INDIGENOUS RIGHTS AND CONSTITUTIONAL CHANGE IN ECUADOR

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INDIGENOUS RIGHTS AND CONSTITUTIONAL CHANGE IN ECUADOR

My dissertation, *Indigenous Rights and Constitutional Change in Ecuador*, is motivated by a question that has inspired a rich discussion in the political theory literature: how should democracies accommodate indigenous groups? I focus on this question in the context of indigenous participation in the 2008 Ecuadorian constitutional convention. Ecuador is an interesting case in that the constitutional convention represented an opportunity for indigenous and non-indigenous groups to discuss the very topics that concern political theorists: the ideal relationship between indigenous and non-indigenous communities, the formal recognition of indigenous groups, indigenous rights, the fair economic distribution of resources, and the nature of citizenship. However, despite the fact that indigenous groups focused on constitutional change as a vehicle for indigenous empowerment, the political theory literature is largely silent on how constitutional change can affect minority groups. This silence is indicative of a larger failure on the part of political theorists to fully consider how institutions shape the normative goals of a society. Similarly, the literature on constitutional design does not examine indigenous groups as a separate case study and, therefore, provides little guidance as to how institutions can be used to empower indigenous groups.

During the constitutional convention, indigenous people in Ecuador presented their own plan for constitutional change: plurinationalism. This paradigm combined the idea of indigenous group rights with a call for alternative means of economic development, radical environmentalism, and recognition of an intercultural Ecuadorian identity. In so doing, plurinationalism moved beyond the general parameters of group rights and/or power-sharing arrangements discussed by political theorists and constitutional design scholars. In this

dissertation, therefore, I examine the underlying tenets of plurinationalism, how plurinationalism was interpreted by non-indigenous people and incorporated into the 2008 constitution, and the future constitutional implications of plurinationalism. I argue that the Ecuadorian case has implications for both the political theory and constitutional design literatures: it allows political theorists to move beyond the language of indigenous rights to consider other institutional avenues for indigenous empowerment and points to value for design scholars in considering indigenous people as a separate case study, reframing assumptions about constitution-making in divided societies.

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Chapter One

A New Way of Looking at Indigenous Empowerment

In both 1997 and 2007, the Confederación de las Nacionalidades y Pueblos Indígenas del Ecuador (CONAIE), Ecuador's largest indigenous organization, was instrumental in the country's decision to call for a constitutional convention to rewrite the nation's founding document. In both instances, the organization argued through political protests that indigenous and non-indigenous peoples should work to reclaim and "refound" the state for all Ecuadorian nationalities. In so doing, CONAIE called for the creation of a new Constitution that would recognize Ecuador as a plurinational state, break "colonial" patterns of governance, provide new outlets for public participation, overturn neoliberal economic conventions, provide for indigenous rights, and protect Mother Nature (CONAIE 2007).

In 1997, CONAIE helped form a national constitutional assembly with representatives from labor unions, various indigenous groups, and other social interest organizations, which drafted constitutional reform recommendations. Unfortunately, the assembly's finished project was not published in the official registry for an opportunity for public comment but was, instead, turned over to a drafting committee made up of representatives from Ecuador's registered political parties. The drafting committee retained little of the original document in its 1998 Constitution. In particular, while CONAIE had lobbied for the term "plurinational" to be included in the constitution, the final document referred to Ecuador by the less controversial term "pluricultural."[1] Additionally, several of the 1997 assembly's more radical economic

[1] The term "pluricultural" implies that mainstream Ecuadorian life is influence by several different cultural groups. The term "plurinational" is much more radical as it implies that

provisions were revised. CONAIE, in conjunction with other social movement organizations, protested the finished document, arguing that the professional politicians of the drafting committee overrode the will of the people, as embodied in the popular assembly. In the end, the controversy surrounding the 1998 convention was as much about the nature of Ecuadorian democracy and the representativeness of institutionalized political parties as it was about the content of the two documents (Andolina 1999).

Then, in 2007, CONAIE supported President Correa's bid for a constituent assembly to rewrite Ecuador's 1998 Constitution. CONAIE and other social movement organizations hoped that the delegates would be more representative of the average Ecuadorian (and subsequently less influenced by entrenched political parties) than those who drafted the final 1998 document. For the 2007 Convention, delegates were elected from both the national and provincial levels; traditional parties did poorly while Correa's Country Alliance Movement (AP)[2] won nearly 70 percent of the seats. Pachakutik (CONAIE's political arm) fared similarly to other more established parties, earning only 4 seats. However, despite its low number of seats, CONAIE was finally able to achieve its goal of having Ecuador recognized as a "plurinational" state, and was also able to incorporate most of its environmental and economic policies into the constitution.

The story of the 1997 and 2007 conventions highlights both the political and symbolic importance that CONAIE placed on constitutional reform. Yet despite this, there is very little discussion in either the political theory literature on indigenous politics or the constitutional design literature regarding how attempts to include indigenous groups may change the

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Ecuador is made up of several small nations, each of which deserves some measure of local autonomy, rights, and formal recognition.

[2] Correa ran for president on a platform that condemned traditional political parties as being corrupt and only interested in the welfare of the rich. The AP movement was formed by a broad coalition of leftist organizations to support Correa in the election (Becker 2011, 113).

constitutional structure of the state. In this dissertation, therefore, I will examine the underlying tenets of plurinationalism (CONAIE's platform for constitutional change), how plurinationalism was interpreted by non-indigenous people and incorporated into the 2008 constitution, and the future constitutional implications of plurinationalism. In so doing, I argue that the Ecuadorian case has implications for both the constitutional design and political theory literatures. Namely, the Ecuadorian case allows political theorists to move beyond the language of indigenous rights to consider other institutional avenues for indigenous empowerment. Moreover, it also encourages constitutional designers to consider indigenous peoples as a separate case study. In addition, considering the Ecuadorian case in the context of both the political theory and constitutional design literatures puts into relief a common blind spot in both literatures regarding the underlying assumptions and goals of national constitutions.

Political Theory Meets Constitutional Design

This dissertation is motivated by a question that has inspired a rich discussion in the political theory literature: how should modern democracies accommodate pluralism? More specifically, I have focused on a narrow subset of this research by examining the question: how should modern democracies accommodate indigenous groups? However, while CONAIE sought to refound its relationship with non-indigenous Ecuadorians through constitutional reform, the political theory literature itself has very little to say about how indigenous peoples can be empowered through constitutional or institutional change. This blind spot in the political theory literature is particularly interesting given that the Ecuadorian constitutional convention represented an opportunity for indigenous and non-indigenous groups to discuss the very topics that concern political theorists: the ideal relationship between indigenous and non-indigenous communities, the formal recognition of indigenous groups, indigenous rights, the fair economic

distribution of resources, and the nature of Ecuadorian citizenship. Therefore, I argue that a greater understanding of the way indigenous goals were incorporated into the constitution and its subsequent institutions is valuable in aiding political theorists in understanding the central question of how indigenous people can be incorporated into liberal democracy.

In his recent work *Political Political Theory*, Jeremy Waldron argues that normative political theory has paid too little attention to the study of political institutions and constitutionalism. In short, he argues that normative theorists have put too much emphasis on the question of "the ends and ideals a good society should seek to promote" without considering "the political institutions that are needed in a good society," instead leaving the study of institutions to empirical political scientists (Loc 140). However, focusing on the first question to the exclusion of the second misses the ways in which political institutions shape the normative goals of a society. Therefore, Waldron argues that normative theorists can play an important role in assessing political institutions in light of the social goals democracies are trying to promote. This assessment can be two-fold. First, political theorists consider what types of institutions would best further social goals like justice, liberality, and equality (Loc 254), and second, political theorists can evaluate existing institutions in terms of whether or not they meet normative goals (i.e. does the existing institution succeed in promoting the dignity of all citizens?). Waldron ultimately argues that approaching institutions from a normative standpoint, not only enhances "our theoretical understanding of the role of…institutions," but also makes political theory "intelligible to our empirical colleagues and open to their input and interests…" (Loc 480).

In addition, Waldron notes that, to the extent that they have focused on institutions, normative theorists have largely asked how institutions can be used to safeguard individual

freedoms from either an oppressive government or tyranny of the majority. In other words, constitutionalism is predominantly preoccupied with constructing a limited government. Here, Waldron offers two critiques to constitutionalism. First, he notes that the ways of limiting power advocated by normative thinkers are not particularly well theorized. For example, he argues that, although the doctrine of separation of powers draws heavily from Montesquieu's work in the *Spirit of Laws*, Montesquieu does not clearly outline why separation of powers is essential to a democratic government, why government should be specifically divided into three different branches (legislative, executive, and judicial), or why the legislative branch should necessarily be the strongest. This under-theorization of the basic tenets of limited government leads, in part, to the under-theorization of political institutions discussed above. Second, Waldron argues that in focusing on constructing a limited government political theorists too often ignore the question of how government can be harnessed to empower citizens to achieve normative goals. In summation he argues that "the task is not to limit power but to constitute it, to build the conditions in which political freedom can flourish in the affirmative sense. What sort of housing, what sort of structure are we looking for here?" (Loc 6116).

Finally, Waldron argues that normative theorists, not only pay too little attention as to how to constitute government power, but also generally ignore the question of who constitutes it. He notes that, while in theory democratic power is derived from "popular sovereignty," it is not entirely clear what that means in terms of constitutionalism. For example, he contends, the origins of the American constitution were "decidedly aristocratic" (Loc 883). And even in instances where the process of drafting the constitution is highly participatory and/or democratic, the question of popular sovereignty is still problematic, given that current citizens are tied to the decisions of past generations. In short, Waldron argues that, in generally ignoring

the question of constitution-making, normative theorists all too often paint over the difficult questions surrounding popular sovereignty.

As a corollary to Waldron's argument, Ran Hirschl (2014) argues that the comparative constitutional law literature has become narrowly focused on international human rights as studied through the lens of comparative case law. He contends that this narrow focus misses the connection that comparative constitutional law has to the fields of comparative political science, economics, and philosophy and, in so doing, treats case law as if it takes place in a vacuum. In addition, the literature also ignores the ways in which institutional decisions (ex., the choice between presidential and parliamentary systems) operate in the context of culture or regional history.[3] Hirschl argues that the field of comparative constitutional law should take an interdisciplinary approach to more big-picture questions, such as:

> …the real-life impact of constitutional jurisprudence and its efficacy in planting the seeds of social change; how constitutions reflect and shape nationhood and identity; how constitutions construct, not merely constrain, politics (e.g. by framing the goals and interests people believe they can pursue in politics); the actors and factors involved in demanding or bringing about constitutional transformation; the place of constitutionalism, national and transnational, in the emerging global economic order; and the ever-increasing judicialization of politics worldwide, and its impact on the legitimacy of the courts and the quality of democratic governance more generally (153).

Notably, Hirschl's suggestions that scholars study how constitutions "construct" politics, affect democratic quality and legitimacy, and plant "the seeds of social change" echo Waldron's call

[3] Donald Horowitz (2008) makes a similar argument as to why consociational democracy typically doesn't work in practice. He contends that consociationalism relies on a specific combination of institutions (ex., minority veto powers, group rights, reserved legislative seats, etc.), but countries often only choose a few of these institutions while ignoring others. Countries often decide which institutions to include based on culture, historic precedent, or regional constitutional patterns, and Horowitz argues that this decision-making process is often ignored by design scholars.

for theorists to consider how institutions empower citizens and promote liberal democratic values.

Therefore, in returning to the question that motivates this dissertation (how should democracies accommodate pluralism?), I will take an interdisciplinary approach that seeks to combine lessons learned from a contextualized study of indigenous people's involvement in rewriting the Ecuadorian constitution, an examination of the constitutional design literature regarding the institutional changes indigenous groups advocated for, and the political theory literature on indigenous politics. However, while Waldron suggests that theorists ask broader questions about political institutions, the constitutional design literature has little to say on the topic of incorporating indigenous peoples into democratic societies. As mentioned above, the largest area of focus for comparative constitutional law is the expansion of domestic and international rights.[4] In addition, as I will explore further in the next chapter, the constitutional design literature that focuses on multiculturalism tends to single out post-conflict environments and ask how constitutional design could potentially make these post-conflict governments more stable. In so doing, the literature focuses on institutional structures that are meant to share power between ethnic groups, such as federalism, minority veto power, and legislative quotas. However, these power-sharing arrangements have been widely criticized for their potential to reify group difference, rather than create a stable multicultural society (Choudhry and Hume 2011 and Horowitz 2008). The comparative constitutional design literature does not focus on indigenous groups as a separate case study. And as described in more detail below, while

[4] For a survey of current topics and methodologies in comparative constitutional law, see Vicki Jackson (2012). She notes that a small subset of comparative constitutional law focuses on "constructing a general theory, using various legal sources as examples to help refine, and to clarify, the analytics of a general problems in democratic or political theory." However, she argues that this approach has been used primarily in the study of international human rights law.

indigenous SMOs have traditionally been powerful in Ecuador, the relationship between indigenous and non-indigenous groups is more stable than relationships between different ethnic groups in a post-conflict situation, and CONAIE did not call for the types of power-sharing arrangements discussed by the comparative constitutional law literature. The Ecuadorian case, therefore, not only has implications for how the comparative constitutional design literature should handle questions of indigenous politics, but could also help direct the study of plural societies that are not as divided as post-conflict countries.

Indigenous Politics in Political Theory

While the constitutional design literature does not treat indigenous rights as a separate case study, the continued political, social, and economic discrimination faced by indigenous peoples world-wide has caused political theorists to consider how democratic societies should work to accommodate the needs of some of their most vulnerable citizens. However, while many aspects of indigenous people's political situation—territorial autonomy arrangements, protection of natural resources, redistribution of economic goods, and recognition of indigenous cultures—could lend themselves to the type of institutional approach that Waldron suggests, the indigenous politics literature in political theory has generally focused on indigenous group rights, with a few exceptions. And as will be discussed in more detail in the following section, this rights-centric approach has underestimated indigenous people's critique of western democracies.

For example, Will Kymlicka in his work *Multicultural Citizenship* explicitly argues that his aim in the work is to "clarify the basic building blocks for a liberal approach to minority rights" (2). Later, Kymlicka continues:

> The problem is not that traditional human rights doctrines give us the wrong answer to these questions. It is rather that they often give no answer at all. The right to free speech does not tell us what an appropriate language policy is; the right to vote does not tell us how political boundaries should be drawn, or how power should be distributed between levels of government; the right to mobility does not tell us what an appropriate immigration and naturalization policy is…to resolve these questions fairly, we need to supplement traditional human rights principles with a theory of minority rights. (5)

While Kymlicka is right to argue that traditional human rights doctrine does not answer the above questions, Kymlicka does not adequately explain why these questions would be best answered through the lens of group rights. For example, the questions of "how political boundaries should be drawn" or "how power should be distributed between levels of government" are not clearly questions that can be answered by a new "theory of minority rights." This is not to argue that a theoretic justification of minority rights is not important, but questions about the balance of power and the boundaries of the political community have as much to do with institutions as with rights. Kymlicka does not make it explicitly clear why he chooses to focus solely on the latter.

In outlining a liberal justification for indigenous rights, Kymlicka makes two primary arguments. First, he contends that one of liberalism's primary goals is to protect an individual's right to make her own decisions and that access to one's societal culture[5] is a necessary precondition to this right. In other words, in order to make my own autonomous decisions, I must have access to my own cultural background and traditions, which, in turn, will provide me with a meaningful context within which to make those decisions. Moreover, Kymlicka argues, group rights are necessary for the preservation of minority cultures. Second, Kymlicka argues that states have a historic obligation to protect indigenous groups. In short, Kymlicka contends

[5] Kymlicka argues that a "societal culture" is "a culture which provides its members with meaningful ways of life across the full range of human activities…" (Kymlicka 1995, 76).

that indigenous peoples were incorporated into modern states against their will, and, because of the coercive and colonial nature of its past actions, the modern state has an obligation to grant indigenous groups a certain amount of territorial autonomy.[6] This leads him to argue that indigenous groups have a much stronger claim to group-differentiated rights than immigrant and other minority groups who have voluntarily chosen to leave their own societal cultures.

Kymlicka's focus on cultural preservation and historic obligation leads him to favor some sort of territorial autonomy arrangement for indigenous tribes, examples of which can be seen in both Canada and New Zealand.[7] In both countries, indigenous tribes have been given a measure of resource rights, self-determination, and the ability to practice customary law in defined national territories. While Kymlicka's writings are largely focused on territorial rights, his writings can also be used to support state funding for culturally based education programs, indigenous media outlets, and a minority group's exemption from certain national laws. Finally, while Kymlicka himself does not focus heavily on political representation for indigenous groups, he does argue that minority groups may be entitled to "special representation rights," which would be in keeping with the increasingly popular institution of reserved seats. Under this system, a country will allot a specific number of seats for indigenous tribes, and those who choose to vote for the representatives to fill these seats generally register on separate voter rolls. While there is some concern that reserved seats could solidify previously fluid notions of

[6] Along these same lines, Kymlicka argues that treaty agreements give modern states an additional obligation to support indigenous rights. Although, in the end, Kymlicka concludes that the historic obligation to indigenous groups is there, with or without the existence of a formal treaty (ibid.).
[7] It is important to note that these types of autonomy arrangements are typically asymmetric, meaning that indigenous areas have a special relationship with the federal government as compared to other regions or provinces.

identity, countries as diverse as New Zealand, Taiwan, Venezuela, and India have reserved seats for indigenous groups.[8]

In her work *The Moral Force of Indigenous Politics*, Jung (2008) argues that Kymlicka's focus on societal culture is problematic in that it ignores the realities of social group and identity formation. She contends that indigeneity is a political identity constructed by disadvantaged peasant groups in order to gain moral authority and political power in both the domestic and international arenas. By describing indigenous groups in cultural terms, the traditional multiculturalist approach ignores the ways in which indigenous identity is being used for political purposes. In addition, Jung, in keeping with many of Kymlicka's other critics, argues that homogeneous societal cultures don't exist. Instead, rather than viewing themselves as part of one, all-encompassing identity, individuals typically view themselves as members of multiple groups. So, for example, a person could be female, Catholic, and indigenous, and, at various points in time, different aspects of her identity may be more or less important.

In the end, Jung argues that emphasizing the cultural dimensions of indigenous groups leads to three political problems. First, traditional multiculturalism can often lead to a cycle of contention and exclusion. For example, granting an indigenous group autonomy over a particular area could both further separate indigenous groups from the mainstream population and fail to take account of the rights of minorities on indigenous lands. In that same light, using cultural difference to justify rights can often force indigenous groups to prove cultural continuity dating back to pre-contact. This burden of proof can trap indigenous people into playing a

[8] For a similar classification of group rights, see Levy 2000.

certain cultural role rather than allowing their culture to naturally develop over time (ibid., 241). Finally, a focus on cultural rights may keep groups from gaining economic rights and equality.

In spite of Jung's various critiques of Kymlicka, she still recognizes that liberalism's promise of formal equality has not been carried out in practice. However, Jung argues that rather than award rights based upon the precedent of cultural difference, individuals should be awarded rights and privileges based upon the level of "structural injustice" faced by members of their group (ibid., 234). For example, the U.S. may encourage affirmative action measures for employing African Americans, given that as a group, African Americans are disadvantaged economically. It is important to note that, while rights and privileges are assigned to individuals because of the social, political, or economic status of the group to which they belong, these rights are still individual rights. In other words, affirmative action will benefit the particular person applying for the job rather than African Americans across the board. Jung labels this new category of rights "membership rights" (ibid., 275).

However, while Jung is highly critical of Kymlicka's approach to indigenous rights, her list of membership rights does not look all that different from those rights advocated by Kymlicka. For example, she lists the following possible membership rights: affirmative action, bilingual education, monetary reparations, natural resource rights, and "exemptions from many of the laws and policies that violate their beliefs" (ibid., 261, 283). Jung even goes so far as to argue that territorial autonomy may be justified for certain minority groups but only if members of the group continue to be persecuted by mainstream society and separation from that society is the only way for group members to prosper (ibid., 285). In addition to the aforementioned rights listed in her book, Jung argues that indigenous groups many need a broader range of economic and political rights to close the socio-economic gap between indigenous and non-

indigenous populations. Unfortunately, she is a bit unclear as to what these political and economic changes will be. Furthermore, it is unclear how many rights would fall under the category of membership rights since economic rights, in particular, are generally either granted to all citizens individually and equally (i.e. rights to housing, employment, and food) or as special concessions to groups as a whole (i.e. resource rights). [9]

In contrast to Kymlicka and Jung, Duncan Ivison moves away from a strictly rights-based approach to indigenous empowerment. In his work *Postcolonial Liberalism*, Ivison argues that an approach that focuses exclusively on empowering indigenous peoples through group rights underestimates the political, social, and cultural disadvantages that indigenous groups still face and underplays the extent to which current relations between indigenous and non-indigenous communities are still constructed around a colonial past. In short, Ivison contents that rights by themselves will not benefit indigenous groups, if those groups are not in a position to take advantage of or demand implementation of these rights. And he further argues that indigenous peoples should, themselves, have a larger voice in deciding exactly which group rights should be granted by the state.

[9] While the practical implementation of membership rights may sound very similar to the rights advocated by traditional multiculturalists, Jung's decision not to base rights off of cultural difference means that membership rights are only justified to the extent that they address the underlying structural inequality between groups, and not for their own sake. This has troubling implications for cultural rights, such as bilingual education, which may be valued by indigenous communities but have no clear economic or political benefits. Here, Jung compares her writing on membership rights to Fraser's writings regarding policies of recognition and redistribution. In her work *Scales of Justice* (2009), Fraser argues that groups should be granted rights and privileges to the extent that these rights promote a "parity of participation" between minority and non-minority groups. Jung argues that membership rights "appeal to the standard of parity of participation advanced by Nancy Fraser" in that they "are aimed at leveling the playing field, not at preserving ascriptive differences" (Jung 2008, 282).

Therefore, in contrast to Kymlicka, whose stated goal is to develop a liberal theory of group rights, Ivison argues that his paradigm of postcolonial liberalism

> aspires to…articulating a space within liberal democracies and liberal thought in which these Aboriginal perspectives and philosophies can not only be heard, but given equal opportunity to shape (and reshape) the forms of power and government acting on them. But to do this, liberals cannot simply prescribe a priori a place within their existing conceptual schemes and political structures into which to slot indigenous people's claims but, rather, grasp the ways in which they challenge fundamental liberal notions of public reason, citizenship, and justice. (1).

Here, Ivison starts from the premise that, in order for a liberal state to ever become a post-colonial state, indigenous people would have to be given more control over their relationship with the broader state, and he argues that the "obvious solution" is that indigenous and non-indigenous groups engage in dialogue to reach "a mutually acceptable negotiated settlement" (72). However, given the nature of a pluralistic society, Ivison argues that it is unreasonable to suspect that a complete consensus between competing world views can ever be reached. Therefore, he argues that dialogue between indigenous and non-indigenous groups be conducted with the aim of achieving a *discursive modus vivendi*.[10] In short, he notes that indigenous groups and non-indigenous groups will have to come to working agreements regarding political norms, institutions, and moral interests, with the understanding that these agreements may need to be modified and changed over time as the relationships between indigenous and non-indigenous communities change. He argues that a *discursive modus vivendi*

[10] Ivison argues that his concept of *discursive modus vivendi* "take[s] the pluralization of public reason seriously" and allows for disagreements "about what justice is" in a way that other models of public deliberation do not (73). Ivison also contrasts his idea of *discursive modus vivendi* with "a simple or static *modus vivendi*." He notes that a simpler model of *modus vivendi* represents little more than "the strategic pursuit of one's self-interest(s) via appeals to others' self-interests by conditional offers of forbearance or cooperation" (85). However, he argues that his own model of *discursive modus vivendi* also involves the discussion of mutual "moral interests" and provides the type of flexible arrangement to allow individual's ideas about justice or public reason to change over time (85).

is possible because, while indigenous and non-indigenous communities may have different norms or ideas of justice, their communities have already had to negotiate ways of mutually coexisting for centuries and that these communities can use this overlap and experience to find more common ground.[11]

However, Ivison argues that, in order for the above-mentioned dialogue to be fair, indigenous and non-indigenous peoples must be on equal footing. Here, Ivison sets out to define the parameters of liberal equality. In so doing, he examines two approaches to equality discussed by modern liberals: the resources approach and the capacities approach. Proponents of the resources approach contend that each individual should start out with an equal amount of primary goods at his disposal. Ivison argues that this approach is problematic in a post-colonial state given that it fails to address the, "structural features of social political and economic life." Ivison continues:

> These structural features shape distributive patterns in the first place and, thus, cannot be addressed by theories of distributive justice that take these patterns for granted. This point has significant importance for indigenous peoples since…the basic institutions within which the distribution of primary goods take place can be such as to severely disadvantage them.

Ivison then argues that Kymlicka's theory of group rights for indigenous peoples amounts to resource approach to equality: indigenous peoples are granted a similar set of resources as everyone else (in this case access to societal culture). He argues that this approach offers an incomplete picture of the types of structural challenges that indigenous peoples face (124-125). Ivison contrasts this to the capabilities approach which he argues is "concerned with what people are actually able to achieve with their freedoms" (129). He argues that the capabilities

[11] Here, Ivison distinguishes himself from other liberal thinkers such as Rawls, whom he argues focuses too much on the differences between competing comprehensive doctrines and fails to fully account for the "overlap between cultural, ethical, and political identities" that already exists in liberal societies (86)..

approach is a useful way of creating a *discursive modus vivendi* in that it creates "a basic but contestable threshold" for how individuals should be treated. He explains, "a threshold is less than a complete theory of justice, but it identifies those basic human capabilities central to living a life that is recognizably human, in the broadest possible sense" (129). In short, while indigenous and non-indigenous groups may not be able to agree on a mutual conception of the good, Ivison argues that they should be able to agree on a list of basic capabilities that everyone needs to live a meaningful life. Ivison expects that this list of capabilities will be slightly different for each society and may change over time, as indigenous and non-indigenous groups re-negotiate their relationships with one another.

Ivison's theory of post-colonial liberalism is interesting in that he "aims to develop not just a 'liberal theory of rights for liberal minorities,' but an account of liberal political order in which indigenous people can, as far as possible, find a home" (34-35). In so doing, Ivison provides an account of indigenous empowerment that goes beyond group-differentiated or membership rights to look at some of the larger structural problems facing indigenous groups. As I will discuss below, this theme of constructing a post-colonial society as a means of empowering indigenous peoples is echoed in the Ecuadorian case, where indigenous people demanded serval structural changes to Ecuadorian politics outside of group rights.

However, despite the fact that Ivison attempts to move his account of indigenous empowerment beyond rights, much of Ivison's account of post-colonial liberalism circles back to rights in the end. For example, he argues that a right to self-government, resource rights, and cultural rights would still be important to his approach as these rights secure "a particular kind of capability set in relation to Aboriginal people's interest in land, culture, and self-government" (135). Ivison continues:

> These capabilities enable indigenous people to pursue their conceptions of the good and ways of life equally, since they promote a distribution of formal and constructive social power that takes into account the distinctive historical and social factions of their situation, both in the past and today.

Therefore, in the end, it is unclear how different Ivison's approach is from Kymlicka's in practical terms; both thinkers wind up advocating for similar types of self-government arrangements. Along these lines, Ivison does note that a post-colonial society may have to rethink its "constitutional and institutional structures" in relations to indigenous peoples on two fronts (127). First, post-colonial societies would need to structure their institutions in such a way that the basic capability of indigenous peoples to participate in dialogue with non-indigenous peoples is met. And second, taking indigenous autonomy seriously would mean changing mainstream institutions so that they can better coordinate with indigenous groups. However, while Ivison mentions institutional change as one of the requirements of post-colonial liberalism, he never elaborates on what this would me for liberal societies. And in the end, his argument comes off as a bit circular; shared institutions need to be able to accommodate indigenous participation, so that indigenous peoples can help determine what basic capacities they need, so that they can continue to participate on equal footing with non-indigenous groups. To some extent, this circularity serves to highlight Ivison's point that *discursive modus vivendi* is, by nature, an iterative process. However, a sharper focus on the kinds of constitutional and institutional changes that post-colonial societies should make to accommodate indigenous voices could help to clarify the type of dialogic process that Ivison advocates.

In contrast to the other political theorists discussed here, James Tully explicitly focuses on indigenous rights in the context of modern constitutionalism. In his work *Strange Multiplicities* (1995), Tully outlines what he sees as three types of constitutional regimes:

ancient, modern, and contemporary. He argues that in order to better understand the logic behind the indigenous rights debate, theorists must first explore the overriding logics of these different types of constitutionalism. In explaining the difference between ancient and modern constitutionalism, he states that:

> A modern constitution is an act whereby a people frees itself (or them-selves) from custom and impose a new form of association of itself by an act of will, reason, and agreement. An ancient constitution, in contrast, is the recognition of how the people are already constituted by their assemblage of fundamental laws, institutions, and customs… Therefore, paradoxically, the ancient constitutions, by recognizing custom, and the modern constitutions by overriding custom, both claim to rest on the agreement of the people (61).

In this light, Tully argues that the modern constitutional project has had a complicated relationship with imperialism. On the one hand, the modern constitution has been based on the myth of a single nation that comes together and mutually consents to a set of founding laws and institutions. And he contends that this image of the cohesive nation born of consent can be particularly damaging to indigenous populations, who neither come from the same cultural tradition as the majority nor consented in any way to the current government. In this sense, Tully argues that political theory has all too often been used to justify imperial regimes. On the other hand, Tully notes that constitutionalism also has a legacy of opposing imperial powers, first in Europe, where the constitutional regime was adopted in response to the imperial power of the church, and later as former colonies declared independence from European imperialism.

Ultimately, Tully calls for a new contemporary form of constitutionalism that would blend elements of the ancient and modern traditions. In keeping with the modern tradition, contemporary constitutions would focus on the self-government of indigenous peoples, thereby constituting a "third movement of anti-imperialism" (ibid., 15-16). In this sense, Tully argues that because indigenous peoples already formed sovereign governments prior to European contact, the only way for contemporary constitutionalism to overcome the legacy of imperialism

is for current democracies to follow the principle of "mutual recognition." In the context of Canada, Tully states that mutual recognition would require not only that the Canadian government recognize the right of indigenous sovereignty but that indigenous governments recognize the sovereignty of the Canadian government, as well. Tully contrasts this way of conceptualizing "mutual recognition" with the bulk of western political theory, which tends to take a one-sided view of the politics of recognition (i.e., that Canada should recognize indigenous governments). Instead, he argues that by stating that indigenous peoples must also recognize the Canadian government, his theory both acknowledges the prior sovereignty of indigenous groups and gives indigenous groups more authority to negotiate with the Canadian government (ibid., 236-237).

