen vivir* is a political concept born within the indigenous worldviews that encompasses elements such as the reinforcement of symbolic and material relations of care in/with nature, the respect for cultural institutions, the guarantee of peoples' well-being, and their democratic practice (Vanhulst, 2015; Villalba, 2013). Moreover, *buen vivir* in Ecuador is based on the proposal of a plurinational state that recognizes indigenous peoples' right to self-determination regarding their territory and life projects (Altmann, 2016).

Both *buen vivir* and the plurinational state were incorporated into the 2008 Constitution of the Republic, the goal of which is to provide a new institutional framework for public guarantee of collective rights, well-being, the rights of nature, and participative democracy. However, national extractive policy is at odds with the construction of a plurinational state and the implementation of *buen vivir* in that it expands the central state's control over the use of natural resources and ignores territorial self-determination, collective rights, and the rights of nature and impacts the way of life of those affected by extractive projects (Vela-Almeida, Kolinjivadi, and Kosoy, 2018).

Communities and peoples affected by extractive projects demand the participation in decision making that is promised to them by the recognition of

their rights to consultation. Currently, the constitutional mechanisms for participation in extractive policy include popular referenda and consultations as rights derived from direct democracy (Articles 104 and 106); free prior and informed consultation as a collective right of peoples and nationalities (Article 57.7), and the environmental consultation as a requirement for the licensing of any activity that generates an environmental impact (Articles 398 and 395.3).²

FREE PRIOR AND INFORMED CONSULTATION

Free prior and informed consent appeared as a legal instrument in the International Labor Organization's Convention 169 on indigenous and tribal peoples. This international instrument constitutes a framework for the territorial protection of indigenous peoples and other ethnic groups, guaranteeing their cultural, social, economic, and institutional integrity and their right to decide on their developmental priorities and other measures that may affect their lives and territories (Ward, 2011: 55–56). This instrument establishes that states are obliged to consult with indigenous peoples and other ethnic groups prior to legislative and administrative actions or the implementation of plans, programs, or development projects located within the latter's territories (Albán, 2003: 143–144). Free prior and informed consent was ratified in 2007 when the United Nations General Assembly drafted the Declaration on the Rights of Indigenous Peoples, recognizing the right of peoples to free determination as a state principle (UN General Assembly, 2007). According to this declaration, peoples' self-determination is based on historical forms of self-government, independent ways of decision making, and the self-sufficiency of their institutions to promote specific forms or economic, social, and cultural development.

In Ecuador, the iconic case of breaching the right to the free prior and informed consent resulted in an international ruling by the Inter-American Court of Human Rights in favor of the Sarayaku people and against the Ecuadorian state. Since the 2012 ruling, the state has not yet elaborated a procedure to implement this legal framework in the shape of an organic law. The process is currently regulated as a consultation by the Mining Law (Article 90) and Executive Decree 1247 for allocation of hydrocarbon blocks. Moreover, in May 2020 the deputy minister of mines announced a new regulation for the free prior and informed consultation on mining projects to be approved by executive decree (Primicias, 2020). All these reforms were designed without the participation of the sectors possessing this right (Defensoría del Pueblo Ecuador, 2018; García, 2014). These reforms do not include mechanisms for deliberation employing appropriate cultural procedures and have focused exclusively on the sharing of the benefits of extractive activities, ignoring deliberation on potential social and environmental costs (CDES, 2016; Defensoría del Pueblo Ecuador, 2015). Free prior and informed consultation is not binding under the constitution and is a source of conflict in restricting the veto power of indigenous peoples and assigning the ultimate decision to the higher state body (Article 57.7).

POPULAR CONSULTATION

While free prior and informed consultation is a collective right of indigenous, Afro-Ecuadorian, and Montubio peoples, popular consultation in Ecuador is a right of direct democracy exercised via the compulsory balloting of all citizens in a given jurisdiction. This mechanism of direct democracy is a recent addition to Latin American constitutions since the return to democracy (Welp, 2008; Zovatto, 2006) and it advances forms of representative democracy that have been questioned because of unilateral decision making by state authorities (Prud'Homme, 1997). The mechanisms of direct democracy in Ecuador include the referendum, a binding mandate to submit legislation for popular approval, and the popular consultation, also binding, for the approval of issues of national interest. Popular consultation may be convened either by central and sectional governments or by civil popular initiatives.

