

Participation Rights vs. State and Property Rights in Decisions Affecting the Environment: the Colombian Case

El derecho de participación vs. los derechos del Estado y
los derechos patrimoniales en las decisiones que afectan el
medio ambiente: el caso colombiano

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ABSTRACT The aim of this article is to discuss how the right to participation has developed in the Americas, in particular in Colombia as a means to protect environmental rights. To begin with, the right to participation and some of its limitations for its enforceability will be examined. Consequently, it will be explained the recent judicial decisions in Colombia on this right and how the current developments have narrowed the interpretation of the right to participation making it inapplicable in cases related to the exploitation of natural resources. The last section elucidates about the right to participation in conjunction to environmental rights in the Inter-American system of human rights protection and proposes that the Inter-American Court of Human Rights could find a lack of protection to participation rights in Colombia because of the lack of an effective mechanism to enforce this right.

KEYWORDS: participation rights; environmental rights; human rights; environmental rights enforceability; Inter-American Court of Human Rights

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RESUMEN: El objetivo de este artículo es discutir cómo el derecho de participación ha sido desarrollado en el continente americano, en particular en Colombia, como un medio para proteger los derechos ambientales. En primer lugar, el derecho de participación y algunas de sus limitaciones para su exigibilidad serán examinados. Seguidamente, se explicarán las recientes decisiones judiciales en Colombia sobre este derecho y cómo los actuales desarrollos normativos han limitado la interpretación del derecho de participación, haciéndolo inaplicable en los casos relacionados con la explotación de recursos naturales. La última sección busca esclarecer en mayor medida el derecho de participación en conjunto con los derechos ambientales en el sistema Interamericano de protección de los derechos humanos y propone que la Corte Interamericana de Derechos Humanos podría encontrar un déficit de protección de derechos en Colombia debido a la falta de un mecanismo efectivo para aplicar este derecho.

PALABRAS CLAVE: derecho de participación; derechos ambientales; derechos ambientales; exigibilidad de los derechos ambientales, Corte Interamericana de Derechos Humanos.

I. Introduction

The existence of the right to participate in decisions that have an impact on the environment of the locals is closely connected to the concept of participatory democracy. ‘Participatory democracy’ is understood as a mixed form of democracy combining representative democracy with some elements of direct democracy. In this order of ideas, citizens can play a critical role in the approval or rejection of policies that have long time consequences on their everyday affairs. Therefore, democracy is not exhausted under this conception after national or local elections take place. Aragonés and Sánchez-Pagés define participatory democracy as a process in which the main role falls under the citizens that have the opportunity to take policy decisions binding their elected representatives who are compelled to implement these decisions through policies.¹

The aim of this article is to discuss how the right to participation has developed in the Americas, in particular in Colombia, a state party to the Inter-American System of human rights protection. The topic will narrow to the cases in which participation rights are constructed as a means to protect environmental rights of the communities affected and how these previous experiences have contributed to the conception of environmental rights as collective rights. This work is divided in three sections: the first one introduces the reader to the topic of the right to participation and briefs some of the limitations to this right for its enforceability. In particular, this section focuses on the legal formalities and the possible conflict of competences between central and local authorities and between the right to participation and third-party rights

¹ ARAGONÈS, Enriqueta & SÁNCHEZ-PAGÉS, Santiago, “A theory of participatory democracy based on the real case of Porto Alegre”, In: *European Economic Review*, Elsevier, vol. 53, n. 1, January 2009, pp. 56-72.

that may be raised in a consultation process of the local community.

The second section considers the current legal status of the right to participation in Colombia as a constitutional right. It will analyse the different arguments in favour and against the use of the right to participation to allow local communities that are affected by projects taking place in their area to protect their local environment. Consequently, it will be explained the recent domestic judicial decisions on this right as a mechanism to protect environmental rights and how the current developments have narrowed the interpretation of the right to participation making it inapplicable in cases related to the exploitation of natural resources. The last section elucidates about the right to participation in conjunction to environmental rights in the Inter-American system of human rights protection and proposes that the Inter-American Court of Human Rights could find a lack of protection to participation rights in Colombia because of the lack of an effective mechanism to enforce this right under the circumstances described above.

A) PARTICIPATION RIGHTS AND ENVIRONMENTAL DECISIONS: SCOPE AND LIMITATIONS

The right to participate is acknowledged in the Americas by Article XX of the 1948 American Declaration of the Rights and Duties of Man, which states that every person having legal capacity has the right to participate in the government of his country directly or through his representatives.² Article 23.1 (a) of the 1969 American Convention on Human Rights further defines the scope of

² 1948 American Declaration of the Rights and Duties of Man, Article XX: “Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”

this right including on it the right to participate in matters concerning their local environment.³ This definition is broader, in contrast with similar provisions such as Article 3 of Protocol 1 to the European Convention on Human Rights that focuses participation on the conduction of free, periodical elections in which the people can elect their representatives.⁴ However, in the latter example, the right to participate in local matters could be understood as a natural development of the rights to freedom of expression (Article 10 of the European Convention on Human Rights)⁵, freedom of assembly and association (Article 11 of the European

³ 1969 American Convention on Human Rights, Article 23.1 (a), Right to Participate in Government: “Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives;”

⁴ 1952 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3 Right to free elections: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

⁵ 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10: “. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Convention on Human Rights)⁶ and freedom from discrimination in the enjoyment of any right under the European Convention or by law (Article 14 of the European Convention on Human Rights and Article 1 protocol 12 to the European Convention on Human Rights)⁷ in the cases of local minorities.