Tully's conception of mutual recognition leads him to champion a self-determination arrangement that is far more ambitious than the arrangements proposed by Ivison or Kymlicka. In particular, Tully pushes the concept of government-to-government relations to the extreme, arguing that aboriginal peoples should not be seen as falling under the jurisdiction of the federal Canadian government, but as having a parallel governmental system. Tully further argues that indigenous tribes should be granted enough land to be economically and politically independent and should have full autonomy on that territory with regards to health care, resource development, cultural law, and electoral procedures. In response to questions concerning the rights of minorities within indigenous territories, Tully contends that culturally neutral human rights standards that are mutually acceptable to both federations should be adopted. The Canadian Supreme Court would have the responsibility of enforcing those standards, and the First Nations should have at least one seat on the court.

Contemporary constitutionalism would also have elements of ancient constitutionalism. For example, while contemporary constitutions gain part of their legitimacy through respecting self-determination (as modern constitutions do), they also build legitimacy by respecting culture, custom, and tradition (as ancient constitutions do). Furthermore, Tully argues, this means that, unlike their modern counterparts, contemporary constitutions are much more fluid in both content and their conceptions of national unity and identity. For example, Tully argues that contemporary constitutions are "not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements" that "persevere legal, political and, cultural plurality rather than impose uniformity and regularity" (183).

In order to encourage this type of flexibility, Tully further argues that settler states and indigenous peoples should engage in an ongoing "intercultural dialogue" regarding the terms of indigenous autonomy. In short, he argues that, while many theories of indigenous rights aim to preserve a constant and exotic indigenous culture, it would be a mistake to characterize indigenous culture as either fixed or completely separate from mainstream society. Instead, he contends, indigenous culture is fluid and has interacted with mainstream culture for centuries in complex ways. In light of the fact that both indigenous and mainstream culture will continue to change and influence each other, Tully argues that "a constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time" (30).

While Tully does focus on the theoretical underpinnings of modern constitutionalism as it applies to indigenous rights, it is unclear how ideas would apply to written constitutions themselves. For example, Tully's description of the constitution as a "form of activity" in which

agreements between people are constantly renegotiated through dialogue seems to imply that, under a contemporary constitutionalist regime, there would be no single constitutional document but, rather, a series of laws, agreements, and treaties. And while this is true in some common law countries like Australia, it is not likely to be the case in most of the countries in which debates about indigenous rights are likely to play out in the future. So the question remains: can Tully's ideas about the fluidity of future constitutional regimes be at least partially adopted in regimes where a single constitutional document has primacy over all other laws? If so, how could the idea of continual renegotiation be incorporated? For example, is there a way to incorporate Tully's ideas through the constitutional amendment process? Or are contemporary constitutional regimes necessarily predicated on a more common law approach?

Furthermore, Tully's discussion of mutual recognition seems to imply a fully functional, parallel indigenous government and a unified indigenous society, even more so than Kymlicka's writings on self-determination. And this raises all kinds of questions regarding who in the indigenous community would "recognize" the Canadian government. In other words, who would be the legal representative of indigenous peoples? And furthermore, what does Tully's theory have to say about indigenous peoples living in urban areas or in close proximity to non-indigenous groups?

Yet despite these questions surrounding Tully's writings, his and Ivison's approach to indigenous empowerment do have interesting implications for the future of indigenous politics. First, both Ivison and Tully argue that liberal democracies need to do a better job of acknowledging their colonial past and of acknowledging how that colonial past shapes current government relations. This leads both thinkers to argue that simply granting indigenous people group rights will not be enough to either answer for past injustices or empower them in the

future. Instead, both thinkers contend that government institutions and/or the constitutional regime will need to be rethought on a slightly larger scale. As discussed below, this idea of a larger scale reform of government institutions and constitutional conventions is one of the underlying premises of the indigenous movement in Ecuador. This is not to say that Kymlicka, Jung, and other indigenous empowerment theorists do not recognize the historical injustices done to indigenous groups, but anti-colonialism seems to be much less of a focus of their writings. For example, Kymlicka seems much more concerned with providing access to societal culture in the present. The fact that his approach also corrects for historical injustice seems to be more of an added bonus. Because of this oversight, other multicultural theorists advocate for little modification of government and society outside of finding a justification for group rights.

Second, and interrelatedly, both Ivison and Tully's writings raise interesting questions regarding the identity of the liberal state. For example, both writers challenge the idea of a unified liberal state, Ivison through his concept of *discursive modus vivendi* and Tully through his instance on mutual recognition. Tully, in particular, argues that the modern constitutionalism tends to "contrast uniformity, unity, and power to diversity, disunity, and weakness" (196). However, Tully argues that this emphasis on national uniformity lead to "resistance, further repression, and disunity" (197). He argues that a more fluid contemporary constructional regime that incorporates a multiplicity of cultures through mutual recognition is more likely to lead to a strong and peaceful state. In contrast to Tully and Ivison, Kymlicka also challenges the idea of government impartiality, but again he argues that this can largely be remedied by group rights. This leads Kymlicka to focus mostly only making relatively small exceptions to existing government (ex., insisting that government proceedings be conducted in multiple languages) rather than challenging the underlying assumptions of the state. Ivison and Tully's writings, therefore, are much closer to the idea of plurinationalism as "unity in diversity," discussed

below. And Tully's writings in particular raise the question of how much the constitutional regime can and should shape the identity of the state, which will be a recurring theme throughout this dissertation.

In addition, both Tully and Ivison place an importance on mutual recognition and negotiation with indigenous groups, in Ivison's case, to determine an agreed upon list of capacities and, in Tully's case, as a means of shaping the constitutional regime itself. While taking a dialogic approach to indigenous empowerment can take on many different forms and meanings, the fact that both scholars emphasize a dialogic approach to indigenous empowerment is in-and-of-itself significant. As I will explain below, both neoconstitutionalism (a paradigm that influenced Ecuadorian constitutional drafters) as well as plurinationalism place a heavy importance on participatory-deliberative institutions. And while each paradigm might have different ideas on the structure and goals of participation, a dialogic approach to indigenous empowerment does vary substantively from an approach to indigenous empowerment that focuses on group rights. As I will discuss in more detail in the conclusion, a model of indigenous empowerment that places a premium on dialogue allows for a more flexible approach to indigenous politics than an approach that focuses on group rights. In addition, both Tully and Ivison in focusing on dialogue place a larger importance on engaging indigenous groups on their own terms, something that this dissertation hopes to partially achieve.

Finally, while all four theorists (Kymlicka, Jung, Ivison, and Tully) do not give very many specifics about the types of institutional arrangements that their theories would promote, all four point to a means of handling plural societies that contrasts with the constitutional design literature. By starting with the case of indigenous groups, all four authors focus on plural

societies that are not as divisive as the universe of cases that the design literature generally studies. Because of this, each theorist offers methods for addressing diversity that go beyond the more dramatic measures covered in the constitutional design literature. For example, while the design literature tends to treat ethnic identities as well defined and fixed, Jung notes that indigenous people often have common cause with peasant organizations and, in fact, there is often overlap between people who identify as both. This leads her to focus on economic policies that would benefit both groups. In addition, Kymlicka paints indigenous groups as just one type of minority (as opposed to national minorities, religious minorities, or immigrants) in the midst of a very diverse society. And this leads him to ask how indigenous people can be accommodated and integrated along with all of the other types of minorities found into one national community (which leads him to place less of an emphasis on power-sharing arrangements). Finally, Tully and Ivison, through their emphasis on dialogue, point to the possibility of developing relationships between ethnic groups that are flexible enough to change over time. These theories, then, could provide a starting point for designers in how to theorize about a wider universe of cases that are not so narrowly focused on post-conflict scenarios.

However, while Ivison and Tully both attempt to break away from multiculturalist theories that emphasize group rights, both authors end up returning to group rights as a way of empowering indigenous peoples. As mentioned above, Ivison concludes that indigenous group rights secure "a particular kind of capability set in relation to Aboriginal peoples' interests in land, culture, and self-government" (113). Similarly, Tully's insistence on mutual recognition emphasizes rights to self-determination and parallel governing institutions (such as indigenous justice). In this light, taking an institutional approach to indigenous empowerment could complement both Ivison and Tully's approaches by moving the political theory debate beyond indigenous rights. For example, as mentioned above, both Tully and Ivison argue that both

institutions and the constitution would need to evolve in order to accommodate indigenous groups. Focusing on questions of constitutional design could provide more specifics on exactly how institutions could change to incorporate indigenous peoples.

For example, Tully suggests that contemporary constitutions should be ongoing agreements between indigenous and non-indigenous groups. A constitutional design approach to Tully's theory could focus on the possibility of making the constitution easier to amend and/or giving indigenous groups more control over the amendment process. Hypothetically, an amendment could be passed with a majority vote by the citizens in a referendum (a very low bar), or indigenous communities could be given special powers to suggest amendments. These proposals would be important to examine, not only from a constitutional deign standpoint, but from a political theory standpoint, as well. As Waldron suggests, theorists could ask: Do these amendment proposals further Tully's idea of justice as outlined by his theory of mutual recognition? Do these proposals create a more democratic and fair society more broadly? And if these proposals are potentially destabilizing and do not promote justice and equality, is Tully's logic flawed or do we simply need better constitutional design proposals? The political theory literature has begun to ask these kinds of questions about group rights. The debate about whether or not group rights actually empower minorities or simply disempower minorities within minorities is indicative of this approach. Political theory would benefit from applying this institutional approach to other ideas for incorporating indigenous peoples beyond group rights.

Plurinationalism

In contrast to the political theory paradigms mentioned above, CONAIE presented its own platform for constitutional change that it called plurinationalism. In its call for

constitutional reform, CONAIE makes it explicit that Ecuador is still a "colonial state," in which government structures and philosophies are patterned on Western models (CONAIE 2007, 9). And the overarching goal of the plurinational movement is to reclaim and "refound" the state for all Ecuadorian nationalities (Sousa Santos 2009). In essence, plurinationalism is an anti-colonial platform that seeks to address the challenges faced, not only by indigenous peoples, but by all those who have been left behind by neoliberal economic development and an entrenched party system that benefits elites. In this light, plurinationalism dovetailed with President Rafael Correa's 2006 campaign promise to foment a "citizen's revolution" to throw off the shackles of neoliberal economics and Western colonialism and refound the state in a more authentically Ecuadorian image. Ultimately CONAIE was fairly successful in incorporating elements of plurinationalism into the constitution. This success may have been, in part, due to the fact that indigenous goals corresponded to the agenda for constitutional change put forth by the AP party.

In keeping with its call to "refound" the Ecuadorian state, CONAIE proposed fairly wide sweeping constitutional reforms. Plurinationalism is comprised of four key tenets: group rights, interculturalism, sumak kawsay, and the rights of nature. Taken together, these four tenets not only describe a new way of thinking about indigenous rights but also propose a different way of viewing the government's goals and relationship to society.

Interculturalism

Interculturalism is both the least well defined and most popular plank in the plurinational platform. In essence, CONAIE argues that one of the goals of the 2008 constitution should be to create an intercultural society, in which indigenous cultures are recognized for the contributions that they have made to the wider Ecuadorian identity (CONAIE 2007, 10). While

interculturalism is meant to acknowledge indigenous cultural practices, indigenous activists are quick to argue that interculturalism is not the same as multiculturalism. In so doing, they argue that while multicultural policies have often been associated with tolerating or preserving cultural differences, interculturalism emphasizes sharing across cultures and mutual respect. In other words, while multiculturalism argues for tolerance, interculturalism argues for acceptance. And while multiculturalism paints a rather static picture of traditional cultures, interculturalism represents a more dynamic concept of cultural growth and exchange. One key difference between multiculturalism and interculturalism can be seen in education policy. While multiculturalists tend to argue that indigenous peoples should have a right to education in their own language, CONAIE argues that all schools should have indigenous language and cultural education programs (FENOCIN 2008, 1).

Group-Differentiated Rights

Similar to Kymlicka and Tully's writings, the plurinational platform does call for group-differentiated rights. In particular, CONAIE's focus has been on guaranteeing the right to practice indigenous justice in traditional territories, the right to territorial autonomy (including the right to practice communal democracy), and the right to free prior and informed consent (FPIC) over development projects that take place on indigenous lands. However, CONAIE makes it clear that collective rights are important only in the larger context of the other reforms mentioned in this paper. In other words, CONAIE argues that collective rights without the other social and economic reforms that plurinationalism advocates will not be sufficient to change indigenous peoples' place within the state or society. COANIE's assertion that indigenous rights must be accompanied by other political and economic changes is evidenced by the fact that, while Ecuador's 1998 constitution also guaranteed many of the collective rights CONAIE

advocated for, the organization ultimately opposed the document. CONAIE's leadership argued that the 1998 constitution was fatally flawed in that, while it approved a number of collective rights, it did so in a document that also recognized neoliberal economic models and a liberal concept of the rational atomized individual (CONAIE 2009). Finally, while territorial autonomy rights are part of the plurinationalism platform, CONAIE is very explicit that indigenous peoples do not wish to create a "state within a state" but that they hope to find "unity in diversity" (CONAIE 2007, 9).

Sumak Kawsay

In keeping with its anti-colonial message, plurinationalism rejects neoliberal economic models and replaces them with an alternative based in indigenous cosmology, the concept of sumak kawsay (a Quechua phrase, which in Spanish is translated to "buen vivir" or "good living"). "Sumak kawsay" can be seen in some sense as a new development model that "radically questions the accumulation of wealth for the end of gaining more wealth" (CONAIE 2007, 21). Instead, advocates of sumak kawsay argue that development programs should be aimed at ensuring that everyone has the opportunity to live a dignified life that is in harmony with one's community and the natural environment. In addition, sumak kawsay incorporates a whole host of social and economic rights that are deemed necessary to good living, including rights to food, health, housing, education, water, and culture (Walsh 2010, 18). Finally, the concept of sumak kawsay not only focuses upon what the state owes the citizens but also on what the citizens owe the state and community. In this sense, living a life in accordance with sumak kawsay is as much about communal responsibility as it is about rights.

Rights of Nature

Finally, as an extension of plurinationalism's overall anti-colonial focus, indigenous activists also argue that man's relationship with nature has, for the last 500 years, been one of subjugation and conquest. In the same way that indigenous groups have been exploited by the state, Europeans and Ecuadorians alike have sought to dominate nature itself (Acosta 2011). For CONAIE, improving man's relationship with nature is an integral component to creating a plurinational state. In this light, CONAIE argued before the constitutional assembly that Pacha Mama, or Mother Earth, should be endowed with her own set of rights. Specifically, ecosystems and species should be granted the right to life. The rights of nature are indicative of plurinationalism's wider focus in that, rather than concentrating on resource rights in a few specific indigenous territories, the existence of these rights are meant to encourage Ecuadorians to re-evaluate nationwide environmental policy.

Constitutional Implications of Plurinationalism

As evidenced by the above discussion, Plurinationalism represents a marked contrast to the constitutional design and political theory literatures. Rather than arguing for the types of power-sharing arrangements covered in the constitutional design literature, or even more aggressive forms of self-determination rights (as advocated by Kymlicka and Tully), plurinationalism seeks to spark wide-sweeping social, political, and philosophical changes to the state and society for the benefit of all citizens. In this sense, plurinationalism is similar to Ivison and Tully's arguments that the creation of a post-colonial liberal democracy will require more wide-sweeping changes to constitutions and government institutions. In the following chapters, I will explore how enacting the politics supported by plurinationalism would lead to four different types of constitutional change: reconceptualizing constitutional identity, adopting rights-based initiatives, creating participatory institutions, and modifying existing branches of

government. These categories of constitutional change can demonstrate ways in which the theory and design literatures can move beyond advocating for indigenous groups' rights and provide innovative ideas for creating the atmosphere for the type of mutual dialogue that Tully and Ivison advocate.

Constitutional Identity

As Michel Rosenfeld argues in his work "Constitutional Identity," apart from establishing rules and institutions, each constitution also has an overarching identity that both shapes and is shaped by national identity and local cultures. He states that constitutional identity revolves around three main questions: "To whom shall the constitution be addressed? What should the constitution provide? And how may the constitution be justified?" (761). In the Ecuadorian case, CONAIE rejected the 1998 Constitution (despite a long list of group-differentiated rights) because the overarching document did not provide satisfactory answers to these three questions. In essence, CONAIE argued that the 1998 constitution was still a document written for a homogenous nation that supported neo-liberal economic policies and was grounded in the western tradition of the liberal atomized individual. The 2008 constitution, however, had a different overarching philosophy. For example, the preamble to the constitution states that:

> We women and men, the sovereign people of Ecuador, recognizing our age-old roots, wrought by women and men form various peoples, celebrating nature, the Pacha Mama, of which we are a part and which is vital to our existence…calling upon the wisdom of all cultures that enrich us as a society, as heirs to social liberation struggles against all forms of domination and colonialism…Hereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay; A society that respects, in all its dimensions, the dignity of individuals and community groups… (Ecuador 2008).

In so doing, the preamble invokes many concepts that are important to the indigenous community. It specifies that Ecuador is influenced by many cultural traditions, recognizes man's fundamental relationship with nature, and highlights the importance of living in accordance to

the sumak kawsay. The preamble sets the stage for a constitution that addresses a plurinational (as opposed to national) society and that provides the structure for this diverse society to live in harmony with nature and community. And it is justified by its desire to create a uniquely post-colonial experience.

Rights-Based Initiatives

As mentioned above, plurinationalism does advocate for an enhanced list of rights to be incorporated into the constitution. However, the list of rights incorporated into the plurinationalism platform is more extensive than those suggested by any single political theory approach. Ultimately, plurinationalism advocates for the expansion of rights on three fronts, as well as the incorporation of a sense of civic duty to place boundaries on individual rights.

First, like Tully and Kymlicka, plurinationalism does advocate for a list of group-differentiated rights, foremost among them are the rights to free prior informed consent, territorial autonomy, indigenous justice, and bilingual education. However, the right to territorial autonomy is structured slightly differently than the nation-to-nation relationship advocated by Tully. Instead, territorial autonomy rights are incorporated into the overall federal structure of the Ecuadorian government. In essence, there are four levels of government in Ecuador: the parish, canton, province and federal government. Any parish, canton, or province can elect to become an autonomous indigenous district with the approval of a 2/3rds vote (Ecuador 2008, Article 257).

Second, plurinationalism calls for the expansion of individual economic and social rights, as suggested by Jung and Ivison. In particular, these additional economic rights are seen as allowing individuals to live a life of dignity in accordance with sumak kawsay. Third, while on the surface the rights of nature may seem to be a particularly novel concept, they follow a

similar logic to group rights. In other words, while Pacha Mama may be a non-traditional rights-bearing entity, the goal is still to achieve greater environmental protection by extending the idea of who/what is eligible to be granted rights.

Finally, the idea of living in accordance with sumak kawsay also implies that citizens owe certain duties to both the state and the community. In particular, the constitution calls for citizens to uphold the Quechua mandate "Ama Killa, ama llulla, ama shwa" (to not be lazy, to not lie, to not steal), which builds off of an indigenous tradition of prioritizing communal welfare (Ecuador 2008, Article 83). In addition, in keeping with the goals of both the rights of nature and sumak kawsay, the individual right to private property is deprioritized. Individuals and communities are allowed to own private property but must ensure that the property is able to "fulfill its social and environmental role" (Ecuador 2008, Article 66).

Participatory Institutions

In addition, both the sumak kawsay and interculturalism planks of the plurinational platform call for an expansion of opportunities for citizen participation, in order to give indigenous peoples more control over both development and social policy. While the 2008 constitution works to encourage participation on several levels, the most notable change is the creation of a new branch of government, the Citizens' Participation Branch. The Citizens' Participation Branch is headed by a seven-member council (Consejo de Participation Ciudadana y Control Social or CPCCS) which is meant to act as a sort of citizen's advocacy organization. The CPCCS is designed to encourage participation and government transparency by facilitating meetings between ordinary citizens and government officials, promoting transparency by providing SMOs with solicited information, coordinating with local government efforts to engage the community, and exploring the possibility of communal consultation for both

indigenous and non-indigenous communities. In addition, the CPCCS has begun to work with canton governments to construct citizen assemblies that would, through deliberation, determine local development goals (CPCCS 2012).

While the Citizens' Participation Branch is relatively new and still working to carve out its specific functions and boundaries, the branch does have potential for realizing some of the goals articulated by the concepts of sumak kawsay and interculturalism. If the CPCCS does take a more active role in the consultation process, it may have the power to protect indigenous groups from large oil and mining interests. And this protection may be the first step in guaranteeing that the extractive industry sector is more cognizant of the needs of the average Ecuadorian. In addition, the canton development boards may be a space for intercultural dialogue on a local level, and may also give indigenous peoples a further chance to articulate development goals that are in keeping with traditional concerns regarding community and environment. Along these lines, local development forums may also provide a space for the types of discussions regarding capabilities that Ivison suggests. Finally, indigenous activists have long argued that indigenous communities should be allowed to make decisions through deliberative forums and consensus rather than through strict majoritarian democracy (Acosta 2009). And these canton councils may provide a means of incorporating indigenous notions of democracy into local government decision making.

Ultimately, the creation of a Citizens' Participation Branch is interesting in that it provides another means of empowering indigenous groups apart from guaranteeing communities more rights. While an expansion of the list of rights may be valuable insofar as they give grounds for citizens to dispute rights violations in court, rights can also be notoriously difficult to enforce. By creating a fifth branch of government the constitution also changes

existing power structures and thereby increases the likelihood of implementing policies in keeping with the ideas of interculturalism and sumak kawsay.

Effects on other Branches of Government

In addition to creating participatory/deliberative institutions, the plurinational platform also has implications for the legislative, executive, and judiciary branches of government. For example, the legalization of indigenous justice and the recognition of territorial autonomy has wide-ranging implications for the judicial branch. First, as Tully suggests, indigenous communities were reticent about allowing mainstream Ecuadorian human rights policies to govern indigenous justice proceedings, in that they hoped that indigenous justice would be autonomous from (and not subservient to) regular justice courts. Instead, both indigenous justice and Ecuadorian regular courts are bound by international human rights agreements. This greatly impacts judicial interpretations, since all courts must take into consideration "international human rights instruments" (Ecuador 2008, Article 172). Second, the recognition of indigenous justice will necessarily affect the structure of the judicial branch, because a means of coordination between the two types of justice will need to be organized. Here, the Ecuadorian constitution has been criticized for stating that the mechanisms for coordination will be established in secondary legislation; this has led to much confusion regarding jurisdictional boundaries (Ecuador 2008, Article 171). The process of normalizing indigenous justice would most likely run more smoothly with constitutional mechanisms in place to ensure cooperation between institutions. Finally, as Rosenfeld (2012) explains, judges often gather clues on how to interpret the constitution from statements, such as the preamble, which establish the different elements of constitutional identity (as described above). Therefore, changes to the overarching constitutional identity can lead to changes in judicial interpretation of all aspects of the law.

In addition, the structure of the legislative branch can greatly impact development policy. As mentioned in Chapter 4, the size of electoral districts can greatly affect both the overall amount of money spent on development projects, as well as, whether or not funds are spent on national or local projects. Given that realizing the goals of sumak kawsay requires the government to allocate more resources towards local development projects, designers may want to consider how the electoral system could be adjusted to encourage the type of development spending that is more beneficial to indigenous groups.

Finally, the adoption of aspects of the plurinationalism platform have had largely unintended consequences on the executive branch. In particular, the 2008 constitution grants the president wide sweeping powers, including the power to appoint both members of the Constitutional Court and the Citizen's Participation Branch, effectively disrupting the balance of power between the executive and legislative branches. In addition, the constitution allows the President to convene a nationwide referendum on any issue (Article 104), draft legislation under certain circumstances (Articles 138 and 140), dissolve the National Assembly (Article 148), and initiate a constitutional amendment (Article 441). This increase in presidential power is likely tied to the indigenous rights movement in two ways. First, the Citizen's Participation Branch and the President's ability to call referendum were created out of a desire to make the Ecuadorian government more participatory. And second, CONAIE made so many gains in the constitutional convention that it was willing to overlook the additional powers granted to the president and endorse the draft constitution. While a powerful executive is not necessarily a byproduct of greater indigenous rights, the troubles with the executive branch in Ecuador demonstrate that minority rights measures are likely to impact government structures in unexpected ways. And constitutional design scholars need to take the possible ripple effects of indigenous rights measures into account.

In the end, the Ecuadorian case demonstrates that indigenous empowerment can both shape and be shaped by government institutions in unexpected ways. Despite this fact, however, many indigenous rights scholars (in both political theory and constitutional design) do not consider how certain design elements in the executive, legislative, and judicial branches may impact indigenous rights.

The Ecuadorian Case

Ecuador represents an important case for studying indigenous rights, in the context of constitutional design, not only because of the strength and platform of the Ecuadorian indigenous organizations, but also because the 2008 constitution, itself, is indicative of the larger neoconstitutionalism movement. Neoconstitutionalism provides an interesting opportunity for design scholars to study how constitutions can emphasize specific goals other than limited government.

CONAIE

Ecuador is an ideal place for studying indigenous politics in the context of constitutional design, because it has a relatively unified indigenous population that was able to present a comprehensive platform for constitutional change at the 2007/2008 Constitutional Assembly. Ecuador has one of the largest indigenous populations in Latin America, with between 7 and 40 percent identifying as indigenous, depending on the source (Becker 2011, 3).[12] The country is home to 14 indigenous nations with the two most prominent groups being the Kichwa (part of

[12] The exact percentage of Ecuadorians who identify as indigenous is hard to determine because most people in Ecuador have some indigenous ancestry, and the topic is politically contentious. The government (which has incentives to low-ball the estimate) claims that the indigenous population is around 7%, while CONAIE (which has incentives to inflate the number) claims that the indigenous population is around 40%. In addition, the number of people identifying as indigenous varies based on public opinion of the indigenous movement at the time.

the Quechua language group) in the Andes, and the Shuar in the Amazon (ibid., 4). In 1961, the Shuar were the first to form an organization focused solely on the rights of indigenous peoples, and the indigenous movement continued to gain steam in Ecuador throughout the late 1960s and 1970s (Becker 2008). In 1986, existing indigenous activist groups from Ecuador's three main geographic regions (the coast, the highlands, and the Amazon) came together to form a single national organization, CONAIE. To this day, the organization is unique in its ability to unify a plethora of indigenous groups with different languages, cultures, and ways of life under a single banner. CONAIE was active in promoting the 2007/2008 constitutional assembly, and provided an extensive political platform that was accessible to both researchers and public officials. In addition, CONAIE activists such as Monica Chuji, Luis Macas, and Nina Pacari, fleshed out this platform with essays and speeches. Taken together, these statements present a fairly comprehensive platform for constitutional change by a diverse national indigenous movement. Furthermore, the very nature of a constitutional assembly encourages diverse groups of people to come together to discuss their conceptualization of rights and their political identity as a nation. In light of this, there was much discussion in Ecuador about the constitution's description of Ecuador as a "plurinational nation" and what that might mean for Ecuadorians.[13] In, short the process of drafting the 2008 Ecuadorian constitution provided both the context for discussing big-picture issues like indigenous rights, national identity, and equality as well as a focal point for future conversations about these big-picture issues.

[13] In a recent article regarding the future of indigenous studies, Van Cott (2010) argues that nations with large indigenous populations (like Ecuador or Bolivia) are not ideal for studying indigenous rights as they are demographically atypical. However, since I am interested in Ecuador and CONAIE precisely because they have been so successful in changing the dialogue surrounding indigenous rights, Ecuador's atypical nature should not present a problem.

In addition, most scholarly discussions of multiculturalism draw examples from Canada, the United States, and Australia, despite the fact that most indigenous populations do not live in western industrialized countries. A study of the Ecuadorian indigenous movement, therefore, could shed light onto how developing democracies negotiate claims of minority rights and on how these negotiations play into their struggle for a more established democracy. For example, as mentioned in Chapter 4 the debate about whether or not indigenous communities should be able to practice their own form of justice may play out very differently in Canada or the United States than it would in a country like Ecuador, where the state may not have the capacity to ensure access to ordinary justice systems in remote locations. In addition, both Canada and Australia represent common-law systems, and the United States represents the world's oldest constitutional democracy. As such, a theory of indigenous rights which focuses almost exclusively on case studies from these locations, will have difficulty addressing how indigenous goals can be incorporated into the drafting of modern constitutions. Finally, as explained in more detail in Chapter 3, indigenous criticisms of the colonial nature of the modern state are more likely to resonate with citizens in the global South, who were themselves subjected to colonial relations with the West. Therefore, to the extent that post-colonialism is a part of the narrative of indigenous rights, it is beneficial to study indigenous empowerment in the context of the global South.

Neoconstitutionalism

The Ecuadorian case is important not only for the reasons listed above but also because the Ecuadorian constitution can also provide insight to scholars of constitutional design as a representative of the neoconstitutionalism movement. While the indigenous rights literature is often focused narrowly on Canada, Australia, and the United States, the comparative

constitutional law literature frequently measures international constitutions and case law against the United States constitution, which emphasizes limited government. Neoconstitutionalism, on the other hand, focuses on empowering citizens through participation and a strong judiciary, and therefore, represents an interesting counter-point to U.S. constitutional law and an interesting universe of cases for constitutional designers.

Neoconstitutionalism, in its most basic sense, represents an attempt to grapple with challenges to human rights raised by globalization and international economic organizations, as well as new rights claims lodged by social movements, international NGOs, and formerly disenfranchised groups (Narvaez and Narvaez). While neoconstitutionalism is a bit of a nebulous concept, it is often used to discuss three different but interrelated ideas: the necessity of expanding the number and scope of human rights, the role of an active judiciary in enforcing constitutionally granted rights, and the importance of citizen participation and deliberative democracy. Although the constitutions of Ecuador, Bolivia, Colombia, and Venezuela are seen as emblematic of Latin American neoconstitutionalism, aspects of these three traits are gaining momentum in other constitutional movements in the global South (Schilling-Vacaflor and Nolte 2012).

First, neoconstitutionalism is often used to describe the post WWII trend of emphasizing and expanding rights in constitutions, most commonly through an expansion of the number and types of social and economic rights guaranteed, or by including rights protections in the private sector (i.e. neoconstitutionalism includes both a horizontal as well as vertical application of rights). In this sense, proponents of neoconstitutionalism argue that it is, above all, a rights-centered approach to drafting and interpreting the constitution (Avila 2011). [14] Because of this

[14] For example, in many of my interviews, when I asked about the differences between the 2008 and the 1998 constitutions, respondents argued that the 2008 constitution was one centered on rights, or human rights, while the 1998 constitution was a "neoliberal constitution." The term neoliberal seemed to be used

focus on rights expansion these types of constitutions tend to be aspirational, in that they often list a whole host of rights that governments may not have the means or resources to guarantee in the present but may, instead, have to work towards fulfilling in the future (Avila 2011).[15] The aspirational nature of the Ecuadorian constitution is perhaps best illustrated by Ecuadorian scholar Ramiro Avila (2011) who argues in his book, *El Neoconstitutionalismo Transformador*, that "neoconstitutionalism does not tolerate injustice" nor does it recognize any type of hierarchy among rights: all rights are equally important (55, 61). Because of this lack of a recognition of a rights hierarchy, international rights doctrine is seen as important as domestic human rights law.