Popular consultations in Ecuador are of two kinds: (1) those convened by the central government to legitimize its decisions, estimate its degree of acceptance, or show popular support for certain state authorities or powers and (2) those convened by actors seeking to pressure the government or by some authorities to gain legitimacy against others (Welp, 2008: 9). Popular consultations were regularly used between 1979 and 2008, although they were always convened “from above”—by the presidency or sectional governments demanding greater local autonomy. This is why Altman (2005) suggests that popular consultations have, in general, enabled the status quo of political decisions to be maintained from above. All referenda and consultations since 2008 except one, the Loma Larga–Kimsakocha case presented as a citizen initiative, have been proposed by central and local governments.

GOVERNMENT IN TRANSITION AND STATE INSTITUTIONALITY

To understand the political situation and the institutional context in which lawsuits for participation in extractive projects arise, we conducted a review of the transition of the national government since 2006. Between 2006 and 2017, Rafael Correa led a government that was part of the so-called Latin American pink tide. He maintained an extractive policy as a national development priority, strongly promoting the introduction of large-scale metal mining in the country (Sacher and Acosta, 2012; Vela-Almeida, Kolinjivadi, and Kosoy, 2018). Lenin Moreno was elected president in May 2017. His government belonged to the same party as his predecessor and originally promoted the continuity of the political and economic agenda; the extractive program remained intact. Yet, the ideological, economic, and institutional direction of the government changed rapidly. Less than a year after his election, Moreno promoted large institutional changes in state powers required to distance himself from Correa's political agenda. He started a media campaign that promoted tolerance of opposition and openness to political dialogue at the national level (Labarthe and Saint-Upéry, 2017; Wolff, 2018). This invitation to engage in dialogue resulted in concessions for groups that had radically opposed Correa, irrespective of their ideological position. Moreno was initially open to the demands of both

indigenous organizations and social movements and the corporate sector (Becker and Riofrancos, 2018; Labarthe and Saint-Upéry, 2017). Over time, however, his proximity to the country's economic elites became more evident (Andrade and Vásquez, 2018). He sought to get rid of high officials in state control and regulation organisms that were aligned with the previous government via the restructuring of the Consejo de Participación Ciudadana y Control Social (Council for Citizen Participation and Social Control—CPCCS), a state body responsible for appointments to key state institutions such as the Public Prosecutor's Office, the Attorney General's Office, the Judicial Council, the Ombudsman's Office, and members of the National Electoral Council (CNE) (Labarthe and Saint-Upéry, 2017; Wolff, 2018).

These changes represented major transformations in state institutionality and were enhanced by the February 2018 national referendum and popular consultation. This ballot consisted of seven inquiries to be approved or rejected, three of which are relevant to this analysis: (1) the removal of the CPCCS and appointment of a new council proposed by the president was approved by 63.08 percent of voters, (2) the banning of metal mining in protected areas and urban centers was approved by 68.62 percent, and (3) the reduction of oil exploitation in the Yasuní area and the expansion of the protected area of the park was approved by 63.01 percent. While the questions about mining and oil were raised as a critique of extractivism, activists called attention to their ambiguity and limitations, viewing them as merely tokens to further the approval rate of the overall balloting (Ramirez, 2018; Wolff, 2018). The lawsuits discussed below illustrate the political pressures exerted by Moreno's government to expand extractive activities even in areas it explicitly sought to protect in the consultation, such as the Yasuní.

With this institutional transformation, the National Assembly chose a Transitional CPCCS (CPCCS-T) from a list proposed by Moreno that would last until March 2019 and would be responsible for selecting the top officials of the aforementioned state control and regulation organisms. This resulted in new authorities allied with Moreno's government who, in general, showed a marked corporatist tendency and were allied with right-wing parties in the country (Wolff, 2018). It was during this period of transition and institutional instability that indigenous peoples, peasants, and other social movements managed to mobilize in favor of participation for territorial defense. Previously, allegations of violations of the right to consultation had been dismissed.

LAWSUITS FOR BREACH OF THE RIGHT TO CONSULTATION

We analyzed five lawsuits for infringement of participation rights in extractive projects. Three cases sanctioned the violation of the right to free prior and informed consultation: Río Blanco–Molleturo, A'i Cofán de Sinangoe, and Waoranis de Pastaza, and resulted in the temporary halting of the projects in question. The other two cases involved requests for binding popular consultation: Loma Larga–Kimsakocha, where a local popular consultation was conducted, and Yasuní, where a national popular consultation was rejected twice (Table 1).