It is necessary to notice from this definition that, although participatory democracy takes elements from direct democracy, not all policy decisions are subject to debate by the members of the communities under this system. The right to participation is limited by the legal framework that defines the scope of the right, the topics that are subject to this consultation and the requirements to call for a referendum or a similar binding mechanism. Judicial

⁶ *Ibidem*, Article 11: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

⁷ European Convention on Human Rights, *op. cit*, Article 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” 2000 Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1: “1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

decisions related to the legality of referendum (including but not limited to the fulfilment of the legal formalities for a referendum to be called) and the legitimacy to exercise the right to participate in this matter are also limitations to participatory democracy. Therefore, it has been observed that local referendums related to the environmental impact of economic projects are likely challenged on the basis of their alleged illegality or lack of legitimacy.⁸ In the former case, participation rights are put into question based on the laws and regulations setting the requirements and proceedings to call for a referendum. In the latter, participation rights are challenged based on the alleged conflict between the result and the authority of the state in matters of its sole competence or the group of people that aims to represent their local community by calling a referendum or an alleged harm to the rights of third parties affected by the decision of the community which were previously recognized by the law.

According to Meyer, the political opportunity theory explains the conditions that must be met for a local referendum to take place. Under this theory, political actors and their demands should not be examined separately but as part of a political context. Participation rights are influenced by the different political actors and their claims, the degree of a country's political openness and the existence of strong political allies that support the social claims subject to the democratic debate among other factors.⁹ Therefore, some of the arguments opposing the execution or implementation of local referendums based on the alleged illegality of the election indicate that the political system would likely not be open enough

⁸ DIETZ, Kristina, "Politics of Scale and Struggles over Mining in Colombia", In: *Contested Extractivism, Society and the State: Struggles over Mining and Land*, Palgrave Macmillan, 2017, pp. 127-148

⁹ MEYER, David S., "Protest and Political Opportunities", In: *Annual Review of Sociology*, n. 30, 2004, pp. 125-145, at: <<https://www.annualreviews.org/toc/soc/30/1>>.

for the realization of participation rights to the extent the communities are demanding them to be implemented.

For instance, one of the arguments that has been employed to oppose the use of referendums or similar participation mechanisms or the implementation of the result after a voting has taken place is that these mechanisms are supposedly not accepted according to the law to decide on the subject. This could mean that the communities are not allowed by the law to accept or reject a project that may have an impact in the local environment or that the result would not be legally binding.¹⁰ This outright denial of a meaningful mechanism to exercise participation rights may enable the individuals whose local environments are threatened by this state of affairs to challenge their governments to their respective regional human rights tribunals as it will be examined below for the case of Colombia and the Inter-American system of human rights.

Similarly, the principle of legality presupposes the fulfilment of all the requirements and formalities referendums may observe before being called and to be legally binding. These requirements most likely include an assessment of the phrasing of the question that is purported to be decided on the polls. For instance, a question that suggests a positive or negative answer may fail a judicial assessment on the basis that it is inducing the will of the voters and therefore makes the result not legally binding. This argument has been raised as a way to object the choice of words of a referendum question and to request the use of a “neutral” language. Furthermore, this argument has been used to challenge the utility

¹⁰ See for instance: T-445/16 Judgment, Constitutional Court of Colombia, August 19, 2016, section 6.3.1. In this case, the Colombian Mining and Energy Ministry alleged to the Constitutional Court that at the moment there was not a suitable mechanisms for the locals of a community to have a say on the granting of “mining titles”. According to the Ministry, the Nation has the sole prerogative to grant mining rights to private individuals. Therefore, local referendums would not undermine this power.

of participation rights to decide on complex subjects whose ramifications go beyond the protection of the environment and the rights of local communities. According to this line of reasoning, the way local referendums are organized, asking the citizens of a concerned area to decide on the continuation of extraction projects, make them already biased against these activities. Even if the question does not involve a value judgment some opponents to these participation mechanisms argue that these consultations create a dichotomy between environmental protection and extraction activities giving the impression that they were mutually exclusive.¹¹

The concept of legitimacy has been understood as a right states and institutions have to operate without interference, in order to accomplish their goals in a functionally manner.¹² This definition does not rule out a certain level of interference institutions are expected to tolerate under democratic societies. Accordingly, legitimate institutions have the expectancy of developing their constitutive duties which are essential to their existence. In this order of ideas, the opposing argument to the exercise of participation rights in matters related to the environment lies on the effects that their implementation have in the functioning of the state and its institutions.

For instance, in many cases in the Americas, constitutional or legal provisions have settled that underground resources belong to the state.¹³ Moreover, national legislation is used to define the

¹¹ See for instance: Ibid, Constitutional Court of Colombia. In this case, the Colombian “Mining and Energy Planning Unit” said on behalf of the state that the relation between mining projects and land or water contamination or a negative impact on public health and to local agricultural activities would be a “generalization”.

¹² ADAMS, Nathan, “Institutional Legitimacy”, In: *International Legitimacy and Law*, Goethe University Frankfurt, 2015, p. 5.