Second, and interrelatedly, neoconstitutionalism can be used to describe the approach to interpreting a country's constitution, as well as that country's provisions for judicial review. In this sense, neoconstitutionalists argue for an active judiciary, whose primary goal is to uphold the cause of human rights, even to the extent that they may damage other national interests. In describing the paradigm, Avila argues that when interpreting the law, neoconstitutionalist judges can and should refer to the following: national legal precedents, international precedent, executive laws or mandates, indigenous justice, and their own moral judgment. As mentioned above, Avila places a striking emphasis on international precedent arguing, for example, that a Nicaraguan court case at the Inter-American Court of Human Rights, should be used to

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loosely to describe a system of government based on individual rights and economic advancement at the expense of sustainable development, economic equality, and community life.

[15] The Ecuadorian constitution takes this expansion of rights a bit further by including what advocates call third and fourth generation rights: collective rights of indigenous and minority peoples and the rights of nature or non-human entities. Notably, this emphasis on third and fourth generation rights may prove to be a new trend in the region. Bolivia, for example, also emphasized collective rights in its 2009 constitution and has since passed legislation (although not a constitutional amendment) protecting the rights of nature.

guarantee indigenous communal property ownership in Ecuador (124). Avila further elaborates that human rights and equality should take priority over other concerns. For example, if a legal case pits intellectual property rights against an individual's medical needs, then the right to health should always triumph (55).[16]

Notably, the 1991 Columbian Constitution, established a similar philosophy of judicial interpretation as the Ecuadorian constitution. And while Lizarazo-Rodriguez (2012) notes that this approach to judicial review has popularized the courts and has "empowered the Court to protect the rights of social groups excluded from political power," this method of judicial review has also raised some concerns, particularly in the Latin American context (163). In the end, this model grants a fairly large amount of political power to the judiciary and disrupts some of the institutional boundaries between the judicial branch and the legislature. In particular, the court's ability to rule on legislative omission practically places them in the role of legislator. Furthermore, neoconstitutionalism also blurs the idea of specialization among judges and courts. If a civil court is asked to decide if a law violates the constitution, if a constitutional right applies despite the absence of a law, or if a legislature should draft a law on a particular topic, then in some sense, each judge is asked to also be the equitant of a Supreme Court justice.

[16] Avila's recommendations regarding judicial interpretation stem from earlier precedents set by the German and Colombian courts. As Mattias Kumm (2012) explains, the German court system, with its heavy emphasis on rights protection, has been a model for several European and third world democracies. In essence, the German constitution allows for an indirect application of constitutional rights into the private/civil sphere, which according to Kumm allows "fundamental rights norms" to "radiate" into all areas of the German legal system. Constitutional rights have a large impact in all areas of German law, given that the constitution forbids any German public authority to act in a way that would contradict German citizens' fundamental rights. In practice, this provision has been interpreted to suggest that civil courts and the legislative branch must always act in the interest of preserving fundamental rights. Significantly, this means that if a civil suit is brought before the court, the judge cannot apply the law in a way that would violate a citizen's rights as listed in the constitution, and if a current civil law unambiguously violates a constitutional right, the civil court must refer the case to the Federal Constitutional court.

Finally, this increased power of judges accentuates already existing concerns about how judges are chosen and the extent to which they are accountable to an electorate. If judges are appointed by the president and/or serve life terms, then giving the judiciary additional power may encourage corruption in the office.

Finally, the third sense in which neoconstitutionalism is used, is to describe constitutions that attempt to foster a more participatory approach to government. In this sense, Albert Noguera Fernandez argues that all constitutions, to an extent, represent an attempt to break from the past and to create a new model of government. And in so doing, newer constitutions in Latin America seek to restore the power of social groups, as well as the power of citizen activism, thereby attempting to "imitate an emancipation process to recover popular sovereignty" (Fernandez 2012, 105). In fact, Carlos Santiago Nino (1996), one of the most influential neoconstitutionalist thinkers, argues that some form of deliberative democracy is the best way to arrive at "morally correct decisions," as citizen deliberation ensures that all citizens' interests will be both properly understood and accounted for when making decisions (119). In particular, Nino argues that decentralization is necessary to facilitate face-to-face deliberation and advocates the creation of more small, local government structures patterned off of town hall or canton meetings in the United State and Switzerland. Specifically, he argues that these local assemblies should have the power to deliberate questions and policies dealing with rights or resource distribution (152).[17] Nino further argues that our institutions promoting representation need to be reevaluated, so that representatives both consult their constituents in participatory assemblies and spend more time deliberating in the legislature itself. In the end,

[17] For more information, see Viciano and Martinez (2012), who echo Nino's discussion about the importance of citizen deliberation to neoconstitutionalism.

the constitutions of Bolivia, Venezuela, and Ecuador have all gone above and beyond Nino's recommendations by providing additional mechanisms for citizens to check the power of the three traditional branches of government. As I will discuss in Chapter 3, both Ecuador and Venezuela, for example, have an additional branch of government which is designed to provide citizen oversight and encourage citizen participation at the national level (Lander 2012).

While these three ideas—expanded human rights protections; a strong judiciary; and increased citizen participation, deliberation, and oversight—are emblematic of neoconstitutionalism, they coexists with a certain amount of tension. For example, Nino argues that judicial review can conflict with the ideals of citizen participation and deliberative democracy, given that judicial decisions are inherently counter majoritarian. And in that same light, an emphasis on participatory/deliberative institutions is slightly at odds with the idea that neoconstitutionalism should promote human rights above all else. However, understanding the Ecuadorian case in the context of neoconstitutionalism offers an interesting opportunity to consider the goals and identities of national constitutions in a new light. For example, as mentioned at the start of this chapter, Waldron criticizes western theories of constitutionalism for being too focused on limiting government power, without considering how governments can positively empower citizens to act. There is an element of this limited government ideology in neoconstitutionalism; one of the reasons neoconstitutionalism places a primacy on human rights is to protect citizens from authoritarian government. However, neoconstitutionalism is more focused on citizen empowerment. In Ecuador, neoconstitutionalism has been interpreted as allowing for both a strong judiciary and a strong executive with the purpose of interpreting and enforcing the law in such a way as to empower the most disadvantaged citizenry (Avila

2011).[18] And the paradigm's focus on participatory/deliberative institutions is largely about giving citizens more of an active voice in politics. Finally, neoconstitutionalism is also associated with the overarching goals of breaking Ecuador from its colonial past and with a strong commitment to social justice in Ecuador's future.[19] As mentioned above, elements of neoconstitutionalism can be highly problematic, and in the following chapters of my dissertation I do not necessarily recommend institutional changes compatible with neoconstitutionalism. However, studying the Ecuadorian constitution, which was drafted under the influence of neoconstitutionalism, does provide an interesting perspective on how rights and institutions can work together to positively empower citizens. And it provides a window into a theory of constitutionalism that is focused on creating a national post-colonial identity and pursuing the national goals of social justice, raising new questions about what the goal and purpose of a constitution should be. In his survey of Latin American constitutionalism, Laurence Whitehead (2012) argues that Latin American constitutions, with their emphasis on "the empowerment of hitherto excluded social groups," "citizens…as collective actors," "political mobilization," and the role of community in politics, may wind up being "more relevant to many of the new constitutional systems now being established in Africa, Asia, the Middle East, and the post-socialist countries than the atypical Anglo-Saxon models" (130-131).

[18] One of my interviewees made a similar argument about the ability of the presidency and the judiciary to empower citizens. See personal interview with an independent assembly member, 7/03/2012 (18). While the idea of a strong executive as a means of empowering citizens has been problematic, the theory behind it is that the president can make executive mandates that may aid disempowered citizens when the legislature refuses or is too slow to act (Avila 2011, 127). This argument is persuasive to many Ecuadorians, given that before 2008 many of the legislators were from long-established politically elite families. For more on this, see Chapter 2.

[19] Personal interview with and AP Assembly Member 9/13/2012 (40).

Interviews and Methods

Constitutional Ethnography

In conducting my research in Ecuador, my primary goal was to determine how indigenous and non-indigenous actors conceived of the following: 1) the term plurinationalism 2) their experience drafting the 2008 Ecuadorian constitution, and 3) the constitution itself. In addition, I examined how the constitution as a document treated plurinationalism and its constituent concepts. In so doing, I borrow from Kim Scheppele's (2004) concept of constitutional ethnography.

In his survey of political ethnography, Schatz (2009) notes that there are two types of ethnographic study. The first (and most common) type of ethnographic study relies on participant observation and immersion into a specific community. In the second type of study, "ethnography is a sensibility that goes beyond face-to-face contact. It is an approach that cares—with the possible emotional engagement that implies—to glean the meanings that the people under study attribute to their social and political reality. Thus, while some scholars equate ethnography with participant observation, one may nonetheless abstract from participant-observation qualities that inform a more general ethnographic sensibility" (5).[20] Schatz notes that this type of ethnographic sensibility can be brought to the study of interviews and texts as well as the more conventional studies involving participant-observation.

Kim Scheppele's (2004) concept of a "constitutional ethnography," takes the more expansive definition of ethnography that Schatz refers to and applies it to the study of national

[20] For more on "ethnographic sensibility," see Pader 2006, and Jourde 2009.

constitutions.[21] In short, Scheppele notes that much of the constitutional design literature focuses on large N studies that ask broad-based questions about the nature and stability of particular institutions (eg. parliaments vs. presidents or activist vs. constructivist courts). In contrast, she states:

> Constitutional ethnography does not ask about the big correlations between the specifics of constitutional design and the effectiveness of specific institutions but instead looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements (ibid., 390).

Scheppele goes on to argue that in conducting constitutional ethnography, the scholar examines the following: the constitution as a holistic document (rather than focusing on its component parts); the cultural, ideological, and economic context in which the constitution was written (as well as the context in which it currently exists); and how the constitution is used in practice (by both the courts and the citizenry) to answer specific legal questions. She notes that while this type of study generally necessitates that a scholar focuses on only one or two constitutions, constitutional ethnography can provide a more complete picture of the influences on governing institutions and the way they shape and are shaped by a country's citizenry. In this sense, while constitutional ethnographies may not involve the type of in-depth participant observation that is associated with a "typical" ethnographic study, they do require that scholars approach their project with a general "ethnographic sensibility." Scheppele (2002) notes that in her own work she uses "in-person on sight observation," interviews, and archival research to gain a better understanding of the "lived experience" of citizens and their institutions" (398).[22]

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[21] While Scheppele (2004) coins the term "constitutional ethnography," she argues that ethnographic studies of constitutions themselves are not new. On the contrary, she argues that the older studies of constitutions used to fit within this framework, and cites Montesquieu's *Spirit of the Laws* as an example.

[22] Scheppele's approach to constitutional ethnography is similar to Ginger's 2006 approach to using interpretative methods to evaluate legal documents. In short, Ginger traces the "storyline" of

In keeping with Scheppele's analysis, I examine different concepts in indigenous thought and culture (including how indigenous people think of the term "plurinationalism"), and how those concepts shaped the 2008 constitution. In addition, I ask how non-indigenous actors perceived both the experience of writing the 2008 constitution as well as the indigenous concepts that made their way into the document. I also study how the interlocking parts of the plurinationalism platform fit together in the Ecuadorian constitution and how these different elements of plurinationalism shape more established institutions such as the judiciary branch. Finally, I ask how the ideas behind plurinationalism shape the sense of national identity the 2008 constitution develops. In so doing, my study of the Ecuadorian constitution takes the more holistic approach to constitutional design that Scheppele advocates, as I examine both how the constitution is shaped by indigenous culture and how it shapes culture and identity in return.

One of the values of the type of ethnographic approach to constitutionalism that Scheppele describes is that it leaves room to evaluate the Ecuadorian constitution on its own terms. In his essay "Ethnography and the Study of Latin American Politics," Enrique Desmond (2009) argues that one of the negative aspects of studying Latin American governing institutions through the lens of "normal science" is that scholars often fail to fully grasp the history and cultural context surrounding Latin American institutions and, instead, assume that any difference between Latin American institutions and European institutions is due to a failure of democracy. Desmond notes that "the result is…an emerging teleology in which imperfect developing democracies are set on a continuum defined by the types of regimes that exist in North America and Western Europe" (10). Desmond argues that a more ethnographic approach

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bureaucratic documents over time to discover how documents were produced, how the individuals producing those documents conceived of certain public policy initiatives, and how both the content documents themselves and the bureaucrat's perception of public policy changed over time.

to Latin American institutions can allow them be judged by their own standards based on whether or not they are successful in promoting the goals that Latin Americans themselves wish to pursue. As Walsh (2009) argues, an ethnographic study has the potential to allow scholars evaluating claims made by the "other" on their own merits, thus giving the individuals a scholar studies more agency. In my dissertation, taking an ethnographic approach to constitutional design allows me first to acknowledge the goals that *Ecuadorians* had for their constitution before asking how those goals fit into the overarching literature of constitutional design.

Interviews in the Context of the Ecuadorian Case

In order to conduct my dissertation research, I spent eight months in Quito in 2012 conducting sixty-three elite-level interviews. During this time, I interviewed mainstream politicians (most of whom had been involved in the 2008 Constitutional Assembly), members of non-government organizations, and indigenous political leaders and activists. While my dissertation focuses on indigenous politics in Ecuador, I primarily focused on Confederación de Nacionalidades Indígenas del Ecuador (CONAIE). I have chosen to focus my analysis on CONAIE's platforms and leaders, as the organization represents the widest variety of indigenous groups. CONAIE is also the indigenous organization most likely to interact with the Ecuadorian government and international organizations like the World Bank on behalf of indigenous peoples (Lucero 2008, 11). Finally, CONAIE has also been involved in regional and national conferences pertaining to indigenous rights, most famously the regional 500 years of resistance movement, which drew international attention to the plight of indigenous people on the 500-year anniversary of Columbus's voyage. Because I am interested in the future of indigenous rights movements in liberal democracies, I especially want to look at a movement, like CONAIE,

that is engaged in creating indigenous rights standards on both a national and international level.

In total, I interviewed twenty-three indigenous leaders, most of whom were affiliated with CONAIE at some point in their career.[23] However, I was able to speak with two representatives of FEINE and a representative of FENOCIE (Ecuador's two other national indigenous organizations). In addition, all of my interviewees were Quechua (the largest indigenous group). And almost all of my interviewees were from the Andes region, with the exception of two prominent Amazonian activists and a representative of CONAIE's coastal arm (CONAICE). Five of the twenty-three activists were women. This constellation of interviewees does shape the research I was able to conduct. As mentioned above, I specifically wanted to focus on CONAIE's political activities. However, I would have liked to expand my study to include a few Shuar activists (a tribal group centered in the Amazon) as well as a few more representatives of the Amazonian community. Unfortunately, I was unable to make contacts in these areas. However, CONAIE as an organization does represent other ethnic groups besides the Quechua and represents all three geographic regions and the largest concentration of indigenous people is in the Andes, so these factors should help mitigate the fact that I was unable to travel to the Amazon for more interviews.

Interviewee selection was predominantly done by snowball method whereby my initial contacts, provided by the Fulbright office, introduced me to additional contacts. However, I also

[23] The political and activist class in Ecuador is fairly small, and, therefore, many of my indigenous as well as non-indigenous interviewees wore many "hats" either simultaneously or throughout their careers. For example, one of my interviewees was an Assembly member, active in an NGO, and Vice President of a small grass roots political organization. So, while not all of my indigenous interviewees had current roles in CONAIE, most of them had held leadership positions in CONAIE or one of its regional organizations at some point.

cold contacted Assembly Members to round out my interviews of main-stream political actors. Interviews were semi-structured to allow for a more flexible and detailed response from interviewees as well as follow-up questions. While these interviews were different for each interviewee, they focused on the interviewee's goals (or those of the group that the interviewee represented) for the 2008 constitution leading up to the convention, the interviewee's experience at the constitutional convention itself (if they attended the convention), the largest political problems that the interviewee (or his group) currently faces, how interviewees understood different concepts in the constitution (particularly those dealing with plurinationalism), and how those concepts had been implemented. I did not start the project with the idea that plurinationalism was comprised of four different components (interculturalism, indigenous rights, sumak kawsay, and rights of nature), but these topics emerged organically out of my interview discussions. However, as political elites, many of my interviewees were experts in particular areas (ex. indigenous justice, women's rights, etc.) or had unique experiences related to my project (i.e. headed a specific table at the constitutional assembly), and so in those cases, some of my questions were also tailored to their area of expertise or experience as it related to my project. In addition, many of my interviewees have also written political essays or books on the topics surrounding plurinationalism, and when I had enough advanced warning of an interview, I read their essays on the topic beforehand. As a result, some of the authors quoted in the dissertation were also interviewees. However, I did not note these instances to preserve anonymity. Interviews were conducted primarily in Spanish. For the first part of my trip I had an interpreter, but the last half of interviews were conducted on my own.

To supplement my interviews, I studied newspaper accounts of the constitutional convention, and read essays by indigenous activists, SMOs, and mestizo political elites regarding

different key concepts in the constitution. I also examined the constitution itself and studied, not only the institutions it created, but the way in which the document reflected the goals and cultural beliefs of indigenous peoples, as well. Finally, I attended a one-day conference hosted by the Development Council of the Indigenous Nationalities and Peoples of Ecuador (CODENPE – a government-run indigenous agency focused on indigenous people and development), a two-day academic conference hosted by FLASCO (a university in Quito), and the *Inti Raymi* celebrations (an indigenous festival to celebrate the summer solstice) in Otavalo. Taken together, these resources allow me to paint a more contextual picture of the Ecuadorian constitution that focuses, not only on the design implications of the Ecuadorian constitution, but also the economic and social realities that the constitution both responds to and helps to create. In addition, in studying the Ecuadorian constitution in this way, I was able to explore how indigenous cultural concepts were reflected in the constitution and how the constitution, in turn, redefined what it means to be Ecuadorian.

Outline of Dissertation

In the following chapters, I conduct a more in-depth examination of the four different planks of plurinationalism and their subsequent effect on constitutional identity, constitutional rights, citizen participation, and existing government institutions. In so doing, each chapter focuses on one plank of plurinationalism, how that plank is motivated by indigenous cosmology, how it relates to the constitutional design literature more broadly, how it is incorporated into the Ecuadorian constitution, and the implications of each plank on constitutional design moving forward.

Chapter 2 of this dissertation starts with an examination of the 2007/2008 constitutional convention. I compare the participatory nature of the convention with the literature on participatory constitution-making. I argue that, while minority voices were not drowned out

during the convention, the participatory nature of the event may have contributed to Ecuador's current model of hyper-presidentialism. Unfortunately, the fact that a highly participatory convention may have made otherwise undesirable aspects of the constitution more palatable, raises troubling implications for both models of participatory constitution-making and Tully and Ivison's accounts of intercultural dialogue.

In the following four chapters, I focus more specifically on the individual planks in the plurinationalism platform. Chapter 3 of this dissertation focuses on the idea of interculturalism. This chapter examines the existing literature on constitutional design in divided societies. Here I note that there are basically two different approaches in the literature to dealing with divided societies: integrationist (which seeks ways to incorporate national minorities into existing institutions) and accommodationist (which seeks to manage group difference through unique voting systems and power-sharing arrangements). After outlining both approaches, I argue that plurinationalism actually straddles both paradigms. Interculturalism outlines a modified integrationist approach: it does represent a new effort to forge a national identity, but it attempts to create one that recognizes the importance of indigenous beliefs and cosmovision. In so doing, interculturalism requires the creation of a new constitutional identity, an increase of citizen participation at the local level, and changes to the executive cabinet that would give indigenous peoples more control over intercultural and bilingual education.

While interculturalism represents an attempt to integrate indigenous identity into mainstream politics, the second plank in plurinationalism, indigenous rights, is designed to accommodate cultural difference. In Chapter 4, therefore, I examine the three more "traditional" indigenous rights issues that CONAIE has pursued: territorial autonomy, free prior informed consent, and indigenous justice/legal pluralism. I also note that certain accommodationist mechanisms, such as power-sharing (as advocated by the constitutional

design literature) as well as reserved legislative seats (as advocated for by the political theory literature), are not mentioned in the plurinationalism platform. Ultimately, I argue that indigenous rights and interculturalism represent two sides to the same coin in the integrationist/accommodationist debate and demonstrate some of the tensions in the plurinationalism platform.

While Chapters 3 and 4 focus on how indigenous culture can be accommodated by, and integrated in, the broader national identity, Chapters 5 and 6 focus on CONAIE's critique of Ecuador's neoliberal economic policy. In Chapter 5, I explore the indigenous concept of sumak kawsay and compare it to other movements for alternative development. While the idea that Ecuadorian economic policy be reoriented towards indigenous goals of sustainability, enhanced quality of life, and community building was important to indigenous groups, the design literature does not examine minority rights in the context of economic reform. This chapter, therefore, examines how the constitution could support indigenous economic goals. I conclude that it would require changes in how socio-economic rights are enforced, as well as the creation of new government institutions to safeguard indigenous and rural economic interests. In the end, I argue that design theorists, in general, also need to think much more critically about how constitutions can affect the economic models of the state.

The indigenous emphasis on sustainability is also tied to the indigenous belief that Mother Earth is a sentient being worthy of respect. Chapter 6, therefore, examines Ecuador as the first country to adopt the rights of nature and asks how environmentalism fits into the overarching plurinational platform. I argue that the adoption of the rights of nature not only requires an expansion of the idea of who should be granted rights, but also requires a change in constitutional identity. Specifically, it challenges the conventional answer to the question: who

is the constitution written for? This plank of plurinationalism, more than any other, demonstrates the extension to which empowering indigenous groups also requires empowering other groups or entities that have often been left behind by the development of the liberal state.

In Chapter 7, my concluding chapter, I will tie my in-depth examination of indigenous thought in the Ecuadorian constitution back to both the indigenous rights and constitutional design literature. Ultimately, in the Ecuadorian case, the forces of the indigenous movement and the citizens' revolution converged at the 2008 Constitutional Convention, where both indigenous and non-indigenous drafters alike sought to break down old colonial structures of government and refound the Ecuadorian state. In so doing, assembly members incorporated many aspects of the indigenous cosmovision into the new constitution in an attempt to make the document more uniquely Ecuadorian. This process of empowering indigenous groups and incorporating indigenous ideals into the constitution was much more transformative than the indigenous politics literature in political theory would suggest. Instead of seeking to simply carve out a place for indigenous cultural preservation or autonomy, indigenous activists sought to change the economic, social, and power structures of the state to make them more accountable to disenfranchised groups. I argue that the Ecuadorian case raises three primary areas for future research for both political theorists and scholars of constitutional design. First, theorists and designers alike need to think more critically about the goals of a constitution. For example, how can (and should) a constitution be used to establish national post-colonial identities? Or should constitutions have a hand in determining the economic philosophy of the state? Second, this dissertation challenges scholars to consider if/how Tully's idea of constitution as intercultural dialogue may work. What would having a truly dialogic relationship between indigenous and non-indigenous groups require? And are participatory institutions stabilizing, or a threat to

individual and indigenous rights? And finally, I examine what theorists and designers miss by focusing almost exclusively on group-differentiated rights and power-sharing arrangements. In particular, both groups of scholars miss the ways in which indigenous peoples hoped to not only change their relationship with the state, but the government's underlying environmental and economic philosophies, as well.

Chapter Two

Participatory Constitution-Making in Diverse Societies

In 2007, the newly elected Ecuadorian President, Rafael Correa, called on the National Assembly to convene a constitutional convention to rewrite the nation's founding document. The effort to redraft the constitution was part of Correa's larger campaign promise to lead a "citizens' revolution" to throw off the shackles of neoliberal economics and western colonialism and refound the state in a more authentically Ecuadorian image. Notably, from its very inception, the 2007/2008 constitutional assembly enjoyed public support and made a marked effort to include citizen input by accepting and reviewing thousands of proposals, receiving a number of citizen delegations at its headquarters in Montecristi, and hosting citizens' workshops across the country.

The drafting process of the Ecuadorian constitution is unique in that, not only was it highly participatory, but it had the support of the country's sizable and influential indigenous population. In fact, Correa's rhetorical vision for his citizens' revolution echoed the earlier call of indigenous organizations and civil society to rewrite the Ecuadorian constitution and, by extension, reconceptualize the Ecuadorian state. Indigenous SMO support for the convention, as well the inclusion of large parts of the indigenous platform in the constitution, provide an interesting opportunity to consider how indigenous and non-indigenous groups can potentially negotiate new constitutional rules and norms for the benefit of both groups. While the participatory nature of the constitutional convention unfortunately helped to contribute to Ecuador's overly powerful executive, participatory constitution-making still represents an

important avenue for future research into how indigenous interests can be incorporated into the constitution.

Drafting of the Constitution

One of the most interesting things about the Ecuadorian constitution is the fact that it was drafted with so much input from the citizenry. In fact, while some had complaints about specific provisions in the constitution or about the ways in which the constitution has been implemented, interviewees almost unanimously agreed that the 2008 constitution was better than the 1998 constitution, that significant parts of their organization's platforms or proposals had been taken into account during the drafting process, and that many of their goals or suggestions had appeared in the final document. In particular, indigenous groups, in spite of having few representatives in the Assembly, were successful in achieving a number of their drafting goals, including the recognition of Ecuador as a plurinational state, the inclusion of the rights of nature, and an economic model built on the principles of Sumak kawsay.

Ecuador as an Example of Participatory Constitution-Making

The practice and study of participatory constitution making is relatively new, and few studies exist on the topic in general or on the participation of minority groups in particular. Therefore, the field represents interesting new ground for studying minority inclusion in participatory-deliberative processes, especially given the relatively high political stakes of constitution making and the fact that deliberations surrounding constitution making will, necessarily, touch on the nature and scope of the political community.

As described in more detail below, Ecuador is part of a small but growing number of countries that have drafted a constitution with wide-ranging citizen input.[24] As Vivien Hart in her study of constitution making for the U.S. Institute of Peace argues, "process has become equally important as the content of the final document for the legitimacy of a new constitution," as citizens in a growing number of countries have begun to demand input in the construction of a new constitution (Hart 2010, 1). While the means in which citizens are incorporated in the drafting process varies from country to country, opportunities for participation generally include some combination of the following: voting for the delegates to a constitutional assembly, submitting proposals to assembly members for particular provisions to be included in the constitution, attending workshops or focus groups regarding constitutional provisions, voting via citizen referendum on solutions for some of the most contentious issues, submitting comments on draft constitutions, and approving of the overall final document via referendum (Hart 2010 and Dann 2011).

Significantly, despite concerns regarding the potential destabilizing effects of deliberation in divided societies, those involved in participatory constitution making contend that the discussions surrounding the drafting of a new constitution can minimize political strife and build national unity, particularly in post conflict scenarios.[25] In essence, participatory constitution making gives conflicting groups the opportunity to discuss past grievances and create workable solutions to some of the country's most divisive issues (Ghai 2004). In so doing,

[24] Other examples include Nicaragua, Uganda, South Africa, Fiji, Eritrea, Albania, Rwanda, Brazil, and Kenya. For more information, see Moehler (2008) and Hart (2010).

[25] For example, scholars writing in the deliberative democracy literature express concern that minority viewpoints will, either not translate well in discussions with majority groups, or that deliberation will be too contentious if not separated from decision-making. See for example Young (1996) and Dryzek (2005).

the participatory process can also expand the agenda of the constitutional assembly and put pressure on elites to address issues that are important to formerly disenfranchised people and minority groups (Brandt et al.). Furthermore, combining citizen input with civic education programs can make citizens more aware of how democratic institutions should be structured and function and more able to hold government officials responsible for future breakdowns in the process (Moehler 2008). In the end, Hart argues that participatory constitution making can alter how citizens view the role of both the constitution and the state. She contends that "traditional constitution making" tends to lead citizens to believe that the government institutions and structures created by elites are fixed and that, by extension, existing dynamics of power are set in stone (3). However, she notes that participatory constitution making encourages citizens to view the resulting document as the beginning of an ongoing conversation about the structure of the state. Hart concludes:

> We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed, and observed. The constitution of new constitutionalism is, in contrast, a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable (ibid.).

In the end, preliminary studies indicate that constitutions which were drafted in a participatory manner may, in fact, enjoy broad-based support. For example, in the referendum over the 2003 Rwanda constitution, 90% of eligible voters turned out to vote with 93% of them voting for the adoption of the new constitution (Moehler 2008).

Despite some of the advantages of participatory constitution-making, the process does raise some logistical concerns. All in all, the collection of citizen suggestions can be very time intensive. For example, Brandt et al. (2011) argue that the collection and compiling of citizen proposals for a draft constitution can take over a year, and the entire constitutional drafting process can take significantly longer. The authors warn that if sufficient time is not allotted to

collect and process citizens' views, then constitutional assembly delegates may not be able to incorporate citizen proposals into the final document. This process is further lengthened by the need for months of civic education and outreach programs prior to the solicitation of citizen proposals. Notably, the Rwandan constitutional drafting process took three years from start to finish and cost seven million dollars, while the South African consultation process took two years and involved the collection of over 2 million public submissions[26].

In addition, it can be difficult to find the correct balance between encouraging citizen input and respecting elite opinion. If the process in not transparent enough, it can be manipulated or cooped by a small group of elites (as in the case of Zimbabwe). On the other hand, elite opinion may be a necessary check on public opinion (as in the case of South Africa, where elites decided that allowing the death penalty would violate international human rights standards despite widespread public support for its inclusion in the constitution). In short, further research needs to be done on the appropriate ways to balance citizen input and expert opinion (Dann et al 2011, Hart 2010, and Brandt 2011).

Makeup and Organization of the Assembly

The Ecuadorian constitutional assembly began on November 29, 2007, in the coastal town of Montecristi, and assembly members originally committed to finishing the document by May 24, 2008, one of Ecuador's national Independence Day celebrations. However, due to extensive citizen input, the overall convention was extended by two months, ending in July. Elections for assembly members were held in September 2007, with the President's party, Alianza Pais (AP), picking up 80 of 130 seats. While most of the members were elected to

[26] The South African Constitution took a total of seven years to write, but only about two of those were focused on citizen participation. See Moehler 2008, 30-31.

represent a certain province (100 in total), 24 were elected by a national ballot, and six were chosen by Ecuadorians living abroad. Pachakutik, the party affiliated with the indigenous movement CONAIE, only elected four delegates, although two of the AP delegates were also indigenous activists. Significantly, Monica Chuji, a young woman with a history of activism in the indigenous movement, was one of the most vocal AP assembly members throughout the process and chaired the natural resources and biodiversity table. It is important to note that this assembly also took over the legislative duties of the government, and congress was formally dissolved. In other words, during the eight months that the assembly was in session, delegates had the duel job of writing a new constitution and fulfilling the traditional role of the legislative branch (Becker 2011).