TABLE 1
Lawsuits Involving Participation Rights in Five Extractive Projects

<i>Case</i>	<i>Rights Claimed</i>	<i>Mechanism</i>	<i>Status</i>	<i>Plaintiffs</i>	<i>Defendants</i>	<i>Result</i>
Río Blanco–Molleturo, 2018–	Healthy environment, rights of nature, free prior and informed consultation	Protection and preventive measures	Appellate ruling August 2018; awaiting extraordinary protection measures	Molleturo communities, FOA, ECUARUNARI, CAOI	Ministry of Mining, Ministry of the Environment, Attorney General	No free prior and informed consultation; immediate suspension of mining concessions
A'i Cofán de Sinangoe, 2018	Free prior and informed consultation, territorial and cultural, water	Protection and preventive measures	Appellate ruling November 2018	A'i Cofán de Sinangoe	Ministry of Mining, Ministry of the Environment, National Waters Secretariat, Attorney General	Immediate suspension of mining concessions
Woorani de Pastaza, 2018–2019	Self-determination, free prior and informed consultation, territorial and cultural, rights of nature	Protection and preventive measures	Appellate ruling July 2019	CONCONAWEP, Woorani de Pastaza communities	Ministry of Energy and Non-Renewable Resources, Ministry of the Environment, Attorney General	Prohibition of entry of oil companies into Woorani territories; free prior and informed consultation imposed
Loma Larga–Kimsakocha, 2012–2019	Participation, water, rights of nature	Local popular consultation	Binding local popular consultation	FOA, Unión de Sistemas Comunitarios de Agua de Girón	CNE	87% against mining in March 2019; no compliance with decision
Yasuni, 2013–	Participation, rights of nature, voluntary isolation	National popular consultation	CNE resolution	Yasunidos	CNE	Consultation denied twice

RÍO BLANCO–MOLLETURO

Starting in the 1990s, the indigenous commune of Río Blanco in Azuay Province was taken over by transnational mining companies. In April 2018 the residents of Río Blanco legally denounced the pollution and disappearance of bodies of water on the paramos, which affected their agricultural production, the violation of the labor rights of mining workers, the violation of collective rights, and the militarization of the area. The complaint was filed by the community of Molleturo, the Federación de Organizaciones Indígenas y Campesinas del Azuay (Azuay Federation of Indigenous and Peasant Organizations—FOA), the Confederación de los Pueblos Kichwas del Ecuador (Confederation of the Kichwa Peoples of Ecuador—ECUARUNARI), and the Coordinadora Andina de Organizaciones Indígenas (Andean Coordinator of Indigenous Organizations—CAOI). The verdict, issued in June 2018, acknowledged the violation of communities' right to free prior and informed consultation, ordering the suspension of exploitation in Río Blanco and the demilitarization of the sector in conflict. The defendant state agencies appealed the ruling, arguing that free prior and informed consultation did not apply in the absence of an indigenous population at the site of the intervention. However, the court upheld the verdict in favor of the plaintiffs in August of that year. The suit remains open because the defendants have filed a claim for extraordinary protection. This ruling marked a new political scenario for other organizations to take up judicial complaints, including the cases of Sinangoe and Waorani.

A'I COFÁN DE SINANGOE

The A'i Cofán de Sinangoe community, located in the Amazonian province of Sucumbíos, filed a lawsuit in August 2018 alleging the violation of its right to free prior and informed consultation, the rights of nature, the right to water, and the right to indigenous territory by unauthorized mining activities on their lands. Mining activities were located on the banks of the Aguarico River and directly affected daily subsistence activities, given that the community lives on fishing and uses the waters of the river for daily grooming. The defendant ministries claimed not to have issued exploitation permits, which made the activities illegal. The judicial authorities accepted the request for protection based on rights infringement and required, as a restitution measure, the implementation of free prior and informed consultation and the nullification of existing mining concessions. The state agencies appealed the ruling, but it was upheld in November 2018.