¹³ See for instance: 1991 Colombian Constitution, Article 332: “The state is the owner of the underground and of the non-renewable natural resources,

competences between the central state and local governments including on economic, environmental and development matters. As part of their competences, these legal arrangements can establish that the state would have the final say on the exploitation of non-renewable resources. Nevertheless, the exploitation of natural resources made directly by the state or through the granting of mining rights to private parties would have consequences both nationally and on the local environment of a community. Therefore, in this scenario a conflict of competences between the local communities right to participate in decisions that have an impact on their environment and the state may arise since the result of such a consultation would have an effect that could go beyond the initial aim of the local referendum. For instance, if the public decides to discontinue a mining project that is taking place in their territories, the impact could be of a national scale, in particular in the cases of nations whose economies are overly reliant on the exploitation of natural resources.

without prejudice to the acquired and perfected rights in accordance to the preexisting laws.”; 1993 Peruvian Constitution, Article 54: “The territory of the State is inalienable and inviolable. It comprises the ground, the underground, the maritime domain and the airspace above (...)”, Article 66: “Renewable or non-renewable natural resources are patrimony of the nation. The state is sovereign on their use. Conditions for their use and their concession to private individuals are laid down by an organic law. Concessions vest their titleholder with a property right, subject to the legal provisions.”; Argentinian Law 1919 (Mining Code), Art. 7: “Mines are private properties of the Nation or the Provinces depending on the area they are located.” Art. 8 “Private individuals are allowed to find and exploit mines and dispose them as owners according to the provisions of this Code” Appendix, Article 1: “Oil mines and fluid hydrocarbons are assets within the private domain of the Nation or the Provinces depending on the area they are located.” 1985 Guatemalan Constitution, Article 121 State properties. The following properties belong to the state.... e. The underground, hydrocarbon deposits, and minerals as well as other organic or inorganic substances within the underground.

Accordingly, the argument linking referendums aimed to protect the environment from extraction activities as a threat to the state's legitimacy are more compelling in the cases of states whose economic systems are dependent on mining projects.¹⁴ A paradox occurs under these circumstances in which the functioning of the state and its structure is mainly sustained by the exploitation of natural resources. In the case described above, the functioning of democratic institutions is substantially conditioned by the extraction of natural resources to have enough funds to be operational, trapping democracies in a vicious circle. These existing conditions would demand to put a limitation on the participation rights of the local communities. Under these circumstances, state actors are most likely reluctant to re-evaluate the extractivist model from which the state budget is based and rather to narrow the scope of participation rights to the cases where the implementation of the result would not have a national impact.

The problem surrounding the legitimacy of democratic processes whose main purpose is to allow or block local initiatives could also be discussed from the standing point of the voters. First of all, it must be acknowledged that local referendums are atypical compared to periodical elections of public officers at a national or local level. For instance, those actors who have enough resources and time to be involved in the process before the voting take place would have the potential of taking a more prominent role in these atypical elections. This would make local consultations a more selective process than regular elections.¹⁵ Moreover, taking into consideration the nature of participation rights as both a collective and an individual right, it is possible that the legitimacy of

¹⁴ ACOSTA, Alberto, «Post-Extractivism: From Discourse to Practice-Reflections for Action, International Development Policy», In: *Révue Internationale de Politique de Développement*, n. 9, 77-101, 2017, paras 12-15, 32-40, at: <<https://journals.openedition.org/poldev/2333>>.

¹⁵ MERKEL, Wolfgang, *Volksabstimmung: Illusion und Realität. Aus Politik und Zeitgeschichte*, 2011, pp. 47-55.

an organized sector of civil society to represent the interests of a community would be put into question.¹⁶

Local communities consist on heterogeneous groups which could hold different views, interests, motifs and power relations. These same dynamics could exist within a group of people demanding to participate and have a meaningful say on the destination of their natural resources and/or the environmental consequences of projects that are set to be implemented on their territories.¹⁷ Consequently, as collective rights, the right holders of participation rights within a community are indeterminate making it difficult to define the right to participate within the scope of a group who would have the legal standing to activate the participation process. This difficulty remains regardless of how significant the group in question is. Nevertheless, the Inter-American Court of Human Rights has interpreted in the case of the Americas when this question has been brought that it is sufficient that one individual or a group of people seek to protect the right of their communities, they belong to consider their petition admissible. Therefore, no further requirements should be imposed to a group of people or an individual to proof they are authorized to represent the interests of their communities.¹⁸

The rights of private individuals also play a role in this discussion. One of the main arguments asserted by mining companies

¹⁶ For instance in T-445/16 Judgment Op. cit, section 5.1, the legitimacy of one of the civil society members calling for a referendum was put into question because her address for notifications purposes was Bogota instead of the municipality where the referendum was aimed to take place.

¹⁷ DIETZ, Kristina, Consultas populares mineras en Colombia: “Condiciones de su realización y significados políticos. El caso de La Colosa” [Local referendums on mining in Colombia: Conditions for their implementation and political meaning. The La Colosa case], In: *Colombia Internacional*, n. 93, 2018, p. 103.

¹⁸ *Saramaka People v. Suriname Judgment, Inter-American-Court of Human Rights, November 28, 2007, paras 21-24.*

against the effects of giving the final say to the communities on their projects is that the implementation of an unfavourable outcome for the exploitation of these resources would be a violation to the legal principles of legitimate expectations and protection of acquired rights.¹⁹ Furthermore, it has been previously pointed out by companies involved in the exploitation of natural resources that the whole process could take several years from the granting of mining rights to the starting of exploratory works before the extraction takes place. A “change of the rules” in the middle of the process would undermine the principle of legal certainty and the rule of law.²⁰ Moreover, it is possible that a local community take the decision via referendum to retroactively reject extraction projects within their jurisdiction as a negative response to mining or similar activities already having an impact on their local environments.