In early December, the assembly decided to form ten tables, these tables would each be responsible for hearing testimony and drafting articles on specific topics. Tables would then present their findings to the larger assembly for debate, modification, and approval. These table titles were as follows: 1) Citizen Rights, 2) Organization and Citizen Participation, 3) Institutional Structure of the State, 4) Territorial Organization and Designation of Powers, 5) Natural Resources, 6) Work and Production, 7) Development 8) Justice and the Fight Against Corruption, and 9) Sovereignty and Latin American Integration. As opposed to the first nine tables, table ten, Legislation and Oversight, took over the powers of the dismissed congress, drafting legislation to be approved by the overall assembly (Carter Center 2008a).

Opportunities for Participation in the Ecuadorian Convention

The Constitutional Assembly heavily emphasized citizen participation and created a Social Participation Unit (UPS) in order to facilitate it. This office was responsible for receiving and distributing citizen proposals, coordinating individual and group visits, arranging expert

testimony, and holding educational workshops for citizens (Unidad de Participación Social 2008). And throughout the drafting process, several avenues were provided for citizens to take part. First, individuals and social groups were encouraged to submit proposals to the assembly's website. UPS would then sort those proposals according to topic and distribute the proposals among the relevant tables. UPS reports that between January 7 (when the office was created) and June 15 it received 1524 proposals via its website. In addition, social groups and organizations as well as national NGOs were encouraged to visit Montecristi to present their proposals to assembly members in person. UPS reports coordinating approximately 70,000 visits to the assembly and notes that this number does not include visitors who did not coordinate through UPS. While proposals and participation varied across tables, table participants estimated receiving thousands of proposals per table.[27]

Additionally, assembly members traveled across the country hosting workshops that involved a mixture of citizen education and citizen participation. Assembly tables attempted to spread out their visits so that a maximum number of cities received table delegations. Initially, tables attempted to complete all of their visits by mid-February so that they would have time to draft constitutional articles, and the assembly director's committee approved each table for a maximum of five city visits of three days each. Each table was encouraged to hold four forums during their three day stay, for a possible total of 20 forums per table.[28] While the forum

[27] Personal interview with Afro-Ecuadorian activist 9/19/12 (39). Personal interview with an advisor to Table 6, 9/27/12 (50).

[28] This number of table visits was the initial number and time frame approved by the director's committee as reported in El Universo on January 5. This is the maximum number of table visits approved to take place before mid-February, so some tables were more active than others in taking advantage of travel time. In addition, the office of UPS (which was created after these initial tables visits had been set) coordinated citizen forums from mid-February to early April. The UPS coordinated table discussions took place in 13 different cities in all three regions of the country (coast, mountains, and rainforest). The

formats varied depending on the participants, they were generally designed to both inform citizens of developments within the drafting process, and allow citizens' input in the new constitution.[29] Individual cities also drafted proposals to send to the assembly. Most notably Ecuador's three largest cities, Guayaquil, Quito, and Cuenca, all drafted reports. These cities also hosted citizen forums for input on their individual city proposals (*El Universo,* "Quito Discute"). Finally, in addition to the above-mentioned means of participation, NGOs (both foreign and domestic), national and international scholars, and experts on the Bolivian and Colombian constitutions were asked to play an advisory role to certain tables on a variety of issues. In the end, then, there were several opportunities for citizens to participate, and groups from all over the country--incuding indigenous activists, members of the women's movement, afro-Ecuadorian organizers, youth and student groups, and environmental activists--attended Montecristi. All in all, one interviewee from a participating NGO estimated that over 1,000 civil society organizations took part at the convention, and Assembly members argued that proposals and input were an important part of the drafting.[30]

After the drafting of the constitution, citizens were given a final chance to participate by either voting for or against adopting the complete constitution. The constitution was approved

number of participants at each forum ranged from 80-1,500. See Unidad de Participación Social, "Informe de Actividades"; El Universo, "Los asambleístas prevèn 2007;"and El Universo, "Cinco Viajes."

[29] Interview with AP Assembly Member at 2008 convention, 7/12/12 (24); see also Ronquillo and Ramos 2008.

[30] While I was only able to interview a small sample of assembly members, the Carter Center (2008e) conducted interviews of assembly members throughout the entire assembly process, and in their final report also noted that "the majority of Assembly members stressed the importance of citizen participation in a variety of the Assembly's spaces...for achieving the final product" (11). See also personal interview with AP Assembly Member, 8/2/12 (30); personal interview AP Assembly Member (24).

by a large margin with 64% of voters voting to adopt the new Constitution, and 28% voting to reject the document (Carter Center 2008f).

Implications of the Drafting Process

In the end, the drafting of the 2008 Ecuadorian constitution demonstrates that deliberative and participatory processes do not always result in discussions that ignore or misunderstand indigenous interests. In this case, while the constitution was drafted with input from a wide variety of SMOs, NGOs, and communal organizations, the assembly itself contained only six indigenous members. And yet, indigenous goals were not drowned out in the ensuing discussion. On the contrary, the two biggest changes that indigenous groups failed to push through in the 1998 constitution, the recognition of the Ecuadorian state as plurinational and a change in the states' economic goals, were both achieved in the 2008 draft. In addition, important parts of indigenous cosmology, such as the idea that the government should protect the rights of nature, were promoted in the constitution.

Notably, indigenous SMOs played a large part in bringing about the 1998 constitution assembly, by leading massive nationwide protests which helped to topple the Ecuadorian president and bring new elections and a new constitution (Becker2011). However, while indigenous SMOs were integral in bringing about the constitutional assembly, indigenous leadership was largely locked out of the drafting process, which was conducted by a group of experts and politicians with little input from the citizenry. Ultimately, indigenous leaders were so disappointed with the resulting constitution that they protested its adoption and began immediately calling for a new convention (a goal that was finally realized in 2007).[31] In

[31] Interview with an Assembly Member at the 1998 convention, 8/27/12 (33).

particular, indigenous leaders' two largest complaints with the 1998 Constitution were that the constitution fell short of recognizing Ecuador as a plurinational state and that it failed to challenge the supremacy of neoliberal economic policies. Indigenous leadership fought to correct these deficiencies at the 2008 convention.

In the lead up to the 1998 constitutional convention, indigenous activists tried unsuccessfully to lobby delegates to declare Ecuador a "plurinational" state. Instead, the 1998 convention, declared Ecuador to be a "pluricultural" state. The difference between the two terms represented a significant symbolic difference to indigenous peoples; the term "pluricultural" implies that mainstream Ecuadorian life is influenced by several different cultural groups, whereas the term "plurinational" is much more radical, as it implies that Ecuador is made up of several small nations, each of which deserves some measure of local autonomy, rights, and formal recognition. In other words, while the term "pluricultural" merely represents a nod to multicultural efforts to achieve a modicum of inclusiveness, plurinationalism represents a willingness on the part of political actors to reconsider the founding, makeup, and nature of the state. In the context of the literature surrounding participatory constitution-making and deliberative democracy, the rhetorical switch from a pluricultural to a plurinational state is significant in that it demonstrates that indigenous groups were at least partially successful in redefining their relationship to the state when the constitutional drafting process became more inclusive (CONAIE 2007).

In addition, indigenous activists rejected the 1998 constitution on the grounds that, while it did recognize some economic and indigenous rights, it still promoted a neoliberal economic state. At the 2008 convention, indigenous leaders argued that the new constitution needed to fundamentally reconceptualize the state's goals in promoting economic growth. In

particular, CONAIE successfully lobbied for the inclusion of the indigenous concept of "sumak kawsay" into the new constitution. Sumak kawsay (a Quechua term, which has been translated in Spanish as "buen vivir" or "good living" in English), has been used to connote a life lived in harmony with nature and community. And prioritizing it as a model for development means, not only shifting the country's focus to sustainable development projects, but also measuring development goals by what is best for communal life or individual well-being, rather than simply GDP. Along these lines, Article 275 specifically states, "The development structure [of the state] is the organized, sustainable, and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living (sumak kawsay)." While I will discuss the incorporation of sumak kawsay into the constitution in Chapter Four, from a participatory democracy standpoint it is important to note that the original Quechua wording was included in the constitution.[32] Article 275's mandate that the economic structure of the state be based on sumak kawsay represents the fact that non-indigenous groups were willing to consider a fundamentally indigenous way of viewing economic progress.

In addition to correcting what they saw as deficiencies in the 1998 Constitution, indigenous activists also lobbied for the 2008 constitution to guarantee rights to Mother Earth. In essence, indigenous peoples argued that indigenous cosmology teaches that Mother Earth, or the "Pacha Mama," is a single sentient organism and, as such, should be endowed with human rights. Significantly, the Ecuadorian constitution uses both the Spanish term *"la naturaleza"* for environment as well as the Quechua "Pacha Mama," which is better translated as Mother Earth. While *la naturaleza* may connote a collection of lifeless elements (such as rocks, mountains,

[32] As I will discuss in more detail in Chapter Four "sumak kawsay" doesn't have a direct translation into Spanish. If only the Spanish equivalent "buen vivir" had been included in the constitution, therefore, it would not have represented the same commitment to indigenous goals.

water, or air), Pacha Mama connotes a single sentient being worthy of respect.[33] While I will discuss the rights of nature more in Chapter Six, the discourse surrounding the inclusion of the rights of Pacha Mama into the constitution is interesting in light of the debates regarding the incorporation of minority viewpoints and cosmologies in a deliberative setting. In an interview, an environmental activist who worked closely with indigenous groups throughout the assembly explained the debate surrounding the rights of nature. She noted that, in the beginning, indigenous groups worked hard to promote the idea that nature should be endowed with its own sets of rights. While older members of the assembly "saw the poetry" in granting nature rights as a sentient being, younger participants (particularly lawyers) had difficulty understanding the indigenous viewpoint. The idea of nature as a being endowed with rights was very foreign to them. And yet, she noted that by the end of the assembly the rights of nature had been included into the new constitution. She argued that part of this change was due to the fact that indigenous groups were very persuasive and made people more comfortable with the whole concept of the rights of nature and that part of this was due to indigenous group's ability to tie the rights of nature to other prominent sentiments throughout the assembly, particularly the anti-colonialism sentiment.[34] Notably, during many of my interviews, indigenous and non-indigenous responders alike were proud that Ecuador was the first country to recognize the rights of nature in the constitution.[35] In short, it seems that indigenous peoples were successful, in part because of their ability to change perceptions about Mother Earth and the indigenous

[33] Personal interview with a representative of an environmental NGO at the 2008 convention, 10/3/12 (52).

[34] Personal interview with a representative of an environmental NGO at the 2008 convention, 10/3/12 (52).

[35] For more information, see Chapter Six of this dissertation.

cosmovision and, in part, because of their ability to give arguments for the rights to nature that resonated with non-indigenous groups. In any case, indigenous arguments and belief systems were not overshadowed by non-indigenous assembly.

In the end, what is particularly interesting about the 2008 constitutional convention is that indigenous groups did not simply win a small number of concessions that were added post hoc into a largely neoliberal constitution (as was the case in 1998). Instead, indigenous groups were able to significantly influence the underlying philosophy of the document. The fact that Ecuadorian indigenous groups were able to affect a philosophical sea change suggests that non-indigenous politicians were interested in incorporating larger aspects of indigenous ideology into the constitution. In other words, the incorporation of indigenous worldviews into the constitution does not seem to represent a compromise position so much as an effort to change some of the fundamental principles upon which the Ecuadorian constitution was based. Significantly, as mentioned above, this willingness to adopted indigenous principles coincided with Correa's "citizen's revolution" and his call to "re-found" the Ecuadorian state in a way that would break from the colonial influences of the West, as well as the country's own recent neoliberal past. In this light, ideas from indigenous cosmology (such as the sacredness of Pacha Mama or the importance of sumak kawsay) may have served as a cultural resource for an Ecuadorian population that was already searching for alternatives to Western economic and political models. This frustration with Western economic and political models is not unique to Ecuador, and it is possible that other developing countries may, in the future, draw on indigenous and minority groups as a way to differentiate their country's politics and policies from those of the West (Mignolo 2011).

Criticisms of the Process

While, as mentioned above, there was overwhelming support and participation for the constitution writing process, there were a few criticisms of the drafting process that were repeated throughout my interviews as well as frequently in the Ecuadorian media. In short, while the participatory nature of the constitutional convention helped to ensure that indigenous platforms were included in the constitution, the unintended consequence of such an inclusive program may have been to increase presidential power. The problems arriving from the Ecuadorian case suggest that the ways in which the incorporation of minority voices may have unintentional effects on presidential or elite power may be an important line of future research.

One of the primary concerns surrounding the drafting of the constitution was that the final version was simply too inclusive. In other words, assembly members were not discriminating enough about which proposals they selected to be part of the constitution. The end result was a 444 article document that has so many promises as to seem (to some) meaningless and impossible to implement in practice. For example, Article 27 makes sweeping statements regarding the goals of Education:

> Education will focus on the human being and shall guarantee holistic human development, in the framework of respect for human rights, a sustainable environment, and democracy; education shall be participatory, compulsory, intercultural, democratic, inclusive and diverse, of high quality and humane; it shall promote gender equity, justice, solidarity and peace; it shall encourage critical faculties, art and sports, individual and community initiatives, and the development of competencies and capabilities to create and work.

While these are all laudable goals for the public school system, it is difficult to see how schools with limited time and resources could promote all of the above-mentioned attributes simultaneously. Furthermore, how does one measure whether or not an education curriculum is "humane" or promotes, "solidarity"?

In a similar vein, Article 11 states that:

> No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights.

The Article further argues that the government shall implement affirmative action programs to protect the above-mentioned groups of people. Once again, while ideally everyone should be treated equally all of the time, it may be difficult to establish protections and affirmative action programs for such a large and diverse group of citizens. In the end, the constitution is riddled with similar articles that critics argue either include too much or offer rights and protections that are too vague to be implemented.

Additionally, almost all of my interviewees (even interviewees from the AP party) argued that one of the biggest flaws with the new constitution is the amount of power it grants the president. For example, the constitution allows the President to convene a nationwide referendum on any issue (Article 104), draft legislation under certain circumstances (Articles 138 and 140), dissolve the National Assembly (Article 148), and initiate a constitutional amendment (Article 441). In addition, critics charge that Correa has used the ambiguity in the constitution surrounding the appointment of Constitutional Court members, Members of the Elections Tribunal, and Citizens' Participation Branch to stack these other three branches with supporters. Correa has further been able to use the above provisions to extend his time in office. Correa got the Constitutional Assembly to agree that if he were reelected in 2009, it would count as his first term in office under the new constitution (this essentially granted him an extra term). In 2011 Correa used his power to initiate a nationwide referendum to gain even more power over the judiciary branch. And in 2015 Correa further used his ability to initiate constitutional amendments to get the National Assembly to pass an amendment doing away with executive

term limits. As of this writing, Correa has declared that he will not run for reelection in 2017 despite the new lack of term limits. However, critics speculate that he may sit out the 2017 election cycle to remove himself from the economic downturn caused by low oil prices, and may instead run again in 2021.

I found it particularly surprising that the constitution had such overwhelming support, given the large increase in executive powers. However, many interviewees noted that they supported the constitution because of the positive provisions for their group, despite their concern regarding the power of the executive. For example, one environmentalist lawyer who lobbied the convention on behalf of her NGO argued that they were able to get at least 50% of her organization's platform into the final constitution. And an influential advocate for Afro-Ecuadorian women's rights stated that she felt that the Assembly was very responsive to her organization and that almost all of their platform was eventually adopted into the 2008 constitution. For indigenous peoples in particular, it was hard to oppose a constitution that declared that Ecuador was a plurinational state, upheld the value of sumak kawsay, and recognized the rights of Mother Earth. In short, one of the dangers of drafting a 444 article constitution that contains something for everyone may be that individuals will vote for it despite the document's overall strengths and weaknesses. It is possible that, if the process of writing the constitution had been less participatory, the Articles concerning executive power would have been less palatable. Ecuador's hyper-presidentialism is particularly troubling in light of the fact that participatory democracy is upheld as a means of holding elected representatives accountable by encouraging deeper political involvement of the citizenry (Cohen and Fung 2004).

The general inexperience of the delegates at the Constitutional Convention may have also served to exacerbate the aforementioned weakness of the document. As mentioned in the introduction, one of Correa's goals in fomenting a "citizen's revolution" was to break the power held by political elites and mainstream political parties. And, on this issue, Correa was fairly successful. In the 2006 presidential election, where Correa emerged the victor, the four political parties that had dominated Ecuador since the country's return to democracy in 1978 only garnered a combined 26.6% of the vote, and none of them proposed their own candidate when Correa ran for reelection in 2008 (Bowen 2015). At the Constitutional Assembly itself, as mentioned above, 73 of the 130 delegates represented the AP Party. In comparison, the next largest parties were the Partido Sociedad Patriótica (PSP) with 18 seats and the Partido Renovador Institucional Acción Nacional (PRIAN) with 9 seats. Both parties were founded in 2002 (Carter Center Sept 5). The decline of Ecuador's more established political parties meant that many of the delegates at the 2008 constitutional convention had no national-level political experience prior to being asked to draft the constitution. This lack of political experience on the part of AP delegates made it even more difficult for them to draft a constitution meant to contain the wide-sweeping reforms and ambitious policy agenda outlined above. A more experienced group of constitutional drafters may have been better able to sort through the numerous petitions and platforms for constitutional change submitted to the assembly and, therefore, less likely to draft a document that was too inclusive. The Ecuadorian case, therefore raises the question of how to include new voices in the constitutional design process while still retaining the necessary experience and knowledge that more traditional political elites bring to the table.

Conclusion

The drafting of the Ecuadorian constitution paints both a hopeful and cautious tale for indigenous activists. On the one hand, Ecuador's participatory constitutional convention played out in much the way Vivien Hart predicts, in that it expanded the political agenda of the convention to include minority goals and ideas. The participatory convention process allowed for an eight-month national dialogue about the future of the Ecuadorian political community. During this dialogue, indigenous peoples were able to draw on their own cultural resources to make arguments about the need to recognize the plurinational structure of the Ecuadorian state, the importance of rejecting Western development models, and the significance of protecting Mother Earth. Despite the fact that indigenous arguments about the need to protect Pacha Mama and the importance of living in keeping with the sumak kawsay were based on beliefs draw from the indigenous community, indigenous peoples were still able to make a national, cross-cultural appeal for these ideas to be included in the constitution. Part of their success may have been due to the fact that the rights of Pacha Mama and the ideas behind sumak kawsay appealed to anti-colonial sentiments within the larger populations. In addition, as Hart argues, the participatory approach to constitution-making resulted in a document that was perceived of as more legitimate than its 1998 counter-part. While indigenous peoples and SMOs protested the 1998 constitution from the outset, they stood behind the adoption of the 2008 document.

These observations regarding the 2008 convention are important because they get at some of the concerns regarding consent, legitimacy, and inclusiveness at the heart of both the constitutional design and political theory literatures. First, as mentioned in Chapter One (and as discussed in more detail in the following chapter), one of the ways in which constitutional designers have sought to create legitimacy in multicultural societies is to create power sharing arrangements between different ethnic groups. In short, these arrangements attempt to

increase stability by minimizing interaction between groups. To some extent, the rational for granting indigenous people extensive self-determination rights stems from a similar impulse. However, while the literature on participatory constitution-making is still fairly nascent, the Ecuadorian case, combined with recent constitution-making processes in other countries, suggests that creating a broadly participatory constitutional convention may be another way of getting at these issues. If minority groups are able to be heard and to agree with members of the majority on the basic political rules of the country, then a participatory constitution-making process may be able to provide more stability than simply drafting power sharing arrangements at the outset.

In addition, Hart's observations on legitimacy and consent echo points made by Waldron, Tully, and Ivison, discussed in the previous chapter. Hart's argument that modern constitutional designers should think of new constitutions as a "conversation" rather than as a "contract, negotiated by appropriate representatives" echoes Tully's idea of contemporary constitutions as exercises in "intercultural dialogue." And, as Wadron notes, political theorists all too often gloss over questions of consent when writing about constitutionalism, taking for granted the same idea criticized by Tully and Hart of constitutions as fairly inflexible contracts passed down by previous generations. The participatory nature of the Ecuadorian constitutional convention provides the opportunity for theorists to reflect upon what democratic consent really looks like. For example, how does the American constitution's notion of tacit consent of a document created in 1787 stack up against an Ecuadorian model based on participatory inclusion? Do these represent two different ideas of consent, or does it represent a trade-off between consent and stability? And, interrelated to Tully's point, how are notions of tacit consent tied up in questions of past colonial relationships?

However, despite the interesting possibilities represented by participatory constitution-making, ultimately, the political atmosphere after Correa's rise to power, the exclusion of 'professional politicians' from the political process, and the participatory nature of the constitutional convention itself all converged to create an overly strong executive. And this raises troubling questions for both theorists and scholars of constitutional design. First, participatory constitution-making is becoming increasingly popular in new democracies, and the Ecuadorian case raises questions that are not adequately addressed in the literature. Namely, to what extent can elites manipulate the process of participatory constitution-making? And, relatedly, how can constitutional conventions merge citizen participation with political experience? Is there a way to shape how constitutional delegates get chosen that can increase stability and accountability? As mentioned above, there are several different ways in which citizens can participate in the constitution-making process; do some lead to more democratic outcomes than others?

Second, does the Ecuadorian case say something troubling about the idea of constitution as dialogue more generally? In the Ecuadorian case, indigenous concerns were not ignored, as one might expect, but rather the opposite problems seems to have occurred: the Ecuadorian constitution seems to be, at times, too inclusive. And this raises questions about how ideas like Ivison's capabilities approach might play out in practice. For example, if indigenous communities and non-indigenous communities were to try to come to an agreement about the types of capabilities necessary for each group, would they be potentially too accommodating, so that agreements are not taking seriously? This is a common critique of new constitutions when it comes to granting populations rights (there are so many aspirational rights that each individual right is not taken seriously), and one wonders if this type of dynamic might play out the same way with capabilities. In addition, as mentioned in Chapter One, Tully's

approach to contemporary constitutionalism relies on indigenous and non-indigenous groups renegotiating their relationship at the constitutional level overtime. The Ecuadorian case, raises the question, would a renegotiation of the terms of the constitution allow for greater manipulation by political elites, such as Correa, or would it allow for an opportunity to correct past oversights? None of the questions raised are meant to point to a fatal flaw in either Ivison or Tully's overarching logic, but they instead point to the value of determining how constitutional-level negotiations work out in practice and, in turn, using these cases to reevaluate the theory.

In the end, it is difficult to draw too many conclusions from the Ecuadorian case, given that both the study and practice of participatory constitution-making are relatively new. However, the nature of the Ecuadorian assembly, and the constitution it produced, suggests that participatory constitution-making might provide a valuable and innovative means of incorporating minority voices into the political rules and procedures that govern mainstream society.

Chapter Three

Interculturalism: Beyond the Integration vs. Accommodation

While the political theory literature has addressed the issues surrounding indigenous rights, the constitutional design literature has largely failed to examine indigenous groups as a separate case study. Therefore, while political scientists have focused on the larger theoretical questions surrounding indigenous rights (ex. whether or not indigenous groups should be guaranteed group rights and how group-differentiated rights may affect the rights of women or non-indigenous peoples), the question of how rights and institutions can be structured at the constitutional level to empower indigenous groups has received much less attention. Instead, the constitutional design literature, to the extent that it addresses diverse societies, has focused on ways to accommodate national minorities via power sharing arrangements and/or alternative voting.

Significantly, CONAIE's call for interculturalism contrasts sharply with the discussion of national minorities in the constitutional design literature. Rather than focusing on creating separate spaces for indigenous political activity and participation, interculturalism attempts to change the way Ecuadorians as a whole think about politics and the nation. In so doing, interculturalism seeks to create a new Ecuadorian identity that recognizes the importance of indigenous culture and cosmology. Therefore, interculturalism raises new questions for the constitutional design literature. In particular, what role can/should a constitution have in creating national identity? How can a constitution support the formation of a new identity without falling victim to the assimilationist policies of the past? And, what types of institutions can be created to help facilitate a healthy dialogue between cultures?

Interculturalism and Constitutional Design

As discussed in Chapter 1, the constitutional deign literature has historically centered around the enumeration and expansion of individual rights. Questions of how to develop or improve institutions created by the constitution and debates regarding how to respond to the challenges created by divided societies have historically gotten less attention in the design literature (Choudhry 2008a, 8).[36] However, in their book chapter "Integration or Accommodation?" John McGarry, Brendan O'Leary, and Richard Simeon note that those studies which have focused on democracy in diverse societies tend to fall along an integration/accommodation spectrum. On one side of the spectrum are integrationists (who argue that cultural differences are not the purview of the political realm), and on the other end are consociationalists (who argue for a range of accommodations for minority groups, including power sharing and veto rights) (McGarry et. al., 2008, 68).

The first, older approach to constitutional design in divided societies is what McGarry et. al. label the integrationist approach. In summation:

> Integrationists believe political instability and conflict result from group-based partisanship in political institutions. A state that serves the interests of one (or some) nationality, religion, ethnicity, or language will promote the countermobilization of the excluded communities, and hence conflict. To avoid the ethnically partisan state, integrationists counsel against the ethnicization of political parties or civic associations (ibid.,45).

[36] For a broader discussion of this, see Choudhry 2008. He argues that the types of questions to dominate the constitutional design literature are focused almost exclusively on how constitutions can do a better job of guaranteeing individual rights. For example: should a national constitution contain a bill of rights? Should those enumerated rights have supremacy over other elements of the constitution? Should these rights be enforced by judicial review? And should constitutions also include socio-economic rights (ibid 8-9)?

In short, integrationists argue that cultural and ethnic differences are best left to the private realm.[37] As Pattern (2008) argues, the integrationist approach can lead to two different types of policy goals: disestablishment or nation building. An example of disestablishment is the U.S. case, in which the constitution prohibits the establishment of any state religion, whereas the nation building approach seeks to use the constitution as an instrument for creating a shared national identity.

McGary et. al. are careful to distinguish integrationists from assimilationists, arguing that theoretically the paradigms are quite different: assimilation "erodes both the public and private differences between groups," whereas integration simply seeks to relegate cultural differences to the private sphere (42). However, despite this theoretical difference, if, in practice, an integrationist constitution does not recognize difference or offer protection for minority groups, it may seem uncomfortably like an assimilationist enterprise. In addition, the fact remains that many countries (Ecuador included) have, at various points in their history, attempted to gloss over cultural/ethnic/linguistic differences in public life, only to have those differences cause political strife and instability (Esman 2000).

On the other end of the spectrum, are consociationalists, who argue that cultural/linguistic/ethnic differences can be politically destabilizing and that the best way to avoid conflict is to create government institutions that recognize these differences and incentivize citizens to cooperate with other ethnic or cultural groups.[38] Arend Lijphart (1985),

[37] For example, see Barry's (2001) writings on equal citizenship. In addition, see Choudhry's (2008b) study of Canada, in which he argues that greater provisions for autonomy in Quebec may have fomented future political unrest.

[38] McGarry et. al. actually place what they call "territorial pluralists" at the far opposite side (from the integrationists) of the accommodation/integration spectrum, followed by the consociationalists. However, their discussion of "territorial pluralists" is very similar to consociationalism, but with a focus on

the originator of consociationalism, argues that older models of democracy assume that political parties will represent diverse interest groups and that political coalitions will shift overtime. Therefore, an individual may be in the minority on certain issues and the majority on others, or may be in the minority one day and the majority the next. However, he contends that in many plural societies, ethnic/cultural/linguistic groups are more salient political cleavages than integrationists recognize and that individual allegiances to these cleavages are not likely to change much over time. So, individuals who are in a minority ethnic group, for example, will always be, by definition, in the minority. And without any ability to gain power, minority groups have no incentive to cooperate peacefully with other ethno-cultural groups, creating instability. Lijphart, therefore, proposes a model of democracy with four components: power-sharing, autonomy arrangements (most often in the form of territorial autonomy for minority groups), proportional representation for ethnic/linguistic groups (in at least the executive and legislative branches), and minority veto power (4). In particular, he argues that divided societies should follow a fairly formulaic structure that includes: a parliamentary democracy, a decentralized federal system which will allow for strong regional autonomy, and proportional representation in cabinet ministries, civil service, the judiciary, and the military (Lijphart 2002). He argues that proportional representation, regional autonomy, and veto power will give each group enough political power so that they all have a stake in maintaining a peaceful political community and cooperating across group lines.

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regional autonomy. Therefore, for the purposes of this review I have collapsed the two categories (ibid., 2008, 64).

The advantage of Lijphart's approach is that is that he recognizes the importance that ethnic/cultural/religious/linguistic groups have to their members in a way that integrationists do not. As Milton Esman (2000) argues in a survey of Lijphart's work:

> He accepted as genuine the participants' [parties in ethnic conflicts] own definitions of what constituted their collective identities. He was prepared to accept ethnic solidarities on their own terms as self-standing phenomena that commanded the respectful attention of political scientists and deserved to be analyzed and evaluated as objective phenomena (99).

However, at the same time Lijphart's model is problematic in that it also has the potential to entrench group differences, which could have the perverse effect of intensifying ethnic conflict over time.

In between the two extremes on the integration/accommodation scale, McGarry et. al. map two other positions: centripetalists and multiculturalists. The centripetalists are best exemplified by Donald Horowitz. One of Lijphart's most vocal critics, Horowitz proposes an alternative model for dealing with ethnic or linguistic cleavages through constitutional design. In essence, Horowitz argues that the types of consociational arrangements Lijphart advocates will not necessarily reduce conflict between groups because there is no reason to assume that members of each ethnic group will choose moderate leaders or that each group will be willing to compromise. Instead, by giving groups veto power and proportional representation, he argues that consociationalism may encourage those perceived as the most loyal to their ethno-cultural group to gain power. Therefore, Horowitz (1993, 2002) argues that the best way to encourage inter-group cooperation is to build incentives into the electoral system which will encourage the election of moderate leaders, who are more likely to cooperate with individuals outside of their ethno-cultural groups. In particular, he advocates alternative voting systems, in which each voter rank-orders his candidates. If no one candidate receives over 50 percent of the vote outright, then the candidate with the lowest number of "first place" votes drops out of the

running and his share of the votes is distributed to the candidates that the voters ranked as "second" on their ballots. Horowitz argues that alternative voting incentivizes more moderate candidates who will gain a 'first place' vote from their own constituents and still have a broad enough appeal to receive "second place" votes from members of other ethnic groups. Horowitz hopes that, over time, a system that encourages the selection of more moderate candidates will help to build trust between groups. For McGarry et. al. Horowitz represents a midpoint between consociationalists and integrationists. Like Lijphart, his policy prescriptions are still fundamentally based on the premise that ethnic/linguistic/religious divisions are, to some degree, entrenched and that constitutional designers should aim to mitigate the differences between these groups to avoid conflict. However, while Lijphart takes minority groups as they are, Horowitz attempts to moderate the effect that ethnic groups have on public life by encouraging coalition building across groups (or at the very least political campaigning across groups), similar to the integrationists.