WAORANI OF PASTAZA

The Waorani Amazonian indigenous communities are located in the Pastaza Province, in the buffer zone of Yasuní National Park, and their subsistence hunting and cultivation of cassava and bananas are affected by oil exploitation. In 2012, oil bidding was opened on 13 blocks including Block 22, located in Waorani territory, and in response to allegations of violations of the right to free prior and informed consultation the state explained that the

affected communities had been consulted between May and October of 2012. This process was criticized for not having been conducted in good faith, and the government was accused of carrying out parallel negotiations with leaders allied with oil interests. In 2018, negotiations for oil tendering were restarted, and the Waorani communities of Pastaza, together with the Consejo de Coordinación de la Nacionalidad Waorani de Ecuador-Pastaza (Waorani Nationality Coordination Council of Ecuador-Pastaza—CONCONAWEP), filed a lawsuit to seek protection for infringement of the people's rights to self-determination and free prior and informed consultation and a threat to their territorial rights and the rights of nature. The court ruled that the state had not complied with the requirement of free prior and informed consultation, given the inconsistencies of the 2012 process, and preventive measures were issued prohibiting bidding or concessions until the requirement had been met.

LOMA LARGA–KIMSAKOCHA

The Loma Larga–Kimsakocha large-scale mining project is located on the Azuay Province's paramo, where farmers have been resisting mining for more than a decade because of the destruction of water sources. A nonbinding community consultation was held in 2011, and 92.38 percent of the population opposed mining. In 2015, the Unión de Sistemas Comunitarios de Agua de Girón (Union of Community Water Systems of Girón) requested a popular consultation on mining and, along with other social organizations of Azuay, collected 2,000 signatures. However, the Constitutional Court did not issue a timely ruling on the constitutionality of the question, resulting in the rejection of the request for consultation. After three years, the Girón water boards, taking advantage of the institutional transformation of Moreno's administration, once again demanded a popular consultation. In March 2019 such a consultation was held, and 86.7 percent of Girón voters rejected metal mining. Girón became the country's first territorial jurisdiction to have a binding local popular consultation on extractive issues. Not long thereafter, the binding character of the consultation was challenged, and the mining company INV Metals still maintains facilities in Cuenca (INV Metals, 2019). There is currently no compliance with the popular decision to halt the project.

YASUNIDOS

Yasunidos was born in 2013, following Rafael Correa's decision to abandon the Yasuní-IIT initiative.³ It emerged as a youth-based, mainly urban citizen movement whose goal was to defend the Yasuní National Park from oil exploitation and to protect indigenous peoples living in voluntary isolation. An extensive process of signature collection throughout the country resulted in 757,623 supporting signatures. In April 2014 these were submitted to the CNE for verification, but the application was rejected without adequate administrative justification. In April 2018 during the transition period, Yasunidos filed two complaints with support from the CPCCS-T against the CNE for irregularities regarding the 2014 signature verification. In May 2018 the Transitional Ombudsman's Office issued a resolution to respect Yasunidos's participation

rights and the public support for the popular consultation. The Ombudsman also requested an audit to verify the signatures, arguing that the CNE had failed to explain the reasons for its decision on denying the participation rights of citizens in matters of public interest such as the Yasuní.

In March 2019 the CPCCS-T urged the CNE to proceed with the national popular consultation initiative and to repair the breach of rights. In November of that year the CNE once again denied the request for popular consultation, arguing that the application had been filed by Yasunidos's attorney, who had died in May, and therefore there was no longer a proponent for the request (Consejo Nacional Electoral, 2019). This process was carried out amid heavy state pressure to halt consultation as oil activities had spread across the Yasuní.

CONSULTATIONS AND OBSTACLES TO POLITICAL PARTICIPATION

The five cases just described illustrate both achievements and obstacles to participation in extractive policy. All of them were based on the violation of similar rights by the same state actors. Plaintiffs called for the enforcement of rights to life and *buen vivir* (e.g., the right to water, food, a healthy environment), the rights of nature, the rights to territory, culture, and self-determination, and the right to participation. However, the rulings depended heavily on the infringement of the right to consultation. In fact, the judge verdicts show that it is easier to demonstrate infringement of the right to participation via administrative processes than to demonstrate infringements of the rights of nature or the right to territory or a healthy environment. Indeed, the resolutions of the five suits established redress for the breaching of participation rights. For the cases of Río Blanco, Sinangoe, and Waorani, these measures involved suspending extractive activities, concessions, or bidding while implementing the free prior and informed consultation in accordance with ILO Convention 169 and ensuring the customary institutionality of indigenous peoples. These measures did not amount to the permanent cessation of extractive projects, being mere suspensions while free prior and informed consultation was conducted. However, results of a consultation are not legally binding for state decisions.