On the other hand, participation rights have to be weighed against these state rights arguments. One of the arguments in favour of the right to participate would be that the exploitation of natural resources is a threat to the living conditions of the community which is directly affected by these activities. Accordingly,

¹⁹ See for instance: SU-095/18 Judgment, Constitutional Court of Colombia, October 11, 2018, section 1.7. In this case, a mining company not only questioned the legality of a local referendum asking whether the community approve the performance of “seismic exploration projects, exploration drilling and the production of hydrocarbons” in their communities or not. According to this company, it was not possible “to question, debate its validity or terminate a legally binding contract” celebrated in good faith between them and the national agency in charge of granting mining and exploitation rights regardless of the outcome of a referendum.

²⁰ See for example *Anglogold Ashanti Colombia S.A. v. Administrative Court of Tolima Judgment*, Council of State of Colombia, November 23, 2016. According to the facts, mining rights were granted to the company in 2007. However, a local referendum was set took place in the municipality in 2016, questioning the legality of the project.

the protection of the right of a community to oppose a project that may endanger its living conditions supersede the rights and interests of the state as well as the economic rights in contention alleged by other individuals involved in these processes. In order to reach to this conclusion, it is supposed that no other arrangements would be feasible to protect not only the right of the people to participate and eventually reject an economic project taking place, but also other rights and interests that would be affected as a consequence of the decision of the state. At present time, this fragile balance between participation rights and the rights of the state and third parties involved in matters concerning the environment is taking place in different judicial bodies at a national and regional level.

II. PARTICIPATION RIGHTS IN THE AMERICAS: THE COLOMBIAN CASE

A) COLOMBIA

Background

The granting of mining rights and other licences for the exploitation of natural resources has been a matter of concern for both the local communities that have been affected by these decisions and the central government in Colombia. According to the official statistics provided by the *Sistema de Información Minero Energética* (Mining and Energy Information System), the mining industry has represented 2,2% of the GDP in Colombia producing 19,6% of net exports and 16% of foreign direct investments during the same period of time.²¹ Moreover on its assessment of the economic

²¹ *Sistema de Información Minero Energética* (Mining and Energy Information System), *Protocolo para la valoración económica de los impactos sociales*

impact of mining activities, the government of Colombia found that the extraction of hydrocarbons contributed with almost 2 trillion pesos (approximately 562 million euros) in royalties by 2012. This report also found out a correlation between Gross Domestic Product and the extraction of natural resources which was associated with the evolution of prices in the international market of commodities that incentivized the extraction of natural resources in the first decade of the twenty-first century.²²

Local referendums in Colombia (known as “*Consultas Populares*”) are a participation mechanism enshrined in the constitution since 1991.²³ This mechanism was further regulated by the Law No. 134 of 1994 as amended by Law No. 1757 of 2015. According to this law, popular consultations can be celebrated at a national,

y ambientales de los proyectos de construcción, montaje y explotación de minería de carbón construida con base en la revisión de experiencias y casos concretos de las zonas de estudio (Protocol for the economic valuation of the social and environmental impact of building, production and exploitation projects of coal mining built on the basis of previous experiences review and concrete cases on the study area), Mining and Energy Ministry, 2017, p. 5, at: <http://acmineria.com.co/acm/wp-content/uploads/normativas/b_protocolo_acb_carbon.pdf>.

²² *Unidad de Planeación Minero Energética (Mining and Energy Planning Unit), Indicadores de la Minería en Colombia- versión preliminar (Mining indicators in Colombia- preliminary version), UPME, Mining and Energy Ministry 2014, pp. 29-63, at: <http://www1.upme.gov.co/simco/Cifras-Sectoriales/EstudiosPublicaciones/Indicadores_de_la_mineria_en_Colombia.pdf>.*

²³ Colombian Constitution, *op. cit.*, Art. 40.2: “Every citizen has the right to participate in the election, exercise and control of the political authorities. To make this right effective she can take part in the elections, plebiscites, referendums and other forms of democratic participation”. Art. 103 lists *Consultas populares* (local referendums) along with elections, plebiscite, national referendums, open cabildos, legislative proposals and recall referendums as mechanisms people can use to exercise their right to participate and exercise their sovereignty in accordance with the law. Article 105 allows governors and town mayors to call for a local referendum to decide on matters of their competence.

regional, municipal, district or local level. The decision taken by the people on matters that are relevant to their jurisdiction should be binding to the authorities in charge of their implementation.²⁴ After the legislative body approves the question that is intended to be referred to the voters, the referendum proposal must be submitted for judicial review. Hence, the competent administrative tribunal must decide on the constitutionality of the consultation.²⁵ The aim of this judicial review is to evaluate whether the legal and constitutional requirements have been fulfilled or not and if the proposed question could be deemed constitutional. The administrative judge has the power to change the wording of the question to offer any needed clarification about the scope of the referendum or to decide against the call for a referendum if any of the requirements has not been fulfilled.

Accordingly, if the administrative judge concludes that the whole process has fulfilled the legal requirements, a local referendum should take place. In order to be binding, the law requires a minimum participation threshold of thirty three percent of the eligible voters in the referred community (at least one third of the voters) and that more than fifty percent of the voters take an affirmative or negative decision to the proposed question.²⁶ Article 42

²⁴ Colombian Law 134 of 1994, Article 8: “A Popular Consultation (In Spanish Consulta popular) is an institution in which a general question about a matter of national, regional, municipal, district or local interest is submitted by the president of the republic, the governor, the mayor, accordingly to the people for their consideration so they formally make a decisión on the subject. In any case, the popular decision is binding.”