Finally, McGarry et. al. argue that multiculturalists lie between Horowitz and Lijphart on the scale. It is important to note that their discussion of "multiculturalists" does not cover the wide range of political theorists mentioned in Chapter 1. They do not refer to any group of constitutional designers or theorists but instead label as "multiculturalist" a loose collection of constitutional policies aimed at protecting group rights and providing territorial autonomy. McGarry et. al. argue that this collection of multiculturalist policies has a lot in common with Lijphart's consociationalism (territorial autonomy and a focus on cultural representation at the national level) but is less suited to highly contentious environments, given that it does not encompass the kind of power sharing and group veto arrangements as consociationalism. Multiculturalists, McGarry et. al. argue, are therefore less concerned with moderating the

behavior of ethnic groups (as is Horowitz) but are also less likely to address "deep antagonisms" between groups than Lijphart (58).

To the extent that constitutional designers focus on mitigating tensions between ethnic groups, then, they tend to focus on policies along this integration/accommodation scale. For example, in his study on the 1979 Nigerian Constitution, Ejobowah (2008) notes that the drafters incorporated several different provisions aimed at containing conflict between ethnic groups. First, the constitution devolved a significant amount of power to local and state governments. Second, local, state, and federal offices were allocated proportionally, according to the ethnic makeup of each respective level of government. Third, in order to win an election, the president must win not only a majority of the national votes but also at least 25% of the vote in 2/3^{rds} of Nigeria's 19 states. Fourth, parties would not be allowed to have any overt ethnic or religious affiliations, slogans, or platforms. And fifth, the government would agree to recognize the legitimacy of different legal systems/courts. Here, Nigeria adopted policies from up and down the scale. The Nigerian constitution incorporated the logic of consociationalism (with the devolution of power and the allocation of offices based on the ethnic makeup of each locality), the logic of centripetalism (in this case the idea that a president would need at least a modicum of support in two thirds of the states) and the logic of integrationists (parties could not have overt ethnic affiliations). However, despite all of these diverse strategies, the Nigerian constitution proved ultimately unstable, and the regime based on it collapsed by 1983. Ejobowah notes that part of the difficulty was with the allocation of oil resources. The federal government was allowed to allocate oil revenue with very few strings attached under the logic that this would make the diverse states beholden to the federal government and allow for some measure of national integration. In reality, conflict over oil revenue simply caused more instability. In addition, Ejobowah suggests that the voting system with a relatively small

requirement for cross-national agreement (a candidate only needed 25% to be considered acceptable to a state) was too easy to manipulate. Ejobawah's study of Nigeria is indicative of much of the literature on design in divided societies in that he takes the accommodation/integration scale as a given and argues that the failure of the Nigerian constitution was due to the fact that the document did not contain the right balance of accommodationist and integrationist policies.

In short, to the extent that the constitutional design literature focuses on constitution building in diverse societies, it tends to focus on the types of questions raised by the integration/accommodation paradigm. And the overarching questions of this paradigm are: what is the best way to mitigate the potentially destabilizing effects of group difference? And are institutions which recognize group difference in the public sphere more or less likely to cause instability? One of the conceptual difficulties with this discussion in the design literature is that it tends to conflate diversity with divisiveness, and focuses on case studies where tensions between ethno-cultural groups threaten to cause constitutional crises, violence, or civil war (Choudhry 2008). The design literature does not really address largely non-violent groups, such as indigenous peoples, as a separate case study. And indigenous people fit awkwardly within the context of the democracy in divided societies literature. On the one hand, indigenous peoples do represent a different ethno-cultural group than mainstream Ecuadorians, and these ethnic and cultural differences have led to oppression of indigenous people by the majority as well as politically contentious moments in Ecuador's history. On the other hand, "indigenous identity" is different than many of the other types of identity discussed by the democracies in divided societies literature. For example, there is no one "indigenous" group in Ecuador; instead, there are at least fourteen different indigenous groups in Ecuador, each with their own customs, language, and culture. At the same time, these indigenous peoples have formed umbrella

political organizations, such as CONAIE, FENOCIENE, and FIENE, and often ally with other indigenous groups worldwide. As a result, sometimes Quechuas, Shuar, and Waorani may act as members of the three separate ethnic groups that they are, and sometimes they may act as one united indigenous peoples. In addition, while all identities are to some extent fluid, indigenous identity is particularly so. Most people in Ecuador have some indigenous heritage, and whether or not an individual currently identifies as indigenous depends to some extent on how popular the indigenous movement is at the time.[39] This difference in how indigenous identity is conceived points to some problematic areas for the design in divided societies literature. In particular, if indigenous peoples were to be given veto power over certain aspects of national policy, would each individual ethnic group be given a veto, or would the indigenous population as a whole be given veto power (in which case, who would represent "indigenous" people)? In short, setting up a power-sharing agreement between native French and native English speakers may look very different than creating power sharing institutions between indigenous and non-indigenous peoples, due to the different nature of indigenous identity.

In addition, as discussed in the following two chapters, indigenous demands themselves do not fit comfortably on the integration/accommodation scale.[40] For example, while one of the goals of interculturalism is to gain respect for indigenous communities and cultures in mainstream society, the concept also challenges all Ecuadorians to recognize the role that

[39] In her book *Collective Rights of Indigenous Peoples*, Jolan Hsieh (2006) provides an in-depth look at indigenous identity in Taiwan. She documents how people with Polynesian heritage sometime identify as indigenous, sometimes identify as being from a certain indigenous group, sometimes identify as being Taiwanese or Chinese, and sometimes identify as a combination of these groups. In addition, individuals from the same family might have different identifications.

[40] For more information, see Miguel Centallas's (2013) chapter "Bolivia's New Multicultural Constitution," in which he delineates the ways in which Bolivia's constitution does not fit within the current constitutional design literature.

indigenous peoples have played in the nation's history. As discussed in more detail below, one of CONAIE's goals was to use the 2008 constitution as a vehicle for forming a new national identity that draws inspiration from Ecuador's indigenous roots. In addition, as discussed in Chapters 5 and 6, plurinationalism also challenges the way the mainstream culture views economic progress and its relationship to nature. In this sense, plurinationalism falls outside of the integration/accommodation scale in the design literature in that it not only speaks to the way that minorities fit into mainstream society but also attempts to change the way mainstream society itself operates. As discussed in more detail below, interculturalism's message of "unity in diversity" is markedly different from Lijphart's picture of a consociational society separated by ethno-cultural difference, but in its attempt to influence mainstream culture, plurinationalism is not integrationist either. And as will be discussed in the following two chapters, since plurinationalism falls outside of the accommodation/integration scale, the paradigm implies different constitutional design elements than would be adopted by integrationists or accommodationists. In the end, the difference between plurinationalism and the cases discussed in the divided societies literature may point to a wider range of cases and policy prescriptions for constitutional designers to consider.

Interculturalism in Ecuador

Interculturalism (interculturalidad in Spanish) has a complex relationship with the overarching concept of plurinationalism. In particular, while not all indigenous groups support CONAIE's larger struggle for plurinationalism, the concept of interculturalism has broader support. At its most basic level, interculturalism is the idea that the wide variety of cultural groups in Ecuador should live in an environment of mutual respect and that cultural exchange should take place at all levels of government, society, and education. For example, in its

proposal to the 2008 Constitutional Convention, CONAIE argued that the first step to a plurinational state is the construction of a national intercultural project that would promote "respect of all forms of cultural expression, knowledge, and spirituality" in Ecuador and "demands the unity of all peoples and nationalities of the society…" (CONAIE 2007, 10). This version of interculturalism is seen as necessary for "a plurinational democracy, economic justice and equality" (ibid.). In short, interculturalism's focus is on combating the long-held stereotype that indigenous culture is somehow savage or inferior, thereby building respect for indigenous tradition from outside the indigenous community while promoting self-respect from within. FENOCIN, (The National Organization for Campesinos, Indigenous People, and Afro-Ecuadorians), elaborates on CONAIE's definition of interculturalism by arguing that the concept, "goes far beyond coexistence or dialogue between cultures…it is an express search to overcome prejudice, racisms, inequalities, and asymmetries that characterize the country" (FENOCIN. 2008, 1). The organization goes on to explain that cultural communication and sharing cannot only benefit minority groups, but enrich society at large and help to forge a newer, stronger, and more diverse Ecuadorian identity. FENOCIN goes on to argue that bilingual and intercultural education (as discussed below) is essential to recognizing the goals of interculturalism, but they also note that this type of respectful, informative, and dynamic cultural sharing cannot take place without redressing the extreme socio-economic inequality in Ecuador. At the end of their statement on interculturalism they ask: "Is it possible to have interculturalism with social injustice (ibid., 4)?" In the end, FENOCIN sees interculturalism as an ongoing and long term process which will have to start with small, everyday changes of opinion and attitude throughout society but which will hopefully be a "legacy for future generations." (ibid., 4)

Because a large part of its emphasis is on self-respect, the struggle for interculturalism seems to have as much to do with the indigenous community as it does with Ecuadorian public

policy or the attitudes of society at large. In fact, one activist commented that with the writing of the 2008 constitution, indigenous communities have the legal and institutional support that they need to pursue the goal of interculturalism, but that change now needs to come from within the indigenous community itself. He lamented that indigenous peoples have internalized and accepted the stereotypes regarding their inferiority, and noted that indigenous youth need to become more active in participating in the life of the community and that they need to feel proud (as opposed to embarrassed) when wearing traditional clothing or speaking in indigenous languages.[41] In addition, he argued that life was traditionally very rhythmic, and that indigenous organizations and communities should work to revitalize indigenous languages, rituals, ceremonies, and songs so that indigenous peoples can remember the rhythm of communal life.[42] Along these same lines, another interviewee argued that "interculturalidad" was really a two part process, one of which was "intercultural" while the other was "intracultural." While intercultural processes focus on sharing between cultures, "intraculturalism" focuses on improving how indigenous communities think of themselves. Both processes he argued, are necessary for interculturalidad.[43]

In addition, indigenous anthropologist, activist, poet, and song writer Patricio Guerrero argues in his work that interculturalism involves reinserting the heart and spirituality into politics and political discussion. He asserts that, in addition to being physically colonized,

[41] One interviewee described the insidious nature of cultural dissatisfaction by arguing that indigenous people are ashamed of their cultural background and, thus, attempt to act mestizo. Whereas, mestizos feel inferior and try to mimic European and American cultures. And Europeans and Americans realize how much they have lost and try to get back the indigenous culture of being close to the environment and community. Personal interview with indigenous activist and 2008 Assembly Member, 9/14/12 (41).

[42] Personal interview with indigenous activist, 5/16/12 (9).

[43] Personal interview with an indigenous Assembly Member, 5/22/12 (10).

indigenous people were mentally colonized. This mental colonization taught indigenous people not only to think of themselves as inferior (as discussed above) but also to think with a western mindset: one that views rationality as the only lens through which political discussion can take place and ignores the role of feeling, sentiment, and spirituality in politics. He therefore argues that interculturalism requires both indigenous and non-indigenous Ecuadorians to break through the colonial mindset and to advocate a political discourse that intertwines rationality and heart. He describes intercultural dialogue, therefore, as taking place both "face to face" and "heart to heart" and asserts that interculturalism must not only be an act of understanding but also an act of empathy (2011a, 87, 92). Guerrero then quotes the words of Ramon Paankikar, "without the union between knowledge and love, interculturalism is an empty word." (ibid., 91) Importantly, Guerrero also has a specific conception of spirituality, which he argues represents a way of being and living in the world that emphasizes man's interconnectivity to nature and his place in the cosmos. In this sense, he asserts, the loss of spiritual understanding is the primary reason for environmental degradation and destruction. Spirituality is also necessarily political because it is intertwined in the struggle against domination. However, Guerrero warns that both spirituality and interculturalism can be "symbolically usurped" by politicians, and he urges social movement organizations to return to the true spirit of these ideals in their struggle for political change. In the end, Guerrero ties his writings on spirituality to other indigenous movements by citing the Iroquois saying: "spirituality is the highest form of political consciousness" (2011b, 21). Guerrero's work perhaps best illustrates the transformative nature of interculturalism, in that he makes it clear that the concept it meant to both encourage new understanding between groups and impact the mainstream Ecuadorian political discourse.

In many ways, the descriptions and goals surrounding the idea of interculturalism are still a bit new and vague, and therefore the concept's significance may be best explained by how

activists contrast interculturalism to other projects like multiculturalism. The indigenous movement is eager to distance itself from what Hale (2002) terms "neoliberal multiculturalism," which he notes is when "proponents of the neoliberal doctrine pro-actively endorse a substantive, if limited, version of indigenous cultural rights, as a means to resolve their own problems and advance their own political agendas" (487). In short, Hale argues that in several Latin American countries, donor organizations such as the World Bank, International Development Bank, and USAID, as well as national governments, actively promoted limited cultural rights for indigenous peoples in order to assuage the demands of indigenous social movements for recognition without significantly modifying their economic goals. [44]While cultural recognition can be its own form of empowerment, many indigenous groups across Latin America have been severely disappointed in the limited gains of the multiculturalist movements of the 1990s, and the term multiculturalism can now have negative connotations among indigenous communities. Interculturalism can, therefore, serve to rhetorically distinguish indigenous movement priorities from the government's previous indigenous rights policies, and signal the shortcomings of government-sponsored multiculturalism. Activists like Guerrero argue that interculturalism implies a broader challenge to the current "relations of power," whereas multiculturalism accepts a limited amount of cultural recognition inside the context of current power structures (2011a, 76).[45]

[44] For more information see Lucero 2013.

[45] In the 1980s and 1990s, several Latin American governments recognized a number of cultural rights for indigenous peoples, while at the same time carrying on economic development policies that further impoverished indigenous communities and/or destroyed indigenous lands. As discussed in Chapter 4, the 1998 Ecuadorian constitution followed this pattern of conceding a certain number cultural rights, such as the right to practice indigenous justice or access bilingual education, without changing the overarching goals of the state. The rhetorical switch from multiculturalism to interculturalism is a reaction to the types

While, on the one hand, the switch from advocating a politics of multiculturalism to a politics of interculturalism represents a frustration with the shortcomings of 1990s era reforms, activists argue that a mindset of interculturalism will lead to key policy differences. In particular, activists argue that, in a multicultural polity, bilingual education is promoted in areas where a high percentage of the population is indigenous so that a community may preserve its language and traditions. However, activists challenge that this type of bilingual education does little to bridge the divide between indigenous and nonindigenous communities and often reinforces cultural stereotypes or the belief that education in indigenous communities is antiquated and inferior. Instead, they challenge the national system to teach indigenous languages in every school (both those that are predominantly indigenous and those that are predominantly mestizo) so that the entire population can be exposed to indigenous culture. This system of education would promote the idea of cultural exchange rather than cultural isolation. In short, activists argue that, while multicultural policies have often been associated with tolerating or preserving cultural differences, interculturalism emphasizes sharing across cultures and mutual respect. In other words, while multiculturalism argues for tolerance, interculturalism argues for acceptance; while multiculturalism paints a rather static picture of traditional cultures, interculturalism represents a more dynamic concept of cultural growth and exchange.[46] And CONAIE contends that these theoretical differences will lead to a change in government policy towards indigenous peoples.

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of policies promoted by the 1998 constitution rather than a commentary on the political theory literature surrounding multiculturalism.

[46] Personal interview with indigenous activist and writer, 5/16/12 (9); Personal interview with indigenous activist and writer, 7/6/2012 (20).

Different indigenous groups also present varying opinions on the relationship between interculturalism and plurinationalism. As mentioned above, CONAIE describes interculturalism as one of the first steps towards building a plurinational state. Significantly, however, FENOICIN and FEINE (the two largest indigenous organizations that are not affiliated with CONAIE) offer interculturalism as an alternative to what these organizations view as *CONAIE's* proposal for plurinationalism. FENOCIN and FEINE argue that the overall concept of plurinationalism is counterproductive as it puts too much emphasis on group specific rights, such as territorial autonomy or indigenous justice systems, and places too little emphasis on how indigenous groups should interact with other ethnic and cultural groups inside Ecuador. For example, in an interview with a FENOCIN spokesperson, he emphasized that FENOCIN is an organization which represents campesinos from all four of Ecuador's ethnic groups,[47] and, as such, the organization finds CONAIE's focus on plurinationalism to be divisive and counter-productive. Instead, he argued that FENOCIN sought to address issues that affected all campesinos, namely discrimination and cultural exclusion, water rights and shortages, and sustainable and environmentally friendly farming techniques.[48] In a similar meeting with a FEINE representative, he argued that plurinationalism is a term created by CONAIE and was not really the focus of his organization. Instead, he noted the FEINE was more focused on interculturalism, the spiritual life of its members, and the eradication of racism. He contended that, by focusing on

[47] Campesinos are rural farm workers. Many of early indigenous social movements were termed campesino movements before indigenous groups organized into distinctly indigenous movements in the 60s and 70s. As mentioned in my introduction, FENOCIN calls itself the organization of Campesinos, Indigenous peoples, and Afro-Ecuadorians, and is therefore considered in Ecuadorian politics today to be one of the country's largest "indigenous" organizations. However, as this interviewee expressed, FENOCIN also represents other ethnic groups. In addition, because FENOCIN represents campesinos, it represents the subset of the indigenous community that are small town Andean or coastal farmers (most of whom are Kichwa), but it does not purport to represent indigenous peoples in the Amazon.

[48] Personal interview with FENOCINE representative, 10/3/12 (51).

plurinationalism, CONAIE was more concerned with politics than the overall wellbeing of its members. He also noted that FEINE members faced double discrimination, as both indigenous peoples and Protestants, and that combating this type of discrimination was one of FEINE's priorities.[49] In short, FEINE and FENOCIN see plurinationalism as both divisive and as a distraction from the main social and political concerns affecting Ecuador's indigenous and rural population.

Despite the fact that some indigenous groups, politicians, and NGOs present interculturalism as an alternative to plurinationalism, I argue that than interculturalism is instead one of the paradigm's components. My reasons for including the concept here are twofold. First, as mentioned above, my primary focus is on CONAIE's definition of plurinationalism, which includes an emphasis on interculturalism (CONAIE 2007, 10). And, secondly, while there is a definite tension among the platforms presented by FENOCIN, FEINE, and CONAIE, the two concepts are, in fact, not mutually exclusive. While it is true that the indigenous rights component of plurinationalism may focus more on the unique rights afforded to the indigenous communities and interculturalism focuses on strengthening relationships between ethnic groups, it is theoretically possible to strive for a balance between group rights and intercultural sharing. In fact, while FEINE may view plurinationalism as a problematic paradigm, they do support and even work with CONAIE on addressing several of the same issues, such as cultural and linguistic preservation, water rights, and tribal consultation. So, while other indigenous groups may not support the group rights aspect of plurinationalism, they

[49] FEINE is both an indigenous organization and an evangelical Protestant organization. Because of its goal of proselytizing to indigenous communities, it is less focused on political organization than FENOCIN or CONAIE. FEINE is most prominent in the Andes, and, therefore, like FENOCIN, it predominantly represents Kichwa groups. Personal interview with FEINE representative, 6/19/12 (15).

do agree with many of the paradigm's tenets.[50] Instead of being a question as to whether or not interculturalism and plurinationalism are mutually exclusive therefore, it seems to be more a question of balance between the two different goals of group distinction and cultural inclusion, both of which are present in CONAIE's political agenda. Catherine Walsh (2009), one of the best known scholars of interculturalism and plurinationalism in Ecuador, warns that interculturalism, when it is not backed by the larger reforms suggested by plurinationalism, can lose much of its significance. In short, she argues that "interculturalism only points to the recognition and the inclusion of diversity within an ill-fated state model that does not confront profound structural inequalities, and that does not abandon its neoliberal agendas" (ibid., 74).

Part of the difficulty in balancing these two goals may lie in the diversity within CONAIE and the indigenous movement itself. CONAIE is an umbrella organization charged with representing both rural and urban indigenous peoples in the Coastal, Sierra, and Amazonian regions, and each group faces different challenges. For example, Quechuas living in a large city like Quito may be most concerned with combating daily racism and discrimination, while Shuars living in secluded groups in the Amazon may be more concerned with protecting resource rights. Given this wide variety in circumstance, the ideal balance between the indigenous rights aspect of plurinationalism and interculturalism will likely vary by both region and community.

[50] The writings of national historian and director of COMUNIDEC (a development organization inside Ecuador), Galo Ramon Valarez (2009) follow a similar line of logic. In his essay, "Plurinationalism or Interculturalism in the Constitution?", he argues that plurinationalism is flawed in that it looks at indigenous peoples as national minorities rather than transforming the larger structure of racism and discrimination within Ecuador (125). Yet despite this assertion, he advocates many of the same things as CONAIE, arguing that Ecuador should be a country that is unified in diversity (ibid). He then states that the major challenges moving forward are: creating a development model that protects Ecuador's immense biodiversity, discovering a national identity that is free from racism and colonial legacies, breaching class and regional differences by economic redistribution, and forming a citizenry that is comfortable with diversity (ibid, 130-133). See also personal interview representative of FINE and FIERPI, 8/15/12 (21).

In summation, when surveying the discussion of interculturalism in Ecuador, two different but interrelated goals of the indigenous communities emerge. First, indigenous leaders argue that indigenous people and communities need to reclaim their respect for themselves and their traditions. And second, the interculturalism movement is tied to the idea of promoting mutual cultural exchange and sharing between groups. Through this mutual dialogue, indigenous community members hope not only to achieve recognition for the role that indigenous culture has played in shaping the wider Ecuadorian Society but also to influence Ecuador's future cultural identity. In a sense, both of these goals would require some measures aimed at cultural preservation, such as the provision of bilingual education, so that indigenous peoples could both revive their own traditions and share them with the wider community. However, interculturalism is less about preserving islands of cultural difference than discovering how old traditions can be shared with modern Ecuador. In short, while the concept would require a certain amount of protection of cultural difference, it is also aimed at forging a new Ecuadorian national identity that incorporates indigenous as well as mestizo history and cosmology.

Constitutional Provisions for Interculturalism

The Ecuadorian constitution mentions "intercultural" or "interculturalism" 23 times, generally with a focus on education, participation, language, and the over-arching responsibilities of government. For example, Article 16 guarantees the right to "intercultural" and "participatory communication" in one's own language; Article 27 states that public education will be, "participatory, compulsory, intercultural, democratic, inclusive and diverse;" Article 32 grants citizens the right to health care services that are "governed by the principles of equity, universality, solidarity, interculturalism, quality, efficiency, effectiveness, prevention, and

bioethics;" and Article 57 states that indigenous communities have the right "to develop, strengthen, and upgrade the intercultural bilingual education system." However, in addition to being tied to specific government services like health and education, interculturalism is also portrayed as an overarching policy goal of the state, while acting in an intercultural fashion is listed as a duty of the citizenry. For example, Article 83 states that Ecuadorian citizens have the duty "to promote unity and equality in diversity and in intercultural relationships;" Article 217 mandates that the National Electoral Council "shall be governed by the principles of autonomy, independence, publicity, transparency, equity, interculturalism, gender equality, swiftness and rectitude;" Article 340 notes that the national development plan, "shall be guided by the principles of universality, equality, equity, progressivity, interculturalism, solidarity and nondiscrimination;" and Article 378 charges the government with funding cultural groups and institutions "with respect to the freedom of creation and expression, interculturalism and diversity."

Finally, the constitution also establishes interculturalism as a foreign policy goal. Article 416 charges the government with crafting a foreign policy that "promotes the establishment of a multipolar global order with the active participation of regional economic and political blocs and the strengthening of horizontal ties to build a fair, democratic, jointly supportive, diverse and intercultural world." And Article 423 states that in regards to regional relationships, the Ecuadorian State shall pledge "to protect and promote cultural diversity, the exercise of interculturalism, the preservation of the cultural heritage and common memory of Latin America and the Caribbean."

What is interesting about the constitution's treatment of interculturalism is that it does not treat interculturalism as incorporating a list of group rights that need to be met. Instead, the

term interculturalism is interspersed throughout the constitution and is used to describe rights that belong to everyone, such as the right to education, or health, or participation, all of which are meant to be intercultural.[51] The fact that the term "intercultural" is used to qualify the rights of everyone in the constitution, as well as the fact that it is often mentioned in conjunction with other state goals (like foreign policy), demonstrates that interculturalism is not so much about offering a set of group-specific rights as it is about changing the way the state approaches its existing duties. And this suggests that the best way for constitutional designers to promote interculturalism is not to expand cultural rights specifically but to open spaces for dialogue between cultures and to reconsider how the constitution itself shapes the identity of the nation.

Constitutional Identity

At its most basic level, interculturalism is about redefining the relationship between indigenous and mainstream society. During the constitutional convention, CONAIE argued that one of the first steps to this process was gaining recognition of Ecuador as a plurinational and intercultural state. In so doing, CONAIE challenged the constitutional identity of Ecuador itself. While constitutional identity has largely been understudied in the constitutional design literature, how a nation defines itself at the outset (particularly in the constitution's preamble and guiding or basic principles) is becoming an increasingly import issue in constitutional law across the globe, and the Ecuadorian case highlights the concept's potential importance to future designers.

[51] While the constitution mentions "intercultural" or "interculturalism" 23 times the term is only mentioned once in the Title 2, Chapter 4 (which lists right of indigenous and minority groups), in clause 14, which states: "To develop, strengthen, and upgrade the intercultural bilingual education system." However, intercultural education is also mentioned in Title 2, Chapter 7 (which enumerates the rights pertaining to Sumak Kawsay) Article 27 as a right for everyone.

Ultimately, CONAIE was successful in gaining symbolic recognition of indigenous culture in the constitution and recognition of Ecuador as both a "plurinational" and "intercultural" state. And interculturalism is not mentioned briefly as a concession to indigenous groups, but is mentioned throughout the document as one of the defining characteristics of the new Ecuadorian state. The fact that the constitution has been heavily shaped by this new ideal of interculturalism is evident from the preamble, which states:

> We women and men, the sovereign people of Ecuador, RECOGNIZING *our age-old roots, wrought by women and men from various peoples*, CELEBRATING nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence, INVOKING the name of God and *recognizing our diverse forms of religion and spirituality*, CALLING UPON *the wisdom of all the cultures that enrich us* as a society, AS HEIRS to social liberation struggles against all forms of domination and colonialism…

The preamble is in keeping with idea of interculturalism as expressed by indigenous groups in that it portrays the Ecuadorian states as being grounded in pre-Colombian culture and recognizes the unique and important influence that indigenous cultures have had on shaping and continuing to shape Ecuadorian society. The new tone of the Ecuadorian constitution is even more evident when compared to the preamble for the 1998 constitution, which states:

> Inspired by its ancient history, in memory of its heroes and the work of the men and women who, with their sacrifice, shaped the country; faithful to the ideas of liberty, equality, justice, progress, solidarity, equity and peace that have guided its steps since the dawn of the republic, proclaiming its intention to consolidate the unity of the Ecuadorian nation in recognition of the diversity of its regions, peoples ethnic groups and cultures, invoking the protection of God, and exercising its sovereignty, this Constitution establishes the fundamental rules that protect rights and freedoms, organizes the state and its democratic institutions, and promotes economic and social development.

While the 2008 preamble depicts the nation's roots as coming from "various peoples" and "calls upon the wisdom of all cultures" to create a new Ecuadorian state, the 1998 document depicts a more unified Ecuadorian republic. In addition, while the 2008 preamble gives a further nod to

indigenous cultures by recognizing the importance of the "Pacha Mama" the 1998 preamble is much more Western in tone, emphasizing the values of "progress" "liberty" and "solidarity".

In addition to the preamble, Chapter One of the constitution sets forth basic guiding principles for the Ecuadorian state. Here, Article One declares that: "Ecuador is a constitutional State of rights and justice, a social, democratic, sovereign, independent, unitary, *intercultural*, *plurinational* and secular state" (emphasis added). This recognition of Ecuador as both an intercultural and plurinational state represented a symbolic victory for CONAIE, since the organization also unsuccessfully campaigned for the term "plurinational" to be included in the 1998 constitution. In addition, Article Two, which further outlines the constitution's basic principles states that:

> Spanish is Ecuador's official language; Spanish, Kichwa and Shuar are official languages for intercultural ties. The other ancestral languages are in official use by indigenous peoples in the areas where they live and in accordance with the terms set forth by law. The State shall respect and encourage their preservation and use.[52]

In so doing, Article Two recognizes the importance of indigenous languages, another key part of CONAIE's intercultural platform. In short, the preamble, the constitution's basic principles, and the numerous mentions of interculturalism all contribute to a change in the ethos of the Ecuadorian state.

While the definition of Ecuador as a plurinational and intercultural state was an important goal for CONAIE, there has been little discussion about constitutional identity in the

[52] There was some debate over the wording of Article Two. Indigenous groups wanted at least Kichwa and Shuar, and possibly other languages, to be declared official languages of the Ecuadorian state. Instead, Spanish is the official language, whereas, Spanish, Kichwa, and Shuar are languages "for intercultural ties," and there is some debate about what this last clause means. However, because the Constitution also mandates that the government promote intercultural communication, the door has been left open for indigenous groups to demand official documents in, and educational support for, both languages.

design literature and some skepticism as to the concept's importance. However, I argue that it would be a mistake to completely disregard this aspect of constitutional design particularly in the field of minority politics.[53] First, the very fact that one of CONAIE's primary goals was to modify the identity of the Ecuadorian Constitution in and of itself makes the issue of constitutional identity politically important. Along these same lines, Orgad (2010), in her survey of constitutional preambles, notes that how a state defines itself in the preamble (as belonging to one specific ethnic/national group or drawing on a diverse cultural past) is becoming increasingly important to ethnic groups world-wide. And she argues preambles are most successful in achieving "reconciliation between the state and its minorities" if minority groups have a hand in the drafting process (735). Orgad's findings suggest that the issue of constitutional identity will continue to be a politically salient one for constitutional designers and that scholars need to consider the best ways to incorporate minority viewpoints into the overall ethos of the document when crafting constitutions.