In the cases of Loma Larga-Kimsakocha and Yasunidos, the binding nature of the popular consultation has not guaranteed the permanent cessation of the extractive projects. Despite a binding local popular consultation in Girón, for example, the Loma Larga-Kimsakocha mining project was not suspended. In fact, INV Metals challenged the decision to conduct a consultation in Girón, and the Ministry of Mining sought the suspension of that consultation but was rejected. The Loma Larga-Kimsakocha popular consultation was significant as the first binding local decision that could override the "national interest." However, because of the economic significance attributed to national strategic projects, local consultation proposals born of popular initiatives are delegitimized for allegedly exceeding jurisdictional power on national issues. The argument employed by the state and other corporate actors is that, given that "strategic" natural resources are of "national interest," the final decision over their use rests with the central government. For

Yasunidos, in contrast to Loma Larga–Kimsakocha, redress for the violation of the right to national popular consultation was denied for the second time in November 2019. This case illustrates the obstacles that are imposed on direct democracy initiatives "from below."

These popular initiatives illustrate that popular consultation processes from below can take much longer than those from above; Loma Larga–Kimsakocha's request began in 2012 and that of Yasunidos in 2013, whereas the February 2018 referendum and popular consultation called for by Moreno were quickly approved despite their lacking the consent of the Constitutional Court (which was in fact required given the need for a legal analysis of the constitutionality of the questions). Moreno made use of an executive decree to open the way for his consultation. Executive decrees have also been used indiscriminately to regulate free prior and informed consultation (e.g., Executive Decree 1247 and the regulations for free prior and informed consultation pertaining to mining projects) in an effort to avoid prelegislative consultations on the construction or approval of such regulations.

THE POLITICAL CONJUNCTURE AND THE ROLE OF THE STATE IN PARTICIPATION

The favorable conditions for the rulings of 2018 and 2019 on the infringement of participation rights were due to a political situation born of a government in transition. Here we focus on two conjunctural phenomena: the boom in lawsuits and the relative successes of the initial cases, which motivated an increase in the number of suits, and also the tumultuous institutional transformation of Moreno's government, which initially increased the success of lawsuits but soon resulted in state and corporate responses that limited new demands for consultation. Following the boom in lawsuits, requests for popular consultation were initiated in the Carchi and Imbabura Provinces in May 2019 to stop the Cascabel mining project. The Constitutional Court issued an unfavorable ruling on this request based on an alleged lack of clarity of the issue (Corte Constitucional del Ecuador, 2019a). Another national case that attracted widespread media attention arose in August 2019, when the FOA in Azuay Province requested a provincial popular consultation for the prohibition of metal mining in provincial water sources, paramos, wetlands, forests, and zones of water recharging and regulation. This initiative arose in response to the rejection of the popular mandate to halt the mining in Loma Larga–Kimsakocha. The then prefect of the province, Yaku Pérez Guartambel, and the FOA presented a question to be evaluated by the court and open the way for the collection of signatures for the popular consultation. During the analysis of this request by the Constitutional Court in 2019, the Ecuadorian Business Committee called for the disqualification of Constitutional Court Judge Ramiro Avila to prohibit his participation in the resolution, arguing that he had previously supported social movements in lawsuits against extractive projects (Corte Constitucional del Ecuador, 2019b; 2019c). Avila was disqualified and in February 2020 the court rejected the Azuay consultation, arguing, for the second time, the lack of clarity of the issue (Corte Constitucional del Ecuador,

2019b; 2020).⁴ These actions generated uncertainty regarding the effectiveness of the democratic principle of good faith when corporate and central state pressure limits the people's right to participate in the decision-making process on extractive projects that might affect their lives.

Ecuador's executive state plays a dominant role in extractive politics despite the fact that participatory processes are outside its legal jurisdiction (Leifsen, Sánchez-Vázquez, and Reyes, 2017). For example, Moreno addressed the Constitutional Court, a body independent of the executive state, when the Court was assessing the constitutionality of the question for popular consultation in Azuay, stating: "If the Court authorizes any mechanism involving a breach [of agreements on extractive projects] that, sooner or later, force us to pay compensation [to extractive companies], I ask that they also invite the people to decide where those [economic] resources will come from and what the sources of funding will be to replace the income we must then give up" (*El Comercio*, 2019). This statement stresses the potential existence of extractive agreements prior to participatory processes and calls into question the idea that the state will guarantee the enforcement of the constitutional right to participate.