²⁵ Colombian Law 134 of 1994, Article 53: “... the text of the consultation will be sent forward to the competent administrative tribunal to decide on the following 15 days thereafter on its constitutionality.”

²⁶ Colombian Law 134 of 1994, Article 55: “Decision of the people. The decision taking by the people in a local referendum will be binding. It is understood that there was a binding decision taken by the people when the question that has been submitted has obtained the affirmative vote of more than half of

of the Law 1757 of 2015 demands the authorities to take the required measures to implement the decision that has been decided by the voters. This requirement means that the local executive or legislative should take the necessary actions to implement the result of the referendum including adopting or amending the existing regulations.²⁷

However, the judicial discussion on the legality of local referendums asking to accept or reject mining projects has been reopened, in some cases even after the referendum has taken place as it will be explained below. Judicial decisions on the fulfilment of local referendum requirements given by administrative tribunals have been appealed to the Council of State (the highest court for issues related to administrative law) and to the Constitutional Court to discuss any alleged conflict of competences between the national government and local governments or a possible breach to the rights of third parties that may have been affected by the people's decision. Although initial decisions gave more weight to the participation rights of the communities over the interests of the central government and third parties, on its most recent decisions, the Constitutional Court of Colombia has re-evaluated its position on this matter narrowing the scope of the right to participation as it will be explained below.

Participation Rights vs. State Rights in Colombia: legal framework

the valid ballots, provided that at least a third part of the eligible voters have participated.”

²⁷ Colombian Law 1757 of 2015, Article 42: “Consequences of the popular approval of a mechanism for citizen participation requiring a vote. Mechanisms for citizen participation which has complied with the requirements set on the previous article and have been approved will have the following consequences... c) When the people have taken a binding decision on a local referendum, the corresponding agency should adopt the measures to make it effective. When a law, ordinance, agreement or local resolution is required, the corresponding agency should issue it (...).”

The conflict between participation rights and state rights in matters concerning the environment has been framed in Colombia as a conflict of competences between the central government and the local governments. Local governments have allowed the voters to decide over the future of extraction projects in their cities via referendum against the position of the central government that considered these projects a national economic priority and therefore, a matter of its sole competence. It must be acknowledged the existence of legal provisions that could support both positions since these types of projects can be considered from the perspective of the central state and its prerogatives to decide how to use and exploit natural resources or from the perspective of the local communities that would endure the direct impact of the approved economic activities over their environment.

Referendums and similar mechanisms empowering communities to participate are indeed instruments that allow the public to exercise political control over their authorities.²⁸ This definition should be read according to Art. 103 of the Constitution of Colombia which declares that, the people can exercise their sovereignty through *Popular Consultations*.²⁹ According to this line of argumentation, it would be legitimate for the central government to characterize local referendums whose implementation would have an overarching effect over the economy and the state's policies as a matter that could not be addressed by the electorate of a city or region in particular. If this framing of the problem is accepted, the conclusion would be that the right to participation on environmental projects should not be taken by a particular community but by the society in large through national referendums or regular elections, for instance.

²⁸ See for instance, *op. cit.* Article 40 of the 1991 Colombian Constitution includes on its definition of the right to participate the ability of the citizens to exercise political control over their elected authorities.

²⁹ Colombian Constitution, *op. cit.*

Notwithstanding the above, the problem surrounding the legitimacy of a local community to decide on a project that is executed in their territory but may have larger consequences could also be framed as a problem of coordination between an autonomous territory and the central power. The principles of “coordination, concurrence and subsidiarity” would imply that the division of competences within the state should not be interpreted on an adversarial matter.³⁰ Conversely, the principle of subsidiarity in public administration requires that the central power refrains from taking decisions that would be better achieved at the local level.³¹ Furthermore, the principle of autonomy that is granted by the constitution in Colombia to the local authorities is defined as the capacity of these entities to manage their interests according to the law.³²

The legal problem surrounding participation rights in Colombia lies on the overlap of interests between the national government and its local counterparts which is also present in the wide definition of certain competences. In the one hand, municipalities have the key role of organizing local development in their territories. To do so, the Colombian constitution vests municipalities

³⁰ Colombian Constitution, *op. cit.* Art. 288: “...The competences assigned to the different territorial levels will be exercised according to the principles of coordination, concurrence and subsidiarity according to the terms prescribed by law”

³¹ Subsidiarity is defined in the Meriam-Webster dictionary as: “a principle in social organization: functions which subordinate or local organizations perform effectively belong more properly to them than to a dominant central organization”.

³² Colombian Constitution, *op. cit.* Art. 287: “Local authorities have autonomy to manage their own interests within the limits of the Constitution and the law. Accordingly they will have the following rights: 1. to rule themselves by their own authorities 2. Exercise their assigned competences 3. Manage their own resources and establish the taxes required to accomplish their functions 4. To receive their share of the national revenues”.

with the power to regulate land use which may conflict with a development vision based on the exploitation of the underground and non-renewable natural resources.³³ On the other hand, as it was commented above, the central government has the power to settle its own economic and environmental policies, setting the conditions to define the use of the underground and the non-renewable resources.