Second, constitutional preambles and accompanying lists of "basic principles" are becoming increasingly important to constitutional courts, with South Africa, India, and France setting important judicial precedents regarding how preambles and basic principles should be used in interpreting new laws (Levinson 2011). In a particularly interesting case in South Africa, the constitutional court ruled that sections of the 1996 draft constitution would have to be rewritten given that they conflicted with the constitutional principles outlined in the 1993 interim constitution. The South African case is significant in that it implies that there is something enduring about constitutional identity that should not be violated, not only in

[53] For a survey of this debate see Rosenfeld 2012.

statutory law, but in constitutional amendments or new constitutions (Jacobson 2010 118).[54] This growing importance placed on preambles and basic principles means that reimagining the constitutional identity to make it more inclusive for minority groups may become much more than a symbolic gesture, and designers should consider how accommodating minority groups in this area may affect not only judicial interpretation but also the ability to amend and change the constitution over time.

Finally, changing the constitutional identity to accommodate indigenous or minority groups raises the question of how much the constitutional identity affects, or is affected by, the culture of the country at the time. For example, both India and Turkey are notable for establishing constitutions that are declaratively "secular" in countries that have strongly religious populations, causing tension between the constitutional identity of the country and its population's national identity. In both cases, the framers of the constitution hoped that establishing these countries as "secular" in their constitutions would, over time, make the laws and customs of their countries more secular as well. These cases raise the question as to whether or not constitutional identities should contain aspirational elements that are not yet reflected in reality. In this sense, the Ecuadorian case is interesting in that, while the new constitutional identity established in the 2008 document is in line with CONAIE's rhetoric, it is unclear to what extent it is in-line with how average Ecuadorians view their country. And therefore, it remains to be seen whether Ecuadorian opinion will change overtime to become

[54] In the Kesavananda ruling in India, the constitutional court similarly argued that you could have unconstitutional constitutional amendments if they violated the overarching basic principles of the Indian constitution. (Jacobson 2010, 120). In addition, the French courts stuck down a parliamentary law arguing that it violated the preamble of the 1946 French Constitution, which was reaffirmed by the country's 1958 preamble (Levinson 2011, 165).

closer to the vision in the new constitution or whether ultimately the constitution's preamble and basic principles will fail to speak to future Ecuadorians.[55]

The Ecuadorian case is particularly interesting given that it represents an effort for a minority group (Ecuador's indigenous population) to significantly remake the national identity in its own image, as opposed to a majority group's effort to subsume a minority identity into the larger culture of the nation. And, on a constitutional level at least, indigenous groups were fairly successful. They not only won the battle to have Ecuador declared a plurinational state, but (as discussed in the following chapters) they were successful in including indigenous concepts, such as the rights of Mother Earth and the benefits of living in accordance with the sumak kawsay, into the constitution. As mentioned above, one of the reasons for indigenous success may be that anti-colonialism is an important part of mainstream thought in Ecuador (particularly after the failures of neoliberalism), and mainstream Ecuadorians have sought ways to distance themselves from the west. In this sense, indigenous cosmology may have provided the intellectual and cultural resources for mainstream Ecuadorians to create a distinct Ecuadorian identity.

In short, while changing the constitution's identity was a large part of CONAIE's platform, constitutional designers often ignore this aspect of constitution writing. However, because constitutional identity is such a salient political issue and because identity statements are beginning to play a larger role in judicial interpretation, scholars of minority politics and constitutional design should consider a number of questions: What are the purposes of preambles and statements of basic principles? Who should be invited to participate in crafting

[55] For more on the aspirational nature of constitutional preambles, see King 2013.

the identity of the constitution? How can constitutional identity shape future laws and customs of a society? And what are the legal and social implications of adopting a constitutional identity that is more inclusive of minority groups? The Ecuadorian case further serves to highlight the importance of these types of questions for scholars of constitutional design.

Citizen Participation

As mentioned above, one of the goals of interculturalism is to encourage dialogue and cooperation between groups, particularly on issues surrounding education, health, culture, and development. One potential method of achieving this goal would be to open spaces for indigenous and non-indigenous communities to participate and interact with each other in local-level politics. To this end, both Ecuador and Bolivia have begun to experiment with new local institutions aimed at increasing citizen participation and enfranchising historically disadvantaged groups. In particular, the 1994 Bolivian Law of Popular Participation (LLP) established more participatory municipal governments. In so doing, the law devolved national government funds to the municipal level, required each municipality to take responsibility for basic public services (such as education, healthcare, and cultural activities), and specified new governing structures for the municipalities (Faguet 2012, 17). Each municipal government was required to have a mayor, a five- to eleven-person municipal council, and an oversight committee. The oversight committee is unique, in that its members are not elected officials but are, instead, members of grassroots organizations selected by other members of civil society.[56] The committee is allowed to propose development projects and can block local government spending if it suspects

[56] Each municipality is divided into a number of regions depending on size. In each region, leaders of the local grassroots organizations choose a representative to sit on the oversight committee. Grassroots organizations can use any method they want to choose a representative (Faguet 2012, 19).

corruption on the part of the mayor or city council. In a detailed study of the Bolivian decentralization, Jean-Paul Faguet concludes that, on the whole, the LPP was a success in that it created more organized municipal governments that were more responsive to local citizens' needs in the areas of education, urban development, water and sanitation, and agriculture (ibid., 149-156). In addition, Faguet conducts and in-depth study of the municipality of Charagua and finds that the LPP opened spaces for local Guarani groups to participate in politics. The Guarani won seats on the municipal council, and seven out of eight of the members of Charagua's initial oversight committee were Guarani. Notably, the members of the oversight committee were chosen and supported by traditional Guarani self-governance organizations that had survived colonization. Ultimately, members of the oversight committee were able to consult their local regions as to which development projects would be best for community, and the municipal council and mayor, in turn, consulted with the oversight committee. Faguet concludes that one of the reasons the municipal government of Charagua was so successful in meeting the development needs of the municipality was that it was able to tap into the social capital generated by traditional Guarani institutions.

As Van Cott (2008) explains in her work *Radical Democracy in the Andes* the Ecuadorian decentralization process was slightly different than the Bolivian LPP. As opposed to Bolivia, where the LPP decentralized government functions almost overnight, Ecuadorian decentralization was much more gradual and piecemeal. The national government began to devolve power to the provinces in 1979, and the process continues into the present. And while the LPP established a fairly rigid structure for municipal governments, the 1998 Ecuadorian constitution granted canton governments (the Ecuadorian equivalent to Bolivian municipalities) much more flexibility in structuring local institutions and in determining which government functions they wanted to take over from the provincial government. Van Cott argues that this

flexibility allowed cantons with high indigenous populations to incorporate traditional institutions and power structures into the canton government and, in turn, strengthened indigenous political parties and organizations. Van Cott then examines in more detail the canton of Cotacachi, a heavily indigenous province, which used decentralization to develop more participatory development structures. In 1996, the canton held its first participatory assembly, in which rural indigenous populations and urban groups were able to come to an important consensus on the Canton's future development goals (Ibid., 138). Van Cott argues that since 1996, the annual canton assemblies have evolved and strengthened by discussing a wider range of issues, incorporating a higher percentage of female participants, and coordinating development projects with development NGOs. As the assemblies grew in size, voting rights were restricted to representatives of local grassroots organizations (each organization could send one member), although all citizens were still allowed to attend and speak at assembly meetings. (Ibid. 143)

While Van Cott lauds the flexibility of the 1998 constitution, the 2008 constitution is designed to create a more uniform structure for canton governments and mandates the eventual devolution of a number of government functions, including the maintenance of water, health, and education infrastructure (Article 264). In addition, the constitution mandates that "all levels of government" create "entities of participation" (Article 100). To this end, the Citizen's Participation and Social Control Council (CPCCS) has recently begun to work with canton governments in establishing local citizen assemblies that would, through deliberation, determine local development goals.[57] The CPCCS argues that the agenda of these citizen

[57] The CPCCS is part of the Transparency and Social Control Branch of government. As discussed in more detail in Chapter 5, the Transparency and Social Control Branch is aimed at increasing citizen participation and oversight.

assemblies should be set by citizens and interest groups and that assembly members should be representative of the overall demographics of the canton. In particular, the CPCCS stipulates that the assembly should have the same percentage of "men, women, young people, adults, elderly, people with disabilities, and people of varying sexual orientations," as the general population (Consejo 2012, 6). The CPCCS literature also stresses that all citizen assemblies should focus on promoting intercultural dialogue. The creation of the citizen assemblies is still an ongoing process, and it has yet to be seen how effective these will prove once they have been set up by the CPCCS (ibid.).[58] While the CPCCS assemblies have yet to be organized, they could potentially take the form of either the citizen's assemblies described by Van Cott or the oversight committees described by Faguet. In either case, this would provide a way of formalizing a system that increases opportunities for indigenous peoples and traditional power structures to play an increased role in local government. This local level participation could be particularly important for the goals of interculturalism in that many of these local institutions control some of the projects most likely to affect indigenous communities. For example, in Ecuador, the decentralization of many of the duties of the Ministries of Education and Culture means that indigenous peoples may have the greatest ability to impact issues like bilingual education or traditional health care policies by participating in local-level assemblies. In the end, local-level politics may prove a fruitful venue for working out the relationship between indigenous and non-indigenous communities and could also provide the opportunity for indigenous and non-indigenous peoples living in close proximity to each other to discuss shared goals for their communities. In addition, these CPCCS councils could prove to be an example of

[58] The implementation of the majority of the decentralization provisions of the 2008 Constitution have yet to go into effect, and the government has a plan for implementation by the end of 2015. For more information, see SENPLADES 2012.

an institution that is integrationist without being assimilationist in that they could foster cooperation between groups while still encouraging the growth and development of traditional indigenous organizations. This could be important for constitutional designers since, as mentioned above, integrationist approaches have so far represented more of a critique of accommodationist methods rather than an alternative model of constitutional design.

Changes to the Executive Branch

Intercultural and bilingual education (EIB) is also an integral part of CONAIE's platform, and while EIB is granted theoretical support in the constitution, creating a viable EIB program in Ecuador is still one of the main challenges faced by indigenous organizations.[59] One of the common difficulties in implementing intercultural education in Latin America has been the lack of influence that the indigenous organizations often have over the education ministry and education policy. While many countries have official policies that promote intercultural education, a lack of resources or political will by the Education Ministry can block effective implementation of EIB on the ground. In addition, the politics of the Education Ministry are subject to change with each administration, and EIB is often allocated "leftover" government funds after more politically prestigious projects have been funded (Cortina 2014, 5).[60]

[59] Personal interview with indigenous member of the TCE, 7/11/2012 (22).

[60] A recent example of the ways in which the Ministry of Education can effectively undermine EIB is the case of Peru. While a 2003 law mandated that EIB be accessible to all students, EIB was deprioritized by the Garcia administration (2006-2011). And in a move to redirect resources to urban schools, the Ministry of Education set very stringent requirements for admissions to teacher-training schools that focused on EIB. As a result, very few students could qualify for admission and most of the country's schools shut down. This rapid dismantling of the EIB infrastructure in part lead GIZ (a German NGO that heavily supported the training schools) to withdraw support from Peru after 32 years of work on EIB (Cortina 2014, 59-61).

In 1998, Ecuadorian policy makers and indigenous organizations attempted to address the Ministry of Education's apathy towards EIB by creating the Direccion Nacional de Educacion Intercultural Bilingue (DINEIB), a parallel Ministry of Education controlled by indigenous organizations.[61] While the DINEIB granted indigenous organizations more control over EIB, the ministry was controversial for a number of reasons. First, a parallel ministry of education belies the whole concept of intercultural education; interculturalism is theoretically supposed to apply to both indigenous and non-indigenous schools alike. Second, critics charged that DINEIB was simply a means by which CONAIE could allocate teaching jobs to enhance its political power: teaching positions are often used as forms of political patronage in Latin America. And third, critics worried that DINEIB was ghettoizing education in rural areas by setting lower standards for teacher and student success. In fact, schools overseen by DINEIB had markedly lower performance standards on average. In 2011, the Law of Intercultural Education dissolved the DINEIB. The Correa administration argued that the DINEIB was no longer necessary, given that the new constitution, as well as the 2011 law, guaranteed that all education would now be intercultural (Gustafson 2014 and Novo 2014). CONAIE protested the law, charging that the government was simply trying to disempower the organization. In the end, critics of both Correa and the DINEIB are most likely correct: while the DINEIB was a controversial and flawed institution, its dissolution came on the heels of a series of government actions to disempower CONAIE.

The story of Ecuador's DINEIB demonstrates a significant concern for advocates of EIB: namely how can indigenous peoples have more control over the Ministry of Education and

[61] The DINEIB was at first controlled almost exclusively by CONAIE, but FEINE and FENOCINE (the next largest indigenous groups) were eventually incorporated into DINEIB as well (Novo 2014, 106).

education policy without segregating or ghettoizing EIB? Unfortunately, scholars of constitutional design have little to say about this area of the executive branch. As mentioned above, some advocates of consociational democracy call for the proportional distribution of government ministries along either partisan or ethnic/linguistic lines.[62] However, this consociational solution is not likely to work in the Ecuadorian case. First, granting indigenous peoples a proportional number of cabinet seats would be practically difficult, as the Ecuadorian government and CONAIE disagree on the number of indigenous people in Ecuador (the government argues that the number is seven percent while CONAIE argues that it is close to forty). Second, even if a compromise number were reached, this type of arrangement would still leave one group in charge of the education ministry (as there would still be a single education minister). If a mestizo member of Correa's party were in charge, EIB would likely still face the lack of support from the education ministry that it receives today, whereas, if an indigenous member of CONAIE were in charge, the Education Ministry may once again be seen as simply a source of patronage for CONAIE. And third, as noted above, this type of division of ministry positions would be counter to the stated objectives of interculturalism. While this type of consociational arrangement would not fit the Ecuadorian case, a division of the Ministry of Education, as represented in the case of the DINEIB, has also proved problematic.

Therefore, the question for design scholars is how to design cabinet positions so that indigenous or minority groups may have more input on all ministry decisions as opposed to

[62] When scholars, such as Lijphart, argue for the proportional distribution of government ministries they tend to assume a parliamentary system of government, which is further removed from the Ecuadorian case. As Power (2010) argues, design scholars tend to assume that a presidential system will all have cabinet members from the president's party since the U.S. is often used as the example case study. However, Power notes the Latin American presidents, like prime ministers, often build coalition cabinets. See also Neto 2006.

simply those ministries controlled by members of their "group." Or put another way, does the old model of appointing ministers/cabinet positions, whereby the president chooses the cabinet members and the legislative branch approves them, really grant citizens enough oversight into the workings of government ministries? Given how much power government ministries (like the Ministry of Education) have on issues that may affect indigenous or other minority groups, this may be a fruitful area of research for future scholars of constitutional design.

Ultimately, the solution to the above questions may vary by country or region depending on the specific issues faced by each indigenous group. In the case of EIB in Latin America, however, part of the solution may lie in granting civil society more access to the decision making process within the Ministry of Education. As Gustafson (2014) argues in his survey of education in the Andes, EIB projects are most successful when they harness the energy of indigenous SMOs and international NGOs (75). Therefore, making the Ministry of Education more accountable to civil society may both provide more oversight to the creation of EIB policy and energize international donor and local indigenous SMOs, who are vital to the process of carrying out EIB. While much of the civil society oversight of government ministries may have to ultimately be worked out in secondary law, there are a couple of possibilities for change at the constitutional level as well. One option may be to require that certain government ministries that have the most impact on indigenous or minority groups (such as the Ministry of Education, Ministry of Culture, or the Ministry of Agriculture) consult with canton or provincial level governments when crafting nation-wide policies. If an accompanying decentralization strategy energizes indigenous organizations and encourages investment by donor organizations, then the Education Ministry (for example) may be able to gain indigenous SMO and international NGO support and input for its policies, by working more closely with local governments. A second option may be to require more cooperation between select government ministries and the

national-level Citizen's Participation Branch. If the Citizen's Participation Branch were reformed to be more representative of civil society (as discussed in Chapter 5) then granting the Citizen's Participation Branch some oversight of select ministries may make those ministries more accountable to civil society leaders. This oversight could take several forms: the Citizen's Participation Branch could be involved in appointing or approving appointments for certain cabinet posts, the CPCCS could help formulate certain ministry policies, and/or the council could have some control or veto power over ministry spending. Ultimately, the issue of bilingual education demonstrates the need for scholars of constitutional design to consider how the needs of indigenous or minority communities may impact the three traditional branches of government.

Conclusion

Interculturalism differs from the accommodation/integration paradigm in the design literature in that one of interculturalism's primary goals is the recognition of how indigenous culture has and can continue to shape mainstream Ecuadorian society. Because of this, while the constitutional design literature focuses largely on whether or not cultural difference should be accommodated in government institutions, interculturalism focuses primarily on how the constitution can be used to reshape national identity and change how both indigenous and non-indigenous Ecuadorians think of themselves. While some of interculturalism's design implications are similar to those of consociationalism (namely government decentralization and changes to the cabinet), the ways in which these changes are implemented are still different. For example, while consociational models would indicate that cabinet positions should be divided proportionally along ethno-cultural lines, the division of intercultural and bilingual education into a separate education ministry did not lead to the types of intercultural education

reforms indigenous activists have called for. In addition, decentralization efforts are directed at giving indigenous peoples (and non-indigenous people) more control over local decision making, rather than creating regional power centers for specific ethnic groups (as is the case in consociational models).

As mentioned in Chapter 2, despite the fact that plurinationalism has focused on bringing indigenous culture into mainstream governing philosophies (not only through interculturalism, but through the rights of nature and sumak kawsay, as well), the ideals of interculturalism were adopted by a constitutional assembly that was largely made up of delegates who did not identify as indigenous. One of the reasons for this wide-spread acceptance of the indigenous platform was that indigenous goals echoed President Correa's call for a citizen's revolution to throw off the shackles of neoliberal economics, which he generally blamed on the west. In other words, one way of reading the political situation in Ecuador is that Ecuadorians were looking for a way to construct a post-colonial national identity, and indigenous cosmology provided them with the cultural resources to construct one. In this sense, indigenous identity movements may be very different from those cases of democracy in divided societies typically studied by design scholars. Namely, while majorities may not be interested in adopting certain elements of the worldviews of national minorities, they may be interested in adopting certain elements of indigenous cosmology as a way to escape their own colonial past. For example, in his book *Taiwan and Chinese Nationalism*, Christopher Hughes (1997) notes that despite the fact that indigenous people only represent roughly 2% of the population of Taiwan, indigenous empowerment movements in the early 1990s gained the support of both political parties. Hughes argues that one of the reasons for this broad-based support was that in recognizing the plural nature of Taiwanese ethnicity, Taiwanese were able to begin to decouple Chinese and Taiwanese ethnicity. The Ecuadorian case then suggests that design scholars should

consider indigenous empowerment movements (particularly those emerging in post-colonial societies) as a different type of case than other types of national minorities. In this sense, the Ecuadorian phenomena of interculturalism also highlights the importance of studying indigenous empowerment movements outside of the settler societies of Canada, the United States, and Australia, given that those societies do not have the same post-colonial dynamic.

In the end, interculturalism raises future research questions for constitutional designers. Namely, under which conditions might interculturalism be a more useful paradigm for thinking about democracy in diverse societies than the accommodation/integration scale? Is interculturalism's idea of bringing indigenous cosmology into the mainstream only possible in countries like Ecuador (with large indigenous populations), or is it applicable in countries like Taiwan (where the indigenous population is small but mainstream society is looking for a way to decolonize)? If the latter is true, then the lessons of the Ecuadorian case may be more applicable to countries in the global south with active indigenous communities than the lessons drawn from the study of indigenous communities in settler states. In addition, are national minorities granted different constitutional concessions in countries that also have an active indigenous population? In other words, how relevant is the accommodation/integration paradigm in a country with both an active indigenous population and vocal national minority groups? In addition, the design literature also often overlooks countries with non-violent national minority groups, which raises the question: is interculturalism or the accommodation/integration paradigm more applicable in situations with largely non-violent national minorities, or do those types of cases require designers to develop a third paradigm for studying democracy in plural societies?

Finally, in expanding the universe of cases that constitutional design scholars consider, the Ecuadorian case highlights the fact that those constructing constitutions in plural societies need to ask more than simply: how can constitutions in diverse societies create stability? They also need to consider how constitutions can address the marginalization of disadvantaged groups, or how those constitutions can (and if they should) construct a national identity built on plurality.

Chapter 4

Territorial Autonomy, Indigenous Justice, and Free Prior Informed Consent

When examining how to structure minority or indigenous rights, there are two different questions that designers should ask. First, how can national and/or mainstream government institutions be made more accommodating to indigenous groups? And second, how can minority groups claim certain group-specific rights and/or how can we bolster minority autonomy claims and cultural institutions?[63] As mentioned in the previous chapter, interculturalism, as well as the accommodation/integration literature, tends to focus on the first question. Policies such as alternative voting or power sharing arrangements or the adoption of a national intercultural education curriculum, are all centered around how mainstream governing institutions can be made more accountable to minority/indigenous groups. This chapter, however, focuses on the second question: how can designers bolster institutions aimed at minority autonomy and culture? As mentioned in Chapter 3, the constitutional design literature is largely silent on this issue, in part because its primary focus is on maintaining stability among competing national minority groups. However, while interculturalism makes up an important part of the plurinationalist philosophy, the paradigm also has an indigenous rights component. In particular, the focus of CONAIE's platform was on three interrelated rights: territorial autonomy, indigenous justice, and free prior informed consent (FPIC). However, while CONAIE's platform calls for the recognition of certain group rights, it also recognizes the importance of a strong state and new institutions in upholding and enforcing these rights. In this light, CONAIE's platform contrasts sharply with accommodationist end of the spectrum in constitutional design,

[63] Thanks to Susan Williams for this insight.

which often tends to focus on the empowerment of minority groups at the potential expense of state unity.

Collective Rights in Ecuador

While each of the three collective rights discussed below is an important element of CONAIE's platform, there is also a sense that the very act of granting indigenous groups collective rights is, in and of itself, significant. For example, Monica Chuji (2008), one of the indigenous assembly members in 2008, states that "the pluractional state is a new form of social contract" that recognizes indigenous pueblos and nationalities as the subjects of rights (3). This form of collective recognition is seen as challenging both the racist foundations of the Ecuadorian state and society and the liberal focus on the atomized modern individual. As the assembly woman notes, recognizing indigenous communities as the subject of rights would be the ultimate repudiation of the country's founding constitution of 1830, which refused to recognize indigenous people as citizens on the basis of education, profession, and property ownership requirements. Therefore, for Chuji (2008) and others, the very act of granting collective rights, regardless of the content of those rights, is a vital step in refounding the state in a more pluralistic image. However, despite the symbolic importance of group rights, CONAIE is clear that collective rights are important only in the larger context of the other reforms mentioned in this dissertation. In other words, collective rights, without the reforms to society suggested by interculturalism or the economic changes rendered by sumak kawsay, will not be sufficient to change indigenous peoples' place within the state or society. The fact that the inclusion of collective rights in the constitution is not sufficient to meet the demands of plurinationalism is best illustrated by CONAIE's response to the 1998 constitution.

Group rights for indigenous peoples first appeared in the 1998 Ecuadorian constitution. Specifically, the 1998 document sets the foundations for territorial autonomy and indigenous consultation and recognizes the legitimacy of indigenous justice systems. For example, Article 84 recognizes the rights of indigenous people to "maintain, develop and strengthen their identity and cultural, linguistic, social, political and economic traditions." And in so doing, indigenous peoples are granted the rights to "maintain possession of their ancestral lands," to participate in the management of "renewable resources" on their lands, and to protect sacred sights on their territories, among others. Furthermore, Article 88 states that indigenous communities should be consulted prior to "all state decision that may affect the environment." And article 191 grants indigenous pueblos the right to exercise indigenous justice in order to "resolve internal conflicts in conformity with their customs" as long as these rulings do not contradict the laws and constitution of Ecuador. However, despite the fact that the 1998 constitution allows for many of the same indigenous rights as the 2008 constitution, COANIE rejected the 1998 constitution and began to call for a new constitutional convention before the ink was even dry on the document. They argued that although the 1998 constitution recognized indigenous rights, it did so in a document that also recognized neoliberal economic models and a liberal concept of the rational atomized individual (CONAIE 2009, 108). In short, CONAIE protested against the 1998 constitution because it seemed to represent a liberal constitution with concessions to indigenous rights groups and civil society, rather than a reevaluation of man's relationships with others, his community, and his environment.[64]

[64] Perhaps the most notable difference between the 1998 and 2008 constitutions is that the 1998 document never mentions the phrases "buen vivir" or sumak kawsay. As discussed in the following chapter, the 2008 constitution uses the indigenous concept of sumak kawsay to construct a government which prioritizes alternative-development models, whereas, the 1998 constitution prioritizes neoliberal economic goals. For example, Article 243 of the 1998 constitution states that the primary objectives of the economy will be, "socially equitable, regionally balanced, environmentally sustainable and

Therefore, although CONAIE does call for group-differentiated rights, it would be a mistake to view plurinationalism as merely an indigenous rights paradigm. Instead, plurinationalism focuses on expanding indigenous rights within the context of a state that has the autonomy, institutions, and political will to enforce these rights. And the fact that plurinationalism seeks the recognition of group rights in the context of a new Ecuadorian state has implications for design scholars, in terms of which rights should be offered and how they should be structured. In this chapter then, I will examine the three most important rights in CONAIE's platform (territorial autonomy, indigenous justice, and free prior and informed consent), evaluate how they have been included in the 2008 constitution, and demonstrate what implications the rights have for constitutional designers. I will then examine how the rights CONAIE lobbied for differ from the rights discussed by constitutional design scholars who study the accommodation of minority groups, and I will ask what these differences mean for the future research in constitutional design.

Territorial Autonomy

As part of their platform for constitutional change, CONAIE argued for increased indigenous control over governance and resources in their traditional territories. However, while CONAIE called for greater territorial autonomy, the organization also made it clear that

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democratically participative development," "the preservation of macroeconomic balances, and sufficient and sustained growth," "the increase and diversification of production oriented to goods and services…that meet the needs of the domestic market," and "the competitive and diversified participation of Ecuadorian production on the international market." Enrique Ayala Mora, National Historian and participant in the 1998 convention argues that the 1998 Assembly dealt with duel influences from both the right and the left, and the tensions between the two camps can be seen in the final document. For while the constitution has a more leftists interpretation of human rights, it has a more right-leaning interpretation of economics and state organization. (Ayala 2007, 96).

indigenous communities were not seeking to create a nation within a nation. For example, the proposal put forward by CONAIE at the constitutional assembly states that:

> Plurinationalism will strengthen the new state by consolidating *unity in diversity* and thereby *destroying racism and regionalism*. Plurinationalism promotes social and political equality, economic justice, interculturalism for all of society, and the right of the nationalities and pueblos to control and govern their own territory *under the unitary state*, on equal terms as the other sectors of society (emphasis added).

This statement is indicative of CONAIE's position with regards to indigenous autonomy. On the one hand, the organization argues that indigenous peoples should have the right to govern their own territory, but, on the other hand, they are careful to mention that these indigenous territories would be part of a united Ecuadorian state. Interviewees also frequently echoed this idea that plurinationalism meant "unity in diversity."[65]

In his article "Manipulating Cartographies," Bret Gustafson explains the tension between plurinationalism's goals of both granting indigenous peoples more local autonomy and remaking the Ecuadorian state itself in a more indigenous image. Gustafson argues that in both Bolivia and Ecuador indigenous movements' original call for greater territorial autonomy was appropriated by neoliberal elites as an attempt to weaken state power, allow for greater privatization of state resources, and create more friendly policies/conditions for extractive industries at the local level. And indigenous elites became aware that, while decentralization could open new spaces for indigenous political activity, it could also leave indigenous communities more open to market forces.[66] Gustafson argues that by the 1990s both nation-

[65] Personal interview with indigenous Assembly Member, 5/22/12 (10); Personal interview with AP Assembly Member, 7/03/2012 (18); Personal interview with indigenous member of TCE, 7/11/2012 (22); Personal interview with indigenous activist, 10/13/2012 (59); Personal interview with CONAIE representative, 10/30/2012 (63).

[66] Both Gustafson (2009) and Eaton (2011) also note that, as indigenous movements have become more focused on strengthening the nation state, conservative elites in both Bolivia and Ecuador have taken up

building and ethno-nationalism had begun to be delegitimized as governing philosophies, and plurinationalism evolved to fill the conceptual void. Therefore, Gustafson contends that while plurinationalism in both countries still demands a measure of indigenous autonomy it also calls for a state that is powerful enough to control business interests. In this sense, Gustafson argues that, for indigenous peoples, the conception of the term "autonomy" has evolved to include not only control over ancestral territories but the power to influence national policy and identity, as well. In addition, Gustafson argues that indigenous peoples in their fights against the oil, gas and, mining industries have, somewhat paradoxically, come to view themselves as the guardians of national unity and state sovereignty. In short, in their fight against extractive industries and high levels of inequality, indigenous groups have built networks with NGOs and peasant organizations to strengthen the power of the state vis-à-vis international industries and organizations and increase its redistributive capabilities.[67] Ultimately, Gustafson concludes that "plurinationalism speaks of robust redistributive social rights rooted in a strong state alongside equally robust indigenous rights." He continues, "The question is whether plurinationalism can reconcile both indigenous rights and strong state sovereignty, while avoiding new exclusions (and violences) associated with territorializing models of ethno-cultural difference and with hypernationalist states" (991-992).[68]

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the call for regional autonomy as a means of loosening regulation and attracting transnational businesses to their regions. For more information, see Eaton's study on the conservative autonomy movements in the provinces of Santa Cruz (Bolivia) and Guayas (Ecuador).

[67] See also Sawyer 2004.

[68] Aymaran intellectual Fernandez Osco (2010) makes a similar point about this expanded definition of autonomy in his essay *Ayllu: Decolonial Critical Thinking and (An)other Autonomy*. He argues that, for indigenous peoples, autonomy is based on the concept of "horizontal solidarity" with both non-indigenous individuals and nature (28). In this sense, autonomy is as much about weaving a new national

In keeping with Gustafson's analysis, CONAIE's proposal for constitutional change seems to argue for a mixed, sometimes contradictory, approach to indigenous autonomy. On the one hand, the proposal argues that "the plurinational state guarantees the existence of territorial community governments for the management and protection of their biodiversity and natural resources." (11) Here, as in other points of the proposal, CONAIE argues that autonomous indigenous territories should be given control over natural resources within their territories as they would be the best protectors of the environment. However, at the beginning of their proposal CONAIE enumerates the "general principles" of its platform, the second of which is "the nationalization and not the privatization of biodiversity and natural resources" (5). The document continues:

> The state should recover its delegated role in the management of strategic areas and its imprescriptible sovereignty over the economy and natural resources, and it should protect and guarantee societal control over the public sector and public businesses.