Political pressure from the corporate sector is another adverse factor for the participatory practice. This sector intervened publicly to dismiss mechanisms of direct democracy and delay processes. For example, the Ecuadorian Business Committee, the Quito Chamber of Commerce, the Ecuadorian Mining Chamber, and the Chamber of Industries and Production launched a campaign to hinder what they termed the "popular consultation fever," which they said would create "legal and unconstitutional chaos," and called on the Constitutional Court to rule against the request for popular consultation made by the prefect of Azuay (*La Hora*, 2019). During a press conference in May 2019, they also urged the court to invalidate citizens' rights because they created legal uncertainty in the mining sector: "It is not possible for a group of people engaged in illegal mining activity or a group of criminals to call for a popular consultation" (Alarcón, 2019). Ecuador's judicial system—restructured as part of the institutional reforms of Moreno—has also shown irregularities regarding the protection of infringed rights. For example, in September 2019, in the heat of consultation demands, a judge from Pastaza Province was arrested for taking bribes to decide in favor of the construction of a hydroelectric plant on the Piatúa River (Defensoría del Pueblo Ecuador, 2019). The judge had initially ruled against a 2014 demand for protection based on the violation of the rights of nature brought by the Kichwa peoples of Santa Clara.

These judicial proceedings and political reactions indicate that the favorable results of the initial judgments were more conjunctural than the result of an effective implementation of the democratic principle of participation. The Ecuadorian authorities have tended to fail to comply with legal regulations on citizen participation (Leifsen, Sánchez-Vázquez, and Reyes, 2017). The examples presented here illustrate that corporate, political, and legal pressure from sectors supporting extractive activities increase when demands for participation increase. The actions of the various state powers also speak to the institutional fragility of ensuring effective participation regarding extractive projects and the actual capacity of citizens to legitimately influence decisions of national interest. Indeed, the state's growing reluctance to support consultations and its

dismissal of popular initiatives from below reveal the unilaterality of extractive governance. Because free prior and informed consultation and popular consultation are channeled through frameworks controlled by weak state institutionalism where there is a clear conflict of interest, decisions about extractive activities, the guaranteeing of rights, and, finally, democratic practice—all founding principles of *buen vivir*—are significantly compromised. There is, then, a need to scrutinize processes that are rhetorically participatory but do not really reflect the social will (Schilling-Vacaflor, Flemmer, and Hujber, 2018) or modify preestablished decisions (Merino, 2018).

PARTICIPATION RIGHTS AND TERRITORIAL DEFENSE

There is no doubt that lawsuits for consultation have served as strategies for territorial defense in Ecuador. The appropriation of state instruments of participation has become a practical response to populations' demands for autonomy and control of natural resources (Gustafsson, 2016). Indeed, favorable conditions for the interruption of extractive projects have resulted from legal claims designed to enforce the right to consultation. The cases analyzed illustrate that it was precisely the lawsuits for breach of the requirement of free prior and informed consultation that succeeded in halting some projects. However, this was not because of effective implementation of the required consultation but because of the failure to implement it, which resulted in preventive measures that interrupted the projects until the consultation had been carried out.

The relative success of the lawsuits for participation does not eliminate the risk to territorial defense, given that the interruption of certain projects is not necessarily permanent. In fact, Ecuadorian law does not enforce the veto power of free prior and informed consultation, while the results of local popular consultations in matters of "national interest" are constantly challenged. The mechanisms for participation materialized in restrictive laws risk reducing the agency of local populations in decision processes that affect their lives (Vela-Almeida et al., 2021; Weitzner, 2017). For example, Machado et al. (2017: 1085) explain that, although the consultation and consent processes involving Afro-Colombian groups and indigenous populations of the Colombian Cauca have focused attention on decision making, they do not constitute genuine mechanisms for intercultural participation.

Under fragile institutional conditions and the pressure of economic sectors, the potential to influence extractive policy depends on the political-organizational strength of organized groups that build collective identification on shared visions (Falleti and Riofrancos, 2018; Machado et al., 2017). In fact, the level of affected population's response depends on local histories and experience of resistance (Schilling-Vacaflor, Flemmer, and Hujber, 2018). In Loma Larga-Kimsakocha, for example, resistance to the mining has managed to halt the project for nearly two decades.