This exclusive faculty from the central government could have an impact to the life conditions of local communities and potentially render their right to participation and the autonomy of the local governments ineffective. As a consequence of the government deciding to set the conditions to start an extraction project of the local non-renewable resources in a given area, any decision concerning its local organization and development would be subordinated by the central power authorities on this matter. In addition, the existing legal division of competences between the central government and its regional counterparts described above is artificial considering that mining activities take place both in the underground and in the surface of a territory. Therefore, even if it is admitted that the final decision over the use of non-renewable resources belong exclusively to the central state, their extraction would disrupt local development, the use of the soil and the environmental conditions which are a matter of direct interest to the local governments and ultimately to the communities who live in the places where these projects take place.

Notwithstanding that the principle of coordination between national and local authorities cannot overrule the exclusive

³³ Colombian Constitution, *op. cit.* Art. 311: “Municipalities as the fundamental entities of the state’s political-administrative division have the role of (...) organizing local development in their territories, promoting community participation, improving social and cultural conditions of their inhabitants and carry out such other functions as assigned by the constitution or the law.” Art. 313: “Municipal Councils are responsible of (...) 7. Regulating the use of the land...”

powers of the central authority in these matters, it would be absurd to interpret from these provisions that in the case studied, the right of local communities to participate in matters of their concern in particular, and collective rights in general are superseded by the prerogative of the state over the use of natural resources. For instance, it must be kept in mind that the collective right to a healthy environment entails a general obligation for the State and private individuals to protect natural resources.³⁴ This right is closely related to the collective right to participation, to the extent that the Colombian Constitution includes the right to “participate on environmental decisions” on its definition of the right to a healthy environment.³⁵

Participation Rights vs. State Rights in Colombia: judicial decisions

Different domestic decisions have been delivered in particular by the Constitutional Court in Colombia aiming to balance the prerogative of the central government to decide on the extraction of non-renewable resources with the collective right of the people to participate in decisions that have a direct impact in their lives. It has been observed in recent times however, that the balance of the national tribunals has shifted from a more “environmental protectionist” position to a more conservative interpretation to the right to participate on environmental issues. On its most recent decisions, the Constitutional Court of Colombia has leaned in favour of the government while acknowledging that granting the government’s right to take the final decision on extraction activities leaves the right to participation unprotected. This change

³⁴ Colombian Constitution, *op. cit.* Art. 8: “It is an obligation of the State and the persons to protect cultural and natural resources of the Nation.”

³⁵ 1991 Colombian Constitution, *op. cit.* Art. 79: “Everyone has the right to enjoy a healthy environment. Law will ensure the participation of the communities in matters that could affect them...”

in the national jurisprudence is translated into a narrower interpretation of the right to participate in environmental decisions.

In 2002, the Constitutional Court of Colombia decided on a case discussing the impact of mining legislation to environmental rights. The Court asserted that “economic development should be compatible with environmental protections in accordance to the concept of sustainable development”.³⁶ In particular, the Court established that national authorities should follow Principle 15 of the 1992 Convention on Biodiversity of Rio de Janeiro before taking a decision on the exploitation of natural resources. In accordance to this principle, in case of scientific uncertainty about the consequences that the exploration or exploitation of natural resources will have over the environment of the zone in which these activities will take place, the authorities should lean towards the protection of the environment.³⁷ The basis supporting an “*In dubio pro natura*” (In case of doubt, environmental rights should prevail) principle is that, if man-made activities are later proof to cause a serious damage to the environment, the possibility to reverse the impact of these actions could be non-existent. Moreover, in their 2002 decision, the Constitutional Court of Colombia acknowledged that national and local environmental rules are interconnected. It is therefore, mandatory for the central authorities to

³⁶ C-339/02 Judgment, Constitutional Court of Colombia, May 07 2002. This judicial decision made reference to the 1992 Convention on Biodiversity of Rio de Janeiro and Principles 4, 8, 11 and 14 of the 1972 Stockholm Declaration on Human Environment.

³⁷ 1992 Convention on Biodiversity of Rio de Janeiro, Principle 15: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

cooperate with local authorities at different levels for the realization of environmental rights protections.³⁸

Additionally, in 2014 the Constitutional Court of Colombia acknowledged the tensions between the prerogative of the central government over the economy including the granting of licenses for the exploitation of natural resources and the autonomy of local authorities over the managing of their interests. The exploitation of natural resources could have an impact on the demand of public services in the territory in question. For instance, the Court pointed out that mining projects which demand an increase in water consumption could lead to a decline in the quality or availability of water resources. Furthermore, the exploitation of natural resources could have long-term socioeconomic consequences in the communities that become more dependent on the exploitation of natural resources in detriment to other activities leading to a rising in the costs of living.

On the other hand, the Court stated in this decision that, the national government of a country organized as a unitary state (as it is the case in Colombia), has the authority to dictate general parameters in areas of national interest that should be followed suit throughout the territory. Although, this limitation to local autonomies should be guided by the principles of reasonability and proportionality, it would rule out the possibility that a community decides unilaterally to prohibit the development of projects on the basis of their impact on their local environment. Therefore, the Constitutional Court concluded that the state had an obligation to guarantee “a reasonable level of active and effective participation” to the local entities in which exploration and exploitation activities take place. In order to comply with this obligation, the right to participation should take place before, during and after a license to exploit natural resources is granted.³⁹ This right to participate