In this instance CONAIE seems to be responding to the economic situation mentioned by both Sawyer and Gustafson. In short, CONAIE is arguing against government policies which allowed for the privatization of the oil industry and greater control of resource extraction by foreign companies. Here, CONAIE seems to be willing to cede some of its resource rights if the government will take a larger role in resource management and will guarantee that natural resources will be used for the benefit of all. In this same light, CONAIE's proposal sends mixed messages regarding communal and participatory democracy. For example, CONAIE argues that territorial autonomy would open spaces for indigenous peoples to use their own "customs for the election of their authorities," which do not "rely on secret elections" but on communal

identity as it is about territorial rights. For a broader discussion of the different ways autonomy is discussed by indigenous people in the region, see also Delgado 2015.

participation (12). However, while CONAIE argues that communal democracy would benefit indigenous communities, the proposal also suggests that the participatory practices of indigenous groups could also serve as a model for non-indigenous communities of how to address "the radical crisis of democracy and representation" that currently plagues Ecuador (12-13). Here, CONAIE's discussion of communal democracy echoes the organization's writings on sumak kawsay and the rights of nature. While these are all concepts stemming from indigenous cosmology, CONAIE argues, they could provide the intellectual resources to reform the Ecuadorian state for the benefit of all.

Ultimately, Gustafson's work and COANIE's own writings on territorial autonomy suggest that the concept is more nuanced than is acknowledged by the indigenous rights or constitutional design literatures. In some sense the seeming contradictions in the way that indigenous groups in Ecuador and Bolivia discuss autonomy may point to unresolved tensions within the indigenous movement itself. A common question running throughout discussions regarding various aspects of plurinationalism is how much concepts like sumak kawsay or interculturalism are meant to apply to changes within the indigenous community, and how much they are meant to change the way the state itself approaches issues such as economic development or cultural education. In this same light, it is ultimately unclear how much territorial autonomy is about preserving indigenous culture and to what extent it is about protecting Ecuadorians in general from a weakened state and predatory extractive industries.

However, it is clear from these discussions that the issues raised by plurinationalism suggest that indigenous activists as well as political theory and constitutional design scholars should rearticulate and reconsider what is meant by the term "autonomy." Additionally, while plurinationalism's treatment of territorial autonomy contains possible contradictions, it is

different from the version of territorial autonomy discussed in the indigenous rights and constitutional design literature. As mentioned in Chapter 3, the literature on divided societies and constitutional design describes decentralization and territorial autonomy as mechanisms to "accommodate" group difference by in some way separating a minority group from the affairs of the larger state. In this light, autonomy arrangements, such as the one in Quebec, are seen as diminishing the central government's power over the region and weakening the power of the state. However, as mentioned above, plurinationalism demands a version of territorially autonomy that will open spaces for indigenous culture in a state that is still strong enough to both be capable of dealing with the threat posed by foreign extractive industries and provide redistribution of resources. In short, given the conflicts between indigenous communities and the oil and mining industries, strengthening indigenous autonomy and the indigenous communities' ability to manage their natural resources is dependent on strengthening the autonomy of the state vis-à-vis the international community. Plurinationalism thus raises the question for constitutional designers: is it possible to both strengthen territorial autonomy for indigenous and minority groups while also strengthening the power of the state?

Along these lines, the Ecuadorian constitution allows for the creation of indigenous autonomous territories within existing administrative boundaries. Here, Article 257 of the Constitution states that:

> Within the framework of political-administrative organization, indigenous or Afro-Ecuadorian territorial districts may be formed. These shall have jurisdiction over the respective autonomous territorial government and shall be governed by the principles of interculturalism and plurinationalism and in accordance with collective rights.

The article goes on to state that any level of government organization (parish, canton, or province), can become an indigenous or Afro-Ecuadorian district (the new indigenous autonomous areas would be called Circumscripciones Territoriales Indigenas, abbreviated as

CTI) if two thirds of the voters in that area vote for the change. For example, if an entire province voted by a two-thirds vote to become a CTI, then that province would then be an autonomous indigenous province. Notably, the Bolivian constitution outlines a similar path to creating indigenous autonomous districts, and to date 11 Bolivian municipalities have become autonomous indigenous districts (Gonzalez 2015).

The advantage to this type of autonomy arrangement is that it already fits within the current administrative divisions of the state and could, therefore, make coordination between indigenous autonomous areas much easier than if autonomous territories were treated as another type of political unit entirely (ex. a reservation for indigenous tribes). Indigenous CTIs could be granted the same funding, rights, and power as other parishes, while maintaining the right to practice indigenous justice or communal democracy within that territory. In addition, bringing CTIs into the existing administrative system may make indigenous territorial districts less of a threat to the power and unity of the state. In other words, this might be the best mechanism for ensuring the type of "unity in diversity" that indigenous groups advocate. Furthermore, allowing parish or canton level votes on whether or not an area wishes to become a CTI gives more flexibility to indigenous communities. Some communities that are primarily indigenous may not be interested in territorial autonomy, and this model gives them the ability to "opt out" without hindering other communities' chances at autonomy. In Bolivia, some municipalities which are overwhelmingly indigenous have, in fact, voted against autonomy (Tockman and Cameron 2014). Furthermore, this model allows for a recognition of the potential differences between indigenous communities. For example, Quechua communities that live in the Andes may have very different customs than those living in the Amazon, and this model sidesteps the question of whose traditions are more "authentic."

However, while interviewees seemed generally satisfied with the idea of parishes, cantons, or provinces, voting to become a CTI, they also had a major critique of the model, centered on the way in which existing administrative boundary lines are drawn. At best, original territorial boundaries were drawn without any regard for the traditional territories of indigenous peoples; at worst, they were drawn to divide and disempower certain indigenous groups (Sawyer 2004). Because of this, the Waorani (an Amazonian indigenous group) are spread out over three provinces, four cantons, and six parishes. And while there may be enough Waorani to fill one canton, and while their communities may even be relatively close together geographically, because of the way the boundary lines are drawn, it would be difficult for the Waorani to gain a two-thirds majority vote in any of the four cantons that they are spread across (Pachamama 2010, 31). Due to the way administrative boundaries in Ecuador have been drawn, no territory has succeeded in becoming a CTI since the 2008 constitution, despite the heavy concentration of indigenous peoples in certain parts of the Andes and Amazon. In order for the government to really support the idea of CTI's it would also have to support a large-scale remapping of jurisdictional boundaries in consultation with indigenous groups, one which is not provided for in the new constitution.

Indigenous Justice

One of the more controversial aspects of indigenous rights in Ecuador is CONAIE's struggle to have indigenous justice systems recognized as legitimate. While each community's system of indigenous justice necessarily varies slightly, Tiban and Ilaquiche (2008), two indigenous rights activists, give a brief outline of the process in their book, *Indigenous Justice in the Political Constitution of Ecuador*. In their work, they explain that when a crime is suspected in a community, it is reported to local indigenous authorities, who then investigate the conflict. The means of choosing the indigenous authorities themselves is unclear, but they are generally

members of good standing in the community. After the investigation, the case is presented before an assembly of the community, where indigenous leaders, as well as both parties, are called upon to present their side of the case.[69] Finally, the community decides whether or not the party is guilty, as well as an apt punishment to be carried out by indigenous leaders. Tiban and Ilaquiche stress that the verdict arrived at by the community should be focused upon upholding communal peace, tranquility, and harmony, rather than being geared solely for punishment or revenge (which, they argue, is too often the goal of the ordinary justice system). The differing goals of the two justice systems often lead to different types of punishment. For example, in an indigenous community if one man kills another man who has a wife and family, the murderer must help support his victim's family for the rest of his life. Activists argue that this type of punishment is better for the community, given that if the murderer simply spent life in prison, the victim's family would in no way benefit. In addition, perpetrators are often forced to undergo a ritual cleansing ceremony which frequently involves corporal punishment.[70]

Given the mainstream acceptance of fairly transformative concepts such as sumak kawsay or the rights of nature, I was surprised that indigenous justice seemed to offer such a point of contention between indigenous and non-indigenous interviewees. Many mainstream political actors remain wary of indigenous justice. Some politicians object on the grounds that they believe that indigenous justice systems are too harsh. They view corporal punishment and ritual cleansing as cruel and unusual, and they object that some communities, particularly the

[69] Tiban and Ilaquiche stress that that individuals represent themselves and that lawyers are not a part of this process. This is significant for Tiban and Ilaquiche, who argue that too often in Ecuador justice goes to the person able to afford the best lawyer.

[70] Personal interview with indigenous Assembly Member, 5/22/12 (10).

Shuar, support the death penalty.[71] Ironically, other mainstream actors argue that indigenous justice is not harsh enough; public apologies and ritual cleansing ceremonies seem like a slap on wrist, and they note that murderers and rapists are not locked in prison but are free to live in the community even after perpetrating a violent crime.[72] In particular, critics contend that it is already difficult for women who are victims of domestic violence or sexual abuse to seek a legal remedy and that turning these disputes over to the community will only make women less likely to come forward.[73]

While concerns about violence against women or the violation of human rights by indigenous justice systems are valid, these critiques seem to stem as much from stereotypes regarding indigenous peoples as real political concerns. For example, while the Shuar's traditional use of the death penalty was mentioned as an example of the barbarity of indigenous justice, indigenous peoples have accepted the state's ban on the death penalty, and it is no longer used in indigenous justice proceedings.[74] However, an overblown fear of the Shuar using the death penalty is still powerful political rhetoric, as it invokes the image of a "backward" Amazonian "savage." In this same light, the idea that indigenous justice offers little more than a slap on the wrist to perpetrators and therefore shouldn't be used to prosecute serious crimes, echoes older racial tropes of the "lazy," "unaccountable" Indian. Notably, the question of indigenous justice was the issue on which indigenous interviewees seems to be most defensive,

[71] Personal interview with AP political advisor, 9/27/2012 (50).

[72] Personal interview with AP Assembly Member, 9/13/12 (40).

[73] Personal interview with AP Assembly Member, 7/6/2012 (19).

[74] In addition, Tiban and Ilaquiche (2008), two of the most vocal advocates for indigenous justice, make it clear that indigenous justice should not include or endorse the death penalty. Personal interview with AP political advisor, 9/27/2012 (50); Personal interview with indigenous Assembly Member, 7/12/2012 (24).

with one interviewee insisting (unprompted) that indigenous justice was not just a made up concept.[75] Another noted that the largest barrier to its implementation was racial stereotypes by non-indigenous peoples.[76]

Ultimately, there is an extensive literature in both political theory and comparative politics that raises questions pertaining to indigenous justice and indigenous autonomy. For example, as mentioned above, indigenous justice raises concerns about the rights of the minority within the minority community (non-indigenous peoples living on indigenous territories) as well as real questions about the legitimacy of a democratic society which guarantees group rights to only a segment of the population. I examine the larger question of indigenous group rights in Chapter 1 and Chapter 7, and I will therefore largely set aside these questions for those chapters. However, the discussion surrounding indigenous justice in Ecuador does offer unique insight into two important issues to consider when thinking about group rights: 1) the rights of women in indigenous communities and 2) the relationship between indigenous communities and the state. I will therefore examine these issues briefly below.

First, regardless of the theoretical concerns surrounding indigenous justice, the question of whether or not designers should incorporate legal pluralism into a national constitution may, in part, come down to a practical question about the capacity of the state and ordinary justice systems. In a study of indigenous justice across Latin America, Julio Faundez argues that indigenous justice is not only a means of preserving indigenous cultural tradition but also a way "to compensate for the shortcomings of prevailing state institutions" (94). In particular, he notes that in many parts of Latin America rural indigenous and peasant populations do not have a

[75] Personal interview with former member of Pachakutik, 9/8/2012 (44).

[76] Personal interview with indigenous Assembly Member, 7/12/2012 (24).

reliable means of accessing ordinary state justice for several reasons. First, ordinary justice proceedings may not be in their first language. Second, courts may be several days' journey from the local populations. Third, there is a shortage of qualified and/or affordable lawyers, particularly public defendants. And fourth, there may be a shortage of police to guarantee that perpetrators of crimes against indigenous peoples are prosecuted. In addition to these logistical difficulties, many indigenous peoples may not trust ordinary justice (since for centuries it was used to oppress indigenous groups) and may therefore not cooperate with authorities of ordinary justice. Faundez, therefore, contends that indigenous or peasant justice systems may be able to make up for gaps in state capacity by, at the very least, handling civil disputes, cases involving family law, and minor criminal offenses. And without recognition of indigenous and/or community justice systems, Faundez contends that many of these types of cases would ultimately go unadjudicated, causing both social unrest and higher crime rates. For example, Faundez studies the case of communities of cattle ranchers in Mexico that are generally too far removed from major cities to be effectively under any state judicial/legal system, and notes that the strengthening of community justice systems was able to reduce local crime by 92%. [77] Indigenous supporters of traditional justice systems whom I interviewed confirmed Faundez's overarching assessment of indigenous justice in Latin America. Like Faundez, they argued that whether or not indigenous justice was given legal recognition in the 2008 constitution, it would

[77] In a study on Mozambique, Sousa Santos notes that many African countries are in a similar situation to the one Faundez describes. He notes that in Mozambique, for example, many areas have current legal structures that are operating on top of both colonial and indigenous legal structures, and that certain areas of law, particularly family law, are still largely informally controlled by traditional justice systems. Sousa Santos ultimately argues that instead of ignoring traditional justice systems, legal scholars need to pay more attention to the way these legal hybrids have shaped the rule of law in practice, as well as how they can be harnessed to provide better access to justice in the future.

have been continued to be practiced in remote communities in the Amazon and the Andes because of a lack of state capacity.[78]

Interrelatedly, a UN official whom I interviewed in Ecuador argued that those who criticize indigenous justice should also consider the flaws of ordinary justice. For example, he noted that many people criticize the way indigenous justice handles perpetrators of violent crimes (who are physically punished for their actions) by arguing that this type of punishment is a violation of human rights. However, he argued that it is important for critics to keep in mind that any type of punishment inherently involves a restriction of the perpetrator's rights, including long prison sentences. In addition, the UN official was part of a team that prepared a report and policy recommendations for the ordinary justice system (along with FPIC, cultural rights, and economic inequality) for assembly members at the constitutional convention. He stated that in the process of researching the report they found that Ecuadorian judges were unproductive (they decided very few cases), were under qualified, and were extremely inconsistent in sentencing. In his estimation about 1 in 100 cases the group examined were handled properly from start to finish. At the end of our discussion, he scoffed and stated, "And this is the system that is supposed to be better than indigenous justice."[79] Other interviewees expressed similar sentiments to the UN representative. They argued that in the ordinary justice system the individual with the most money (either to pay the best lawyer or bribe the right

[78] Personal interview with high ranking indigenous official, 7/11/2012 (22); Personal interview with indigenous Assembly Member, 7/12/2012 (24); Personal interview with indigenous activist and lawyer, 9/5/2012 (37).

[79] Personal interview with UN advisor, 9/26/2012 (49).

judge) usually wins his or her case. And in light of this type of endemic corruption, indigenous justice offers a fairer process for defendants.[80]

This insight into the relationship between the ordinary and indigenous justice systems is notable because it is often ignored in the larger political theory debates regarding indigenous group rights or autonomy. As mentioned in Chapters 1 and 7, the political theory literature often discusses indigenous rights in the context of the United States, Canada, and Australia, and therefore assumes a relatively stable, consistent, and far-reaching justice system. This is not to say that indigenous concerns regarding long prison sentences, cruel punishments (such as solitary confinement), and the availability of affordable lawyers would not also bear out in the cases, but the issues of a lack of state capacity, the corruption of judges, and the question of how to incorporate a de facto hybrid judicial regime, would be less of a concern in these cases.

In this same light, the question of women's rights under an indigenous justice system is more complicated than Ecuadorian critics of indigenous justice acknowledge. As mentioned above, one of the reasons mainstream politicians give for not supporting indigenous justice is that they are concerned that women will be treated unfairly under community justice proceedings. On the one hand, these concerns are valid. Because indigenous justice often involves judgment by the community or elders, women may be afraid to come forward to report things like domestic violence or rape. And even if they do report a violent act such as rape and the rapist is punished, the punishment would not involve jail time and may not involve exile from the community, so women may have to continue to face their tormenter after the trial. On

[80] Personal interview with indigenous Assembly member, 5/22/12 (10); Personal interview with representative of FEINE, 6/19/12 (15); Personal interview with indigenous Assembly Member, 7/12/2012 (24).

the other hand, while there is a stereotype that indigenous communities have higher rates of violence against women, in reality, violence against women is roughly equal across groups in Ecuador. In addition, violence against women is also underreported and rarely punished in the ordinary justice system as well.[81]

The female indigenous activists that I interviewed did not seem troubled by the adoption of indigenous justice in the communities, and many supported it. They all acknowledge that violence against women was a serious problem for both indigenous and non-indigenous communities. However, the prevailing sentiment from interviewees was that it would be easier for female indigenous activist to work to change the community from within than it would be for them to reform the ordinary justice system and Ecuadorian society at large.[82] One interviewee also contended that the very argument that indigenous justice should not be implemented because it is sexist is destructive. She stated that this type of argument pits women against men and makes gender discrimination seem like a women's issue. Instead she argued that sexism is a collective problem and therefore needs to be addressed organically from within the community.[83] In addition, another female interviewee argued that the very process of legalizing indigenous justice encouraged discussions about how indigenous justice could be more inclusive of female community members and that communal norms have changed over

[81] Joint personal interview with representatives from two NGOs focused on women's empowerment, 4/5/12 (7).

[82]Personal interview with indigenous Assembly Member, 7/12/2012 (24); Personal interview with female youth indigenous activist, 7/20/2012 (28); Personal interview with female indigenous activist, 10/13/12 (55); Personal interview with indigenous Assembly Member, 10/16/2012 (56); Personal interview with female member of CONAIE, 10/24/2012 (60).

[83] Personal interview with indigenous Assembly Member, 7/12/2012 (24).

time to be more inclusive of female participation.[84] In some sense, my interview sample was skewed: I specifically interviewed women who are national activists for the indigenous rights movement, and therefore, they may be more inclined to support indigenous justice than women who live primarily in rural communities. However, the very fact that indigenous women have national leadership roles also points to the changing gender dynamic in both indigenous and non-indigenous Ecuadorian society. Ultimately, these interviews demonstrate that critics of indigenous justice also present a false dilemma between an ordinary justice system that respects the rights of women and an indigenous justice system that does not.[85]

While the constitution does recognize the rights of indigenous communities to decide their own cases, the jurisdictional boundaries of the indigenous justice system, as well as its relationship to ordinary justice, are still not clearly established. The conditions for the indigenous justice system are laid out in Article 171 of the constitution, which states that:

> The authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories, with a guarantee for the participation of, and decision-making by, women. The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments.
>
> The State shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities. These decisions shall be subject to monitoring of

[84] Personal interview with indigenous Assembly Member, 10/16/2012 (56).

[85] Susan Williams presents a similar argument in her paper, *Democracy, Gender Equality, and Constitutional Law*. Here she argues that the multiculturalism literature often presents a false dilemma between choosing to protect culture and choosing to protect women's rights. She contends that in reality, choosing equality of rights does not generally work to make women better off, as it often causes a cultural backlash. And this approach also ignores the dynamic elements of culture and the fact that cultural practices can be changed from within. Instead she argues that the best approach may be to allow for institutions such as indigenous justice, while also supporting policies that will lead to strong minority female leadership. In this sense, Williams' argument echoes the female interviewees' statements about working to change the power dynamics of indigenous justice.

> their constitutionality. The law shall establish the mechanisms for coordination and cooperation between indigenous jurisdiction and regular jurisdiction.

Given the level of specificity with which the Ecuadorian constitution discusses concepts such as sumak kawsay or lists individual rights, it is striking that there is only one fairly unspecific article on indigenous justice. Article 171 fails to tackle some of the most difficult questions surrounding indigenous justice, such as: Who should have jurisdiction over non-indigenous peoples on indigenous territories? Should indigenous justice systems be allowed to handle more serious crimes (such as murder, rape, or drug trafficking) or should it be relegated to the treatment of family law and/or misdemeanors? And who should monitor the constitutionality of indigenous justice decisions, and what criterion should these monitors use to determine the legality of the decisions of indigenous tribunals? While the constitution cannot possibly outline all of the contingencies of the relationship between the indigenous and ordinary justice systems, the lack of specificity in the document has led to several difficulties in implementing indigenous justice in practice.

One of the difficulties in implementing indigenous justice is that countries in which it is constitutionally recognized generally include a provision that indigenous justice is still subject to the norms, laws, or constitution of the state. In the Ecuadorian case, as mentioned above, Article 171 states that: "The authorities shall apply their own standards and procedures for the settlement of internal disputes, as long as they are not contrary to the Constitution and human rights enshrined in international instruments." Although in theory this clause may seem like a good way for a constitution to allow for the practice of indigenous justice while also protecting the individual rights of community members, this type of clause often stymies indigenous communities' attempts to resolve their own disputes. For example, Faundez cites a legal case in Mexico in which a member of the Amuzgo indigenous community was charged with illegally

occupying communal lands. The defendant was placed in detention for 12 hours during the hearings. After his release, the defendant filed a false imprisonment claim against the community in the ordinary courts. The ordinary court found in favor of the defendant (and jailed the leader of the indigenous community's assembly) arguing that the indigenous community's detention was not in line with state laws. In short, the difficulty is that the indigenous community was punished, not for violating anyone's human rights, but because its prescribed method of handling a conflict was not in line with how state laws would have handled a similar case. Therefore, while it is important that indigenous justice respect basic human rights norms, state constitutions that make vague pronouncements mandating that indigenous justice follow state, international, or human rights law can essentially end up criminalizing actions by indigenous justice systems (ibid. 100).

One of the primary ways constitutional designers could avoid inadvertently criminalizing indigenous justice may be to include more specifics about the role and jurisdiction of indigenous justice systems in the constitution itself. When constitutions simply leave the functioning of indigenous justice systems to be worked out later in statutory law, legislators too often fail to pass laws regulating indigenous justice, and already existing indigenous justice systems simply continue working outside of the law (Hammond 2011). Faundez argues that the country in which the coordination between indigenous and ordinary justice has been the most successful is Colombia, where the Constitutional Court has made a serious effort to carve out a defined space for indigenous justice. The Colombian constitution includes a fairly standard provision regarding indigenous justice. Article 246 states:

> The authorities of the indigenous [Indian] peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the

> Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system.

However, the Colombian Constitutional Court ruled that rather than being required to uphold every single Colombian law, indigenous justice is only required to uphold "fundamental rights" such as those rights that, "protect life, prohibit torture, prohibit slavery and require compliance with minimum standards of due process." Faundez argues that the court's establishment of a list of fundamental rights is a way of taking the claims of indigenous justice seriously while guaranteeing that basic human rights are protected. However, since the Colombian court is unique in its treatment of indigenous justice, future constitutions may benefit by establishing a list of basic rights that both justice systems are required to respect at the outset. In a constitution like Ecuador's, which has 444 Articles, requiring that indigenous justice respect all rights listed in the constitution might unfairly restrict indigenous justice systems. Whereas, the act of compiling a list of rights that must be respect by both justice systems could ensure that all parties better understand what is expected from each justice system at the outset.

In this same light, the constitution (rather than statutory law) may be a better place to work out some of the specifics of indigenous jurisdiction. For example, one of the primary difficulties of implementing indigenous justice in Ecuador is that indigenous and non-indigenous peoples have different ideas regarding the types of crimes indigenous justice should prosecute. Non-indigenous peoples read Article 171 as protecting cultural rights and, therefore, see indigenous justice as a means of adjudicating disputes between community members or resolving issues of family law. On the other hand, indigenous peoples argue that indigenous justice traditionally dealt with all crimes, and therefore crimes such as rape or murder should also be adjudicated through community courts. These differing interpretations of Article 171 came to a head in the *La Chocha* murder case. In 2010 six indigenous men were convicted of

murder or as accomplices to murder of another indigenous man in the *La Chocha* community. The defendants were subjected to corporal punishment, ritualistic cleansing, and fines made payable to the victim's family. Matters became complicated when the television networks broadcast the event, and the Attorney General attempted to enter the town and "rescue" the defendants from corporal punishment. In addition, the government refused to accept the validly of the trial and retried the men in the ordinary courts and sentenced them to jail. The case eventually made its way to the Constitutional Court, which ruled that indigenous justice will no longer be able to handle cases of manslaughter or murder. The fact that the constitution had not established clearer jurisdictional boundaries not only led to a dispute between indigenous and non-indigenous communities but also led the perpetrators to be punished and sentenced twice. In addition, the question of whether or not indigenous communities should be allowed to prosecute murder was decided, not by statutory law (which had not been passed) nor by negotiations between indigenous and non-indigenous actors at the constitutional convention, but by the Constitutional Court.

Tribal Consultation

In their platform for constitutional change CONAIE argued that the process of free prior informed consent (FPIC) was necessary in order for indigenous peoples to be able to "manage and conserve all of their natural and cultural patrimony" (11). CONAIE's instance on the recognition of the right to FPIC follows a global movement to have the right to FPIC recognized in international law. In her study on indigenous consultation in Bolivia, Almut Schilling-Vacaflor (2013) argues that there is a broad international consensus the process of FPIC should, at the minimum:

> (a) be carried out in good faith; (b) be based on a genuine and constant dialogue between the state and the affected communities; (c) be carried out prior to the planned measure;

> (d) involve legitimate representatives from all local communities affected; (e) be carried out in a social, linguistic, and culturally adequate way; (f) aim to achieve the consent of consulted communities; and (g) recognize established agreements as binding (207).

However, despite international efforts to codify an FPIC process, there are still widespread debates regarding the advantages of consultation vs. consent, the legitimacy of traditional indigenous authorities, and the ability of the state to ensure a fair FPIC that make the incorporation of a right to FPIC in the constitution and the subsequent implementation of FPIC difficult.

One of the difficulties with the implementation of FPIC in Ecuador is that, while the 2008 constitution does allow for a measure of consultation, the exact extent of tribal consultation mandated by the document is hotly contested. For example, Article 57, Section 7 states that "Indigenous communes, communities, peoples, and nations" have the right, "to free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them…" Furthermore, the article mandates that, "if consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken." Section 17 of the same article also gives indigenous communities the right "to be consulted before the adoption of a legislative measure that might affect any of their collective rights." Assembly members, as well as members of the executive branch, have used Article 57 to argue that, while the government must consult with indigenous groups prior to taking action that would affect indigenous lands or community traditions, indigenous groups should not be given an automatic veto vote over government actions or

contracts with foreign companies. In short, free prior and informed consultation does not equal free prior consent.[86]

On the other hand, indigenous groups contend that ILO Convention 169 (of which Ecuador is a signatory) does require that indigenous groups give prior and informed consent.[87] This is a more stringent requirement than the one to prior consultation presented in Article 57. However, Article 398 of the constitution states that all actions that affect the environment also mandate consultation of the community (in this case the community could be indigenous or non-indigenous) and that, during these consultations, "the State shall take into consideration the opinion of the community on the basis of the criteria provided for by law and international human rights instruments." In addition, Article 428 states that when a law is contrary to "international human rights instruments that provide for rights that are more favorable than those enshrined in the Constitution, it shall suspend the case and refer it for consultation to the Constitutional Court." Therefore, indigenous groups argue that the constitution mandates that the government receive the consent of indigenous groups for actions taking place in their territories (particularly actions which affect the environment), given that the document requires that the more stringent criterion of international law (in this case ILO Convention 169) be used.[88]

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[86] Personal interview with Constitutional Assembly Member, 6/20/12 (16).

[87] Personal interview with indigenous activist, 6/10/12 (14).

[88] To make matters even more confusing, the standards in international law regarding consultation and consent are murky and still evolving. While indigenous activists in Ecuador argue that ILO Convention 169 mandates consent, it is not clear that it mandates that all types of negotiations meet the higher standard of consent. In actuality, Article 16 states, "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent." However, Article 15, which deals with resource rights states, "In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples..." This would imply that consent is only required in cases of relocation. However, further complicating matters, the Sarayaku community sued the Ecuadorian government, arguing that an oil exploration

In the end, both sides raise compelling arguments. Article 57 does seem to imply that only consultation is required, whereas Articles 398 and 428 seem to imply that international standards should be used.

Aside from the question of whether or not indigenous communities have the right to veto decisions regarding the use of resources on their territories, early attempts to implement FPIC have also run into questions regarding the best way to ensure that a fair consultation process takes place. For example, as Susanna Sawyer (2004) documents in extensive detail in her book *Crude Chronicles*, the process of consultation raises the question of who exactly should represent indigenous communities. In her work, she documents negotiations in the early 1990s between the oil company ARCO and indigenous groups in the Amazon. She demonstrates that ARCO manipulated the consultation process using a variety of tactics. Most notably, ARCO supported the formation of a new indigenous organization and the formation of new indigenous communities (some of which only encompassed one family unit). They then proceeded to negotiate with these organizations (ignoring longstanding indigenous social movement organizations in the region) and declared that they had gained consent from local indigenous populations.

However, even when consultation is undertaken in good faith, it is difficult to know who should represent indigenous communities. In many areas, indigenous government structures may have broken down over time, and it may not be clear who the "traditional" authorities are.

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project on Sarayaku territory violated the principles of free prior informed consent, and the Inter-American court of Human Rights found that Ecuador was in violation of international norms regarding FPIC. The court ruled that the Ecuadorian state had a duty to engage in consultation with the express goal of achieving consent. For more information on FPIC in international law, see Ward 2011. For more information on *Sarayaku v. Ecuador,* see Verbeek 2013.

And if the government or an oil company recognizes one person or organization as a "traditional" authority, it may give that person an unfair amount of external legitimacy. In addition, it is often unclear which groups should be consulted for a particular project. For example, if an oil company constructs a pipeline running through Quechua territory, should the villages along the pipeline be consulted? Or should regional Quechua organizations be consulted since the effects of the pipeline may spill over into neighboring regions? And if a largely nomadic group of Shuar often use the same part of the Amazon as the Quechua for half of the year, should they be consulted along with the Quechua? And should their opinion matter as much as the Quechua who live there year-round? Larson et al. (2015) note that in the 1990s, in the Bolivian province of Guarayos, indigenous people formed a new province-wide organization, COPANG (Central Organization of Native Guarayos Peoples) to fight construction projects that threated forest areas. The authors note that COPANG was much better at organizing an effort to change government policy than several village-level organizations lead by more "traditional" authorities would have been since many of the projects (such as the construction of a major highway) ran through several villages. However, because COPANG was a new organization it did not have the same oversight by indigenous communities as more "traditional" authorities, whose roles and procedures have been worked out overtime. In short, Larson et al. point out a difficult dilemma in deciding who represents indigenous peoples in negotiations: should indigenous peoples be limited to "traditional" power structures (assuming they still exist) that may be less effective but more legitimate to local communities, or should governments attempt to negotiate with newer, regional-level organizations that may have more bargaining power but a more distant relationship with local communities?