Finally, action on the part of authorities in key state positions to affect democratic processes in extractive governance is fundamental. In fact, by becoming guarantor of the applicants' judicial processes, the Transitional Ombudsman's Office facilitated legal follow-up, accompaniment of the plaintiffs, and the

recognition of rights infringement, and its institutional support of and closeness to the social movements helped them to press their infringement claims when similar applications had been rejected years before. Various modes of relationship with state organisms and potential synergies illustrate the role of other, less influential forms of state institutionality in making operative institutional processes (Gustafsson and Scurrah, 2019).

CONCLUSIONS

This study illustrates that participation in extractive policy is subject to uncertain bureaucratic procedures, political pressures, and conflicts of interest that ultimately compromise state institutionality, compliance with participation rights, democratic practice, and the constitutional commitment to *buen vivir* in Ecuador. The five lawsuits analyzed here are framed by a political juncture that accounts for the continued violation of popular consultation rights and the free prior and informed consultation of indigenous peoples, peasants, and social movements affected by extractive interests. The implications of this analysis are both theoretical and practical. Theoretically, institutional fragility is an obvious explanation for the breach of participation rights, and this fragility is associated with three serious impediments to the securing of effective rights. The first is deligitimation and dismissal of consultation processes where there is a clear conflict of interest, as evidenced by pressure from Moreno and the central state, as well as corporations, to question, minimize, or challenge the consultations. This situation is prevalent in other countries, where consultation is limited by manipulation, rejection of popular initiatives, and even the legitimization of misleading plebiscites (Svampa, 2019). The second is a tendency to discourage, erode, or even block consultation initiatives from below with bureaucratic hurdles and extremely long processing times that put processes of direct democracy at risk. The ease that the central state enjoys in calling for consultations even if they fail to fulfill administrative requirements demonstrates the asymmetry of its bureaucratic power. The third is the ability to invalidate the binding nature of consultations, which is part of a broad and fraught debate that extends to the area of legal interpretation (Santos and Rodríguez-Garavito, 2007). This debate touches on consent and veto power, two processes of political reappropriation of decision making related to the control of natural resources belonging to historically excluded groups (Sieder, 2011). However, the ongoing questioning of the binding nature of indigenous peoples' decisions means that states can limit the most emancipatory international tools such as free prior and informed consent.

In practice, the cases cited here also show that indigenous peoples and social organizations have gained political influence and managed to bring extraction-related discussions into the legal field. Demands for participation are becoming instruments for strengthening self-determination and territorial defense as stipulated by the concept of *buen vivir* and the plurinational state. However, although the boom in lawsuits has succeeded in interrupting certain extractive projects in Ecuador, these victories are part of a specific political context and do not represent an effective transformation of participation policies, since they

reproduce the very power structures that determine who has the right to decide. We propose that, given the institutional fragility and political pressures, the halting of extractive projects is subject to ongoing risks that threaten democratic processes in general and territorial self-determination in particular.

NOTES

1. At the time of writing this manuscript, a new request for popular consultation in Cuenca, Azuay, the third most populous cantón in the country, had commenced. On February 7, 2021, the popular consultation resulted in more than 80 percent of voters opposed to metallic mining in Cuenca's paramo ecosystems, demonstrating the centrality of popular demands to reject large-scale metal mining that affect farmers' livelihoods and vulnerable ecosystems. This last popular consultation is not included in this article, which was finished by August 2020.

2. Here we are not including environmental licensing as a mechanism of participation because the five lawsuits reported the infringement of popular consultation rights and free prior and informed consultation rather than environmental consultation. In practice, however, there is no difference in application between prior consultation and environmental consultation. The Mining Act, for example, mentions free prior and informed consultation to refer to Article 398 on environmental consultation rather than Article 57.7.

3. An initiative established in 2007 with the aim of keeping Ecuadorian oil in the ground. Its aim was to request an international contribution on 50 percent of the revenue the country would receive from the sale of the extracted oil. In 2013 Correa's government decided to end the initiative because of a lack of international support.

4. This process was still changing at the time of writing the manuscript. A third request for popular consultation in Azuay was finally approved in September 2020 and the popular consultation took place February 7, 2021.

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