³⁸ C-339/02 Judgment, *op. cit.*

³⁹ C-123/14 Judgment, Constitutional Court of Colombia, March 05, 2014. The Court considered that the municipalities affected should have the

should not be considered as a mere formality. On the opposite, the right to participate should be granted “at the highest feasible level” to the people that are potentially affected whether their existence as a group is linked to the land (in the case of indigenous groups) or they are just a group of people that may be affected by large scale projects. The Constitutional Court of Colombia concluded that the outcome of an effective and active participation could be that the people of a territory express their opposition to mining activities.⁴⁰

Notwithstanding these considerations, a following decision in 2018 represented a setback for participations rights as a mechanism to oppose projects that may have an impact on the environment. In this decision, the Constitutional Court said that local referendums are not a suitable instrument to decide on the said projects because that would lead to the conclusion that local authorities have a veto power over the national policies on the exploitation of natural resources as executed by the corresponding central authorities. In spite of the fact that referendums are not an appropriate means to protect participation rights, the Constitutional Court asserted that the right to participate, as a human right, should not be left unprotected.

The outcome of this decision was inconclusive because in one hand, the Constitutional Court recognized that the existing mechanisms for participation are ineffective and that the environmental authorities are not legally obliged to take into consideration the concerns of the communities that are directly affected by an exploitation project that is planned to take place in the territories they live. On the other hand, however, the Court concluded that the Congress should be urged to solve this human rights deficit by creating one or several mechanisms to protect the right

right to participate in the determination of the areas that should be excluded from exploration and exploitation activities.

⁴⁰ T-445/16 Judgment, Constitutional Court of Colombia, August 19, 2016, pp. 116, 154-155.

to participation.⁴¹ This reasoning was later ratified by a following decision in 2019 that confirmed the lack of a legal mechanism in Colombia to protect participation rights under the circumstances explained above.⁴²

B) INTER-AMERICAN COURT OF HUMAN RIGHTS

Bearing in mind the legal developments in Colombia that were previously described, it could be concluded that, although the people's right to participate is legally recognized by the Colombian constitution, there are not meaningful mechanisms to enforce it. Consequently, local communities that want to have a say before the starting of a project involving the exploitation of natural resources or that, would otherwise have an impact on the environmental conditions of their region are dependent on future legal developments by the national legislative branch that would allow them to exercise their participation rights. This admission could activate the jurisdiction of the Inter-American Court of Human Rights once a case is reviewed by the Inter-American Commission on Human Rights for the alleged violation of Article 23.1 (a) of the 1969 American Convention on Human Rights (Right to participate in government). In the current circumstances, the Inter-American Court could use the local judicial decisions referred above as evidence of the unavailability of domestic remedies to enforce participation rights for the communities affected by a governmental plan on their environment. This conclusion is reached from the notion that only remedies that are adequate to offer a redress to the alleged victims and that are capable to protect the

⁴¹ SU-095/18 Judgment, Constitutional Court of Colombia, October 11, 2018, pp. 93-94, 134, 149, 157.

⁴² C-053/19 Judgment, Constitutional Court of Colombia, February 13, 2019.

right, should be taken into consideration by the Court.⁴³ Accordingly, the Inter-American Court of Human Rights would assess the merits of the case and could further develop their jurisprudence on the right to participation.

The Inter-American Court has previously examined the right to participation in conjunction with the rights of indigenous groups whose existence as a minority group would be endangered by projects taking place in their lands.⁴⁴ It is generally acknowledged that indigenous groups deserve special protections to prevent further historical human rights violations against them. Therefore, when examining a case under these circumstances, an important weight has been given to the impact of the exploitation of natural resources, over the indigenous group existence as a distinctive group that has a close link with their territory and environment.⁴⁵ The Inter-American Court has shared this view on its jurisprudence concluding that participation should be granted to the indigenous communities in the assessment of the environmental impact of a project that may affect their territories.⁴⁶

Accordingly, the right to participation should comprehend all of the stages of the project including its planning and execu-

⁴³ This conclusion is supported by the 1969 American Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights on this matter. Article 46.2 (b) of the American Convention: “The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when: b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;”

⁴⁴ See among others: *Xákmok Kásek Indigenous Community v. Paraguay Judgment*, Inter-American-Court of Human Rights, June 17, 2005, paras 95-96; *Kaliña and Lokono Peoples v. Suriname Judgment*, Inter-American-Court of Human Rights, November 25, 2015.

⁴⁵ VILJOEN, Frans, “The African Regional Human Rights System”, In: *International Protection of Human Rights: A Textbook*, Institute for Human Rights, Åbo Akademi University, 2012, p. 577.

⁴⁶ *Saramaka People v. Suriname Judgment*, *op. cit.*, para 41.

tion to better protect the rights of a minority group that could be endangered.⁴⁷ Furthermore, the Inter-American Court has said that the assessment of the environmental impact of these projects should take into consideration the connection between the indigenous community and their territory, including their access to the natural resources that have been traditionally used by them. The community's cultural identity should be granted regardless of the outcome of these studies in order to preserve their traditional lifestyles and livelihoods.⁴⁸

Notwithstanding that the previous conclusions could not be extrapolated to other groups of peoples whose rights might be endangered by any project taking place in their territories, it would be the task of the Inter-American Commission and the Inter-American Court of Human Rights to define if its precedent may apply and under which circumstances, when a different community or group of people not in need of special protection under human rights seeks to protect their right to participation. In this respect, the Inter-American Court of Human Rights has recommended in an advisory opinion that the states ought to "allow people that may be affected or any interested person in general to have an opportunity to give their opinions or comments over the project or activity before it is approved" and concluded that, as a result of the right to participation on public affairs (Article

⁴⁷ Kichwa Indigenous People of Sarayaku v. Ecuador Judgment, Inter-American Court of Human Rights, June 27, 2012, para 167; Garífuna Punta Piedra Community and its Members v. Honduras Judgment, Inter-American Court of Human Rights, October 08, 2015, para. 215.