The question of who represents indigenous people also compounds the issue of how indigenous people should be compensated for land use. For example, Sawyer notes that, in her

study on Ecuador, ARCO often promised indigenous communities small amounts of goods, like tin roofs, school supplies, or airplane rides for the right to drill on indigenous lands. While granting these concessions cost the oil company very little, it had the potential to make an immediate difference in the lives of the community. However, there are a couple of problems with these transactions. First, impoverished indigenous communities may feel pressured to accept the offers of oil companies because community members need the proffered goods in the short term, even if in the long term the goods or money offered by the oil company will not offset medical or other expenses incurred by indigenous communities due to the environmentally destructive nature of extractive industries. And second, it is not clear who should receive the concessions. As mentioned above, organizations that "represent" indigenous communities may be the ones to demand compensation, which could create conflict if the organization is not transparent. In addition, often not all parties receive an equal amount of compensation. For example, groups that initially oppose oil contracts may not receive subsequent compensation, or nomadic groups who use the land part of the year may be left out of compensation efforts.

Finally, FPIC may cause conflict between indigenous and non-indigenous communities. As Fontana and Grugel (2016) note, advocates of FPIC often argue that indigenous peoples should be consulted about development projects because they are "uniquely vulnerable" to the damage caused by extractive industries, either because they are the most economically disadvantaged people in the region or because of the threat to their culture caused by the disruption of life in their territories (257). However, the authors argue that in many Latin American countries (the focus of their study is Bolivia) rural peasants may be as affected by economic disruption and environmental degradation as indigenous groups. They therefore ask why the social, health, or economic damage caused to peasant groups should be seen as less

important as the damage caused to indigenous groups. And if extractive industries are shown to be equally destructive to both groups, then, they ask, why should only indigenous communities be granted a right to FPIC?

Ultimately, there are several issues to be worked out in the quest to develop a fair process of FPIC, and many of them may need to be decided on a case by case basis. However, the current issues raised by FPIC do point to a few lessons for constitutional designers. First, as in the case of indigenous justice, the controversy surrounding FPIC demonstrates the difficulty of tying indigenous rights to international human rights law in the constitution. On both the issue of indigenous justice and the question of FPIC, the standards set by international human rights law can be rather murky and mandating that indigenous rights be carried out in accordance with international human rights law can create confusion, frustration, and unrealistic expectations by indigenous and non-indigenous communities. While all of the nuances of FPIC cannot be worked out at the constitutional level, the document should be clear on whether indigenous peoples have the right to consent or consultation.

The question of consent vs. consultation is not an easy one to answer. On the one hand, if indigenous peoples are given the right to consultation, then there is no guarantee that foreign companies or the government will make any concessions to indigenous peoples, since they are only mandated to *speak* to indigenous groups. The idea that foreign corporations or the state would not have to make a real effort to accommodate indigenous groups is troubling given the widespread, social, economic, and health effects of large scale development projects. On the other hand, the right to consent could essentially give indigenous groups a veto power of large scale development projects. In countries like Bolivia or Ecuador, whose economies currently rely heavily on extractive industries, this right to veto could affect the livelihoods of all Ecuadorians

or Bolivians. Without the income from extractive industries, the state would have difficulty financing many of its social programs. One solution to this dilemma may be to state that indigenous people have a right to consultation with the aim of achieving consent, and the legislature could then pass laws outlining a series of steps that the government or foreign corporations would have to go through to prove an attempt to achieve consent. However, ultimately the right to consent vs. consultation raises complex social justice questions that should be addressed in a national discussion at the outset rather than left up to the vagaries of current international law.

Second, the difficulties in the implementation of FPIC demonstrate that the right to FPIC needs to be accompanied by a corresponding strengthening of local institutions. Many of the complications in implementing FPIC have to deal with a lack of authority and capacity at the local level. First, as mentioned above, the question of who represents indigenous groups is often exacerbated by a dearth of "traditional" authorities or by the existence of relatively new organizations that lack internal legitimacy and/or oversight. And second, many of the most egregious manipulations of the consultation process by oil companies are due to a complete lack of government oversight of the process. Both of these concerns could be addressed, to some extent, by changes in government institutions as discussed in Chapters 3 and 5. For example, one solution to the lack of representation for indigenous peoples may be to strengthen local institutions, such as the citizen's participation councils discussed in Chapter 3. FPIC could then be conducted through stronger parish or canton structures. One drawback to this approach is that a more detailed delineation of what local government institutions should look like or a more detailed protocol as to who should carry out the FPIC process could have the unintended consequences of curtailing indigenous autonomy at the local level. Still, strengthening the FPIC process and local accountability may ultimately strengthen the position of indigenous

communities. In addition, creating an FPIC process that is less dependent on "traditional" authorities and more reliant on local government structures may open up spaces for non-indigenous peasant communities that are also often adversely affected by large scale development projects.

On the other side of the equation, it is also clear that an oil company such as ARCO should not be allowed to conduct FPIC negotiations without any type of government oversight. Article 57 of the 2008 constitution simply states that "consultation…must be conducted by the competent authorities," but it is not clear who the "competent authorities" may be in any given case. In Bolivia, which has a more organized FPIC process, the Ministry of Hydrocarbons and Energy (MHE) generally makes a deal with foreign extractive industries and then negotiates with indigenous communities (Fontana and Grugel 2016). Unfortunately, the MHE can also be coercive as it works closely with foreign industry and has an incentive to make sure that the concessions demanded by indigenous groups are not too onerous for extractive industries. Therefore, if the executive branch is the entity which typically negotiates with foreign companies then it may be beneficial for another branch of government to provide oversight of the FPIC process. One possibility may be a legislative committee, although I argue in Chapter 5 that, in the Ecuadorian case, the newly created 5th branch of government may be the best entity to provide oversight. In the end, while FPIC may be a powerful right for indigenous groups, in order to be effective it must be bolstered with institutional reforms.

Conclusions

The discussions surrounding indigenous autonomy and free prior informed consent are markedly different than would be expected from the design literature. To the extent that the design literature covers autonomy movements, it focuses on territorial autonomy as part of a

larger consociational structure (i.e. territorial autonomy is seen as a way of dividing power among different national minorities, by giving them a regional base). In the Ecuadorian case, however, as mentioned above, citizens can vote on whether any existing territorial unit can become an autonomous unit. And it is important to note that this ability extends to other groups as well. Afro-Ecuadorians, for example, could vote to create a CTI in their districts. While this type of autonomy arrangement is problematic without a certain level of redistricting, it does point to a way to include autonomy arrangements into the existing territorial organization of the state. This allows them to be a bit more flexible than the territorial arrangements mentioned in consociationalism (both in terms of who is allowed to form autonomous territories and in terms of the number, size, and placement of autonomous areas). This also allows for territorial autonomous regions that are more compatible with a stronger unified state.

In addition, the discussion of FPIC points to the need for some sort of government oversight of national resource policy (even on indigenous lands) to prevent the manipulation of the process by extractive industries. And, as mentioned above, CONAIE's platform does recognize that the state should have some control of resource policy in indigenous areas, so long as resources are used for the benefit of all Ecuadorians. Like the CTI provisions, FPIC raises the question of how indigenous autonomy can be balanced against the need for a unified state, a concern that is not given as much attention in the design literature.

Finally, the plurinationalism platform is also notable for what it does not call for. Neither the interculturalism nor the indigenous rights planks of the constitution call for reserved seats for indigenous groups, quotas for those serving in the judiciary, a completely parallel justice system (instead, the indigenous justice system still falls under the purview of the constitutional court), veto power for minority groups at the national level (instead, they have advocated for a

veto during local-level FPIC negotiations), or power sharing in the executive. There are likely two reasons for the differences between plurinationalism and the accommodation/integration literature in constitutional design. First, as mentioned in Chapter 3, the design literature seems to be much more focused on how to create stability and less focused on how to preserve minority culture or prevent marginalization. This difference in the type of question design scholars are asking leads to a difference in the type of constitutional change they recommend. Along these lines, design scholars tend to ask how minority groups threaten stability, and not how international forces (like extractive industries) threaten minority groups. This may be one of the reasons that design scholars are less focused on creating a more unified state structure. Second, as mentioned in the first section of this chapter, the indigenous rights element of the plurinationalism platform is tempered by interculturalism, and interviewees often repeated that plurinationalism could be best summed up by the idea of "unity in diversity." Therefore, autonomy arrangements are liable to be designed differently than they would be if a cohesive national identity was not one of the end goals of plurinationalism.

In the end, this chapter suggests two areas for future research in the constitutional design literature. First, the above discussion highlights the need to focus on questions of how group-differentiated rights can be better incorporated into national constitutions. As mentioned above, the constitutional design literature tends to focus on how national-level institutions can be more accommodating to minority groups and leaves the consideration of group-differentiated rights to the political theory literature. Because of this, there are several gaps in research on group-differentiated rights. And scholars may want to consider how a constitution can incorporate group rights. For example, how should indigenous justice be incorporated into a national constitution, and what should its relationship be to the rest of the judicial system? How

should the courts interpret other types of group-differentiated rights? And how should autonomous territories interact with state and federal governments?

Second, the above debates point to the need for scholars to consider how minority groups can be accommodated in a way that does not severely weaken state unity. As mentioned in the previous chapter, one of the critiques of accommodationist models of constitutional design is that they may reify group difference over time and thus prove divisive. In Ecuador, CONAIE has been clear that it wishes to pursue a policy of interculturalism that seeks to open national political spaces to indigenous peoples rather than creating completely separate spaces (at the national level) for indigenous groups. In addition, the discussions surrounding FPIC demonstrate that a lack of state capacity could harm indigenous groups in the consultation process. Taken together, these points suggest that, rather than pursuing consociational models of democracy, constitutional designers should consider the possibility of constructing institutions that provide a measure of autonomy while protecting state unity.

Chapter Five

Sumak Kawsay: Indigenous Peoples and Alternatives to Development

As part of CONAIE's proposal for a plurinational state, the organization called for an end to the neoliberal economic policies that the Ecuadorian government had pursued in the past and argued for the adoption of a new economic policy based on the indigenous concept of sumak kawsay. Indigenous activists argued that while neoliberal economic policies tended to promote economic growth for growth's sake, an economic policy steeped in sumak kawsay would focus on improving the standard of living of all Ecuadorians, promoting community life, and protecting the environment. Notably, CONAIE's call for an economic policy based on sumak kawsay echoes a larger global critique of international development policy made by alternative- and post-development theorists. Like indigenous advocates of sumak kawsay, alternative- and post-development theorists argue that mainstream development initiatives have often left behind minority and disadvantaged groups.

In the end, indigenous activists were successful in inserting sumak kawsay into the 2008 constitution where the concept is mentioned both as a guiding principle of the state (in the preamble) as well as the foundation for the country's economic model later (in Title 7). This chapter, therefore, will first explore the similarities between sumak kawsay and alternative- and post-development theories. It will then examine the ways in which sumak kawsay has been incorporated into the Ecuadorian constitution. And finally, it will ask what the Ecuadorian case can teach future constitutional designers. To date, very little research has been done on how constitutional design affects economic policies and institutions. However, given that sumak kawsay and alternative-development theories are important to indigenous and minority groups

worldwide, constitutional designers should begin to consider the best mechanisms by which constitutions can foment economic change.

Alternatives to Development

The indigenous call for a government based on sumak kawsay is taking place within the context of a broader scholarly critique of development. These critiques allege, not only that western development initiatives have failed to deliver promised economic progress, but that development as a concept is fundamentally flawed. In one of the first works on the subject, *Encountering Development* (1995), Arturo Escobar traces the history and consequences of the international movement for development. Escobar argues that, after World War II, western scholars and policy makers began to divide countries into two categories, developed and underdeveloped, and began to promote foreign policies aimed to bring underdeveloped countries up to a certain standard of development. Escobar argues that there were two main problems with this approach. First, he notes that development experts made a series of decisions on how to structure third world economies, which they argued were value neutral and based on the best "scientific" evidence available on how to promote economic growth. In reality, he contends, development experts' decisions were not value natural but instead represented very conscious decisions to privilege certain values and ways of life over others. As Escobar states:

> "…the [development] discourse privileged the promotion of cash crops (to secure foreign exchange, according to capital and technological imperatives) and not food crops; centralized planning (to satisfy economic and knowledge requirements) but not participatory and decentralized approaches; agricultural development based on large mechanized farms and the use of chemical inputs but not alternative agricultural systems based on smaller farms, ecological considerations, and integrated cropping and pest management; rapid economic growth but not the articulation of internal markets to satisfy the needs of the majority of the people; and capital-intensive but not labor-intensive solutions (43)."

The upshot to these decisions was that development movements privileged the elites of these "developing" countries, while making the vast majority of citizens worse off. For example, the choice to prioritize cash crops lead to massive food shortages and starvation across the global south, the increase in large scale farming caused environmental degradation and displaced peasant farmers from their homes and communities, and the emphasis on capital-intensive industries encouraged unstainable borrowing from abroad which lead economies to crash under the burden of foreign debt. In short, economic development initiatives, Escobar charges, only served to increased economic inequality, poverty, and unemployment in those counties they aimed to help.

However, while part of Escobar's critique focuses on the failures of development initiatives, he ultimately concludes that the very idea of development is inherently flawed for a number of reasons. First, in dividing the world into developed and developing countries, western policy makers were assuming 1) that "developing" countries were somehow inferior to "developed" countries and 2) that "developing" countries should, in fact, strive to achieve the same type of economic and social structures as already "developed" countries. In so doing, he charges that economic development also became the primary focus for western policy makers at the expense of other goals, such as deepening democracy, improving community life, or maintaining traditional lifestyles.

In addition, development experts also tended to try to force individuals within "developing" countries into their own problematic categories. For example, an individual might be labeled as "illiterate," a "small farmer," or a "lactating mother" depending on what a particular development initiative focused on. And as Escobar notes, the difficulty here "is that the whole reality of a person's life is reduced to a single feature or trait…in other words the

person is turned into a case" (110). In viewing individuals as discreet case studies, Escobar argues, those implementing development programs abroad lost sight of the "shared experience of rural people," as well as the larger structural conditions that led to rural poverty (110). The tendency to both prioritize development above all other goals and categorize individuals into discreet groups, Escobar believes, too often leads to development policies that overturn traditional lifestyles and destroy larger communities in the quest for economic progress.

Finally, the development discourse shows no recognition of the limits of development. As Escobar notes, development models tend to assume that the process of economic growth and development can occur indefinitely, with very little thought to environmental and resource constraints. In this sense, for Escobar, the development discourse is inherently unsustainable.

In the wake of development critiques such as Escobar's, scholars have begun to explore the areas of post and/or alternative-development. Post- and alternative-development paradigms seek to challenge the idea that classic economic development models should be the primary focus of scholars and policy makers operating in the global south. Instead, post- and alternative-development scholars look for economic models that will serve an individual's material needs without ignoring other social needs, such as equality, democratic participation, or communal continuity. As Sousa Santos (2007), one of the leading scholars in the field, notes

> In response to the idea that the economy is an independent sphere of social life requiring the sacrifice of non-economic goods and values—be they social (e.g. equality) political (e.g., democratic participation), cultural (e.g. ethnic diversity), or natural (e.g. the environment)—alternative development stresses the need to treat the economy as an integral part of society that is dependent upon society, and to subordinate economic goals to protection of such goods and values. (xxxiv)

Because of their focus on social as well as economic goods, post- and alternative-development scholars tend to focus on economic initiatives that are community based. For

example, in their work on the subject, Gibson-Graham (2005) argue that one of the reasons that the development discourse has been so destructive is that it offers one-size-fits-all solutions to economic development, which can be highly destructive to local communities. In their study of the Philippines, they note that mainstream development programs have focused on integrating the country into the global economy by promoting exports (particularly of cash crops, such as oil palm), international tourism, and the export of migrant labor (2005, 9). Gibson-Graham then conducted a study of the rural municipality of Jagna and note that these development solutions have been problematic in that they have disrupted the production of food crops and destroyed local communities by encouraging some of the best workers to migrate out of the Philippines (where they often work in exploitive conditions). In short, Jagna and other rural communities have been left behind by these development programs. Gibson-Graham suggest that one of the difficulties lies in the fact that mainstream development programs move into areas like Jagna and immediately focus on what the municipality lacks according to some predetermined check list (products for export, sufficient natural resources, large amounts of capital, etc.). These programs then try to make up for those deficiencies by any means possible, without a thought as to how these economic reforms affect the overall community structure. Gibson-Graham instead propose that development programs begin by making a comprehensive diagram concerning all of the assets that a community currently has and all of the types of economic activity that are conducted within the community. And they note, while the community may be "underdeveloped" when measured in terms of capitalist development, each community generally supports a wide variety of non-capitalist economic endeavors. For example, the majority of workers in Jagna are engaged in subsistence farming or fishing or in their own local cottage industries, and much of their economic lives take place outside of the formal market. When rice, one of the primary food crops, is harvested, farmers have a complex system for

determining who will aid in which neighbor's harvest, in return for either reciprocal labor or a share in the profits. In addition, communities of farmers or fishermen generally have community savings programs that operate outside of the formal banking sector. And individuals frequently contribute free labor and goods to community projects like school building. Ultimately Gibson-Graham argue that, rather than focusing on building a strong capitalist market in places like Jagna, international organizations should consider ways in which already existing economic activities could be strengthened and extended to support community wellbeing. For example, they propose that existing community saving and labor schemes could be applied to pool remittances from Filipinos working abroad to grow cottage industries within Jagna. They also note that in recent years municipal leaders, who are normally responsible for raising the money for food for feast days, have forgone buying the food in order to buy infrastructure necessities like water pipes. While these types of community-based economic interventions may lead to slower rates of economic growth than more mainstream development programs, Gibson-Graham reason that they will be more likely to both benefit individuals who are disadvantaged by current development models and strengthen community ties.

Finally, alternative- and post-development theorists argue that moving beyond mainstream models of development requires reevaluating what counts as relevant knowledge. As noted above, both Gibson-Graham and Escobar argue that international institutions tend to place a primacy on technocratic development programs that use generalizable findings from western economic and scientific knowledge to impose a one-size-fits-all economic model on communities in the global south. And this type of technical knowledge all too often invalidates not only indigenous knowledge of an area, but indigenous lifestyles, goals, and priorities, as well. As Sousa Santos (2003) summarizes, "neoliberal globalization is presided over by techno-scientific knowledge and owes its hegemony to the credible way in which it discredits all rival

knowledge, by suggesting that they are not comparable, as to efficiency and coherence, to the scientific nature of market laws" (237). Notably, in recent years, international institutions, such as the World Bank, have attempted to incorporate indigenous knowledge into their development programs. And yet, as Briggs and Sharpe (2006) note, under these circumstances, indigenous knowledge is treated as just another type of technical assistance (i.e. indigenous knowledge may be used to determine the best schedule for crop rotation or the best method for local ecological conservation). Instead, post- and alternative-development theorists argue, indigenous knowledge is more than just technical knowledge, and learning how to incorporate it means learning how to handle fundamental conflicts between the competing world views often represented by each type of knowledge (Simon 2006).

While post- and alternative-development theories raise some important critiques to mainstream development programs, these paradigms are still relatively new, and, at points, poorly defined. In particular, it is unclear the extent to which these paradigms are simply critiquing mainstream development programs from within the development literature or to what extent they are proposing a dismantling of the whole development apparatus altogether. For example, Escobar (1995, 2010) argues that his writings on the topic represent a post-development platform, which is focused on studying alternatives to development. In other words, for Escobar, post-development represents, "the possibility of visualizing an era where development ceased to be the central organizing principle of social life" (2010, 12). On the other hand, Sousa Santos (2007) argues that his writings on the topic are part of an alternative-development movement, which instead of rejecting development altogether, seeks to find more sustainable, community-friendly means of economic growth (xxxix). Sousa Santos explains the difference between himself and Escobar as follows:

> The difference lies in the fact that alternative development proposes changes in the type and scope of growth, but does not challenge the concept of economic growth per se, while alternatives to development are extremely critical of the notion of growth, and therefore explore "post-development" alternatives. (ibid., xl)

And yet, despite theoretical distinction between the post-development and alternative-development paradigms, in the end, proponents of both paradigms ultimately tend to offer similar critiques of development, as well as similar policy proposals for how to structure economic life moving forward. For example, Sousa Santos acknowledges that despite the theoretical differences between the two paradigms, in actuality "many of the proposals made by the advocates of alternatives to development partially coincide with those who defend alternative-development (e.g., emphasis on local efforts, promotion of community autonomy, etc.)" (ibid., xxxix). At the same time, Escobar, despite his post-development writings, acknowledges that post-development "signals the notion that 'the economy is not essentially or naturally captialist'….it doesn't mean for example that capitalism is not an acceptable way of conducting business, it just means that it needs to be displaced as the only way (2010)." Here, Escobar doesn't seem to completely reject the development paradigm but instead goes on to suggest the same type of policy proposals as those upholding alternative-development solutions: namely supporting communal enterprises that can still compete in an overarching capitalist economy. Further confusing the issue, alternative-development scholars, such as Sousa Santos, at times critique development on a more fundamental level than the name of their paradigm suggests. For example, Sousa Santos echoes the post-development critique that capitalist development is destructive in that it fails to recognize indigenous knowledge, imposes the concept of linear time and progress on global relationships, reifies racial and gender hierarchies, and privileges productivity and efficiency above all else (2003, 239). In short, Sousa Santos seems highly critical of the development project altogether.

Ultimately, the existing literature is unclear as to where the true differences between the post- and alternative-development literatures lies and to what extent either literature represents a true rejection of, and/or alternative to, development. One reason for this lack of clarity may be the fact that neither literature clearly defines "development" (McGregor 2009). At times the post- and alternative-development literatures seem to be in opposition to a very specific type of neoliberal economic development model as proposed by the IMF and World Bank. At other times, post- and alternative-development scholars seem to be more generally concerned with capitalist development programs more broadly defined. And still other critiques, such as environmental concerns about the possibility for perpetual economic growth, seem to reject the whole idea of attempting to achieve any sort of economic progress all together. And because development is poorly defined, it is unclear what a rejection of development would really look like. As McGregor (2009) argues, "it is difficult to define where development ends to identify which initiatives can be considered 'alternatives-to'" (1695).

A second reason for a lack of clarity in the literature may also be the very difficultly of imagining a truly "post-development" economy. If one accepts the idea that the very concept of development is flawed because perpetual economic growth is impossible, then what type of economic/social policy should one pursue? While many of post- and alternative-development's critiques of current economic policies may be valid, the fact remains that many individuals around the world have living conditions that they themselves are not satisfied with (apart from what any outside indicators may say of their economic status). Is the implication then that certain communities will have to learn to live without clean drinking water or basic medical care? Or is the goal of "post-development" to ensure that everyone meets a basic standard of living but to reject all other further measures for economic growth? And how do we ensure a basic standard of living for all individuals without some sort of development program? One of

the difficulties with "post-development" may simply be that academia currently does not have the vocabulary for conceptualizing an economic policy that is divorced from development, but, in the end, the "post-development" literature needs to make a better attempt to explain what exactly a "post-development" world would look like.

Sumak Kawsay

In a sense, sumak kawsay represents the indigenous complement to the alternative- and post-development literatures, in that the concept of sumak kawsay represents both a critique of, and alternative to, mainstream development models. However, viewing sumak kawsay only in terms of development would be a misinterpretation of the concept, given that it stands, not only for alternative -development, but an alternative way of living altogether.

In his Essay, "El Sumak Kawsay," Luis Macas (2010), an indigenous intellectual and former president of CONAIE, argues that there are currently two different ideological systems that influence Latin American thought. Over the last 500 years, Macas argues, Latin America has generally been dominated by the "Western-Christian" tradition, which is "characterized by being hegemonic, egocentric, and destructive to other forms of life in the world… [it is a] civilization based in violence against the other, and does not accept other modes of life" (ibid., 33). He goes on to argue that the "Western-Christian" tradition is tied to capitalism, development, and the drive towards a never-ending accumulation of goods. And, in the end, the lifestyle encouraged by this tradition has led to a world-wide environmental and spiritual crisis. Macas contrasts the Western-Christian tradition to the "Abya Yala"[89] tradition of the indigenous peoples. He argues

[89] Abya Yala is an indigenous term for Central and South America, and is used by many indigenous groups in Latin America as symbolic rejection of the term "America." Sometimes it is also used as a way of pointing to the similarities in indigenous cultures across the continent (Macas 2010, 34).

that the Abya Yala tradition is much older than the Western tradition and is based on an understanding of humanity and humanity's place in nature that has been developed and perfected over millennia. While the "Western-Christian" tradition prioritizes individualism, the Abya Yala tradition prioritizes life in the community. In so doing, the Abya Yala tradition values community government, government by consensus, spirituality, ancestral knowledge, and Mother Earth. Because the Abya Yala tradition is based on an older and more tested understanding of the human condition, Abya Yala is "the civilization of life and for life," as opposed to the Western tradition, which brings only destruction. Macas argues that both traditions have competing paradigms, and, while the "Western-Christian" tradition upholds the paradigm of capitalist development, the Abya Yala tradition upholds the paradigm of sumak kawsay (ibid., 38). For Macas then, to live in accordance with the sumak kawsay means to respect the precepts of communal life and the Abya Yala tradition.

In reading Macas's essay, it quickly becomes clear that the term "sumak kawsay" is difficult to translate and define in English or Spanish. In the constitution, as in other Spanish language documents, sumak kawsay is translated into buen vivir (which translates into English as "good living"). However, as discussed in more detail below, buen vivir is often used to connote sustainable or human development and, therefore, has a more economic emphasis than sumak kawsay.[90] Furthermore, in his essay, Macas argues that it is a mistake to equate sumak kawsay and buen vivir because the concept of sumak kawsay only makes sense in the context of community life, whereas the concept of buen vivir is part of the "Western vision" of improving current development efforts (2010, 24). Macas concludes that a better translation of sumak kawsay would be "la vida en plenitude" or "life in fullness" (ibid.). Similar to Macas,

[90] Personal interview with a specialist in buen vivir, 9/20/12 (46).

Lourdes Tiban (2010), an indigenous activist and assembly woman, argues that a more accurate translation of sumak kawsay may be “vida en armonía” (or life in harmony). She goes on to define sumak kawsay as an indigenous “proposal for life, for society in general” that is aimed at promoting “equal development,” “protection of biodiversity,” and “a harmonious relationship between man and nature” (210). For both Tiban and Macas, sumak kawsay is not interchangeable with Buen Vivir, in that it is not only a concept about development but also a concept about how one should live one’s life more generally.

In addition, Macas’s contrast between western culture and the tradition of Abya Yala points to the fact that, for him, the concept of sumak kawsay is intimately tied to a larger struggle against western colonialism. In his essay, Macas further argues that the concept of sumak kawsay is part of the indigenous people’s larger “strategic resistance” against colonialism and neoliberal capitalism (2010, 15). Macas’s account is echoed in indigenous activist Atawallpa Oviedo’s (2011) book, *What is the Sumak Kawsay?* Like Macas, Oviedo argues that western culture is destructive in that it does not respect Mother Nature and, in so doing, obliterates the concept of the sacred feminine, thus leading to the oppression of both women and nature. In addition, he charges that western modernity leaves no room for alternative cultures and lifestyles (ibid., 66-69). For Macas and Oviedo, not only is capitalist development inextricably tied to western colonialism, but challenging its primacy of place, by following the sumak kawsay, is an essential first step in reclaiming cultural and political pluralism (Macas 2010, 36 and Oviedo 2011, 253-255).

Interestingly, while Macas sees the concept of sumak kawsay as an important part of the indigenous struggle against colonialist power structures, he does not believe that it is a concept that applies to indigenous communities alone. Instead, Macas argues that western

societies were also originally centered on community life and used to exist in harmony with nature. However, capitalism, privatization, and division of labor led to man's exploitation of his fellow man and his "rupture" with the natural environment (Macas 2010, 21). Macas believes that the concept of sumak kawsay has the power to save western culture from itself, by reemphasizing the importance of nature and community and providing the intellectual resources to pull the international community away from the brink of a global environmental and spiritual crisis (ibid.,14). In other words, the concept of sumak kawsay is not simply meant to apply to indigenous peoples on indigenous lands but is meant as a means of shifting the entire Ecuadorian society's (and perhaps the world's) economic and social priorities. Oviedo (2011) echoes Macas's sentiment, arguing that "the sumakawsay [sic] has been known and practiced by all of humanity in different periods of its existence in different regions of Mother Earth" (259).

Finally, it is apparent from Macas's account that the concept of sumak kawsay is also intimately tied to the concept of the rights of nature (discussed in more depth in Chapter 6). As stated above, one of the common tenets of sumak kawsay is that life must be lived in harmony, not only with one's community, but with nature. As stated in Chapter 6, this prioritization of living in harmony with nature is one of the impetuses behind the rights of nature in the constitution. And as discussed in further detail below, this focus on nature and the natural environment has led some indigenous and non-indigenous activists to equate sumak kawsay with the environmentalist and anti-extractivist movements.

Despite the excitement that the inclusion of sumak kawsay in the constitution has generated within the indigenous community, the concept has many of the same theoretical problems as the alternatives to development literature. As Arturo Escobar (2010) points out, the

adoption of sumak kawsay is a fairly complicated process since sumak kawsay calls for a new way of conceptualizing both development and the state, and there are many existing institutional barriers to social, political, and economic change. For example, the Ecuadorian state is still essentially a capitalistic and liberal state and exists in a world system which promotes both philosophies. Furthermore, Ecuador's current economic growth rests on the success of its extractive industries, such as oil and copper. It is therefore difficult to conceptualize how the government would begin to promote the type of communal lifestyle, in harmony with nature, that sumak kawsay advocates.

Advocates of sumak kawsay need to better explain what types of economic systems would take the place of liberal capitalism. To this end, several interviewees expressed the idea that an economy based on the principles of sumak kawsay would involve a mixed economic system that relied on the public sector, private businesses, and communal economies and pointed to communities such as Otavalo as an example. Otavalo houses one of the world's largest open air markets, which is largely run by the city's indigenous population. Proceeds from the market have given indigenous communities a lot political power in the area and have provided jobs for indigenous youth in the area. Activists argued that community-based initiatives, like the Otavalo market, should reflect the indigenous norms of solidarity, reciprocity, and environmental sustainability. Additionally, they would allow indigenous youth to stay in the traditional territories, rather than moving to Guayaquil or Quito to seek work. However, while these small scale changes in communal programs may aid specific indigenous communities, interviewees left unexplained if and how the principles of sumak kawsay could be used to influence the private sector of the economy. In short, interviewees spoke of sumak kawsay as a philosophy that would totally upend how Ecuadorians conceptualized development (much like the writings of Macas, Oviedo, and Tiban as discussed above), but when asked about specific