⁴⁸ Yakyé Axa Indigenous Community v Paraguay Judgment, Inter-American Court of Human Rights, June 17, 2005, paras 124, 135, 137; Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama Judgment, Inter-American Court of Human Rights, October 14, 2014, para 112; Garífuna Punta Piedra Community and its Members v. Honduras Judgment, *Ibid*, para 167; Kaliña and Lokono Peoples v. Suriname Judgment, *op. cit.*, para 164.

23.1 (a) of the 1969 American Convention on Human Rights), states have an obligation to ensure the right to participation of “the persons under its jurisdiction on the decision and policy making that could affect the environment, without discrimination, on an equal, meaningful and transparent basis”⁴⁹

This conclusion is based among others on Principle 10 of the 1992 Rio Declaration on Environment and Development. Principle 10 of the Rio Declaration states that individuals should have access to the relevant information and their right to participation should be facilitated and encouraged in order to handle environmental issues.⁵⁰ The Inter-American Court of Human Rights has taken into consideration the Principles under the Rio Declaration as an instrument to interpret the American Convention on Human Rights and develop its scope under the light of environmental rights.⁵¹ The Rio Declaration also points out to the rela-

⁴⁹ Advisory Opinion OC-23/17, Inter-American Court of Human Rights, Environment and Human Rights, State obligations in relation to the environment under the framework of the protection and guarantee of the rights to life and personal integrity- Interpretation and scope of Articles 4.1 and 5.1, in relation to Articles 1.1 and 2 of the American Convention on Human Rights, November 15, 2017, paras 168, 231.

⁵⁰ 1992 Rio Declaration on environment and development, Principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”, United Nations Conference on Environment and Development, 3-14 June 1992.

⁵¹ Claude Reyes *et al.* v. Chile Judgment, Inter-American Court of Human Rights, 19 September 2006, para 81.

tion between the right to participation on environmental issues and the right to effective remedies which would include judicial and administrative proceedings to enforce this right. The Inter-American Court of Human Rights has come to the same conclusion when examining the rights to judicial protection and judicial guarantees (Article 8 and 25 of the Inter-American Convention on Human Rights). According to the Inter-American Court on Human Rights, states should grant effective legal remedies to the people alleging to be victims of human rights violations.⁵²

Finally, it is reasonable to expect the Inter-American Court of Human Rights reach to the conclusion that the Colombian state is not protecting the right to judicial protection and judicial guarantees in relation to the right to participation. Furthermore, as a consequence of the lack of an effective legal protection to the participation rights of local communities in projects involving their environment the Inter-American Court could examine other related human rights violations that may be triggered from this state of affairs. Namely, the right to freedom of expression is essential for the exercise of the right to participation.⁵³ The lack of meaningful mechanisms allowing the citizens to express their concerns over decisions of the government (that would possibly have a direct impact over their livelihoods) and to exercise political participation beyond their voting rights in regular elections would undermine both rights.

Last but not least, the alleged victims of large-scale projects affecting the environment in their communities may experience other potential violations over their rights to life, freedom and personal safety, health and physical, psychological and moral integrity which are protected under the American Declaration of

⁵² Vera Vera *et al.* v. Ecuador Judgment, Inter-American Court of Human Rights, 19 May 2011, para 86.

⁵³ Inter-American Commission of Human Rights, Marco Jurídico sobre la libertad de expresión (Legal framework on freedom of expression), 30 December 2009, para 27.

the Rights and Duties of man and the American Convention on Human Rights.⁵⁴ These rights are to be considered in conjunction with Articles 10 (right to health) and 11 (right to a health environment) of the Protocol of San Salvador to the American Convention on Human Rights, to which Colombia is a party. Article 10 of the Protocol of San Salvador obliges the states to guarantee the enjoyment of the highest level of “physical, mental and social well-being” of their citizens, taking in particular consideration the needs of the “highest risk” groups.⁵⁵ Although Article 10 makes specific reference to poverty as one of the reasons for a group’s vulnerability, this would not exclude the possibility for the Inter-American Court to explore which actions should a state take to protect the right of a group of people whose health could be at risk as a reason of the governmental decisions that affect the environment of an area under its jurisdiction.

In addition, Article 11 of the San Salvador Protocol protects the right to a healthy environment and urge the states to “protect,

⁵⁴ The 1948 American Declaration of the rights and duties of man acknowledges the rights to life, liberty and security (Article I of the American Declaration) and the right to “the preservation of health and to well-being” (Article XI of the American Declaration). Similarly, the 1969 American Convention on Human Rights recognizes the right to life (Article 4 of the American Convention) and the right to humane treatment which includes the obligation to respect people’s physical, mental and moral integrity (Article 5 of the American Convention).

⁵⁵ 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, Art. 10: “1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: ...f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.”

preserve and improve” the environment.⁵⁶ If the Inter-American Court takes the approach of examining a future case in relation to this Protocol, there is room for further development of its jurisprudence remarking the inherent connection between environmental protection and the realization of other human rights.

⁵⁶ *Ibidem*, Art. 11: “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.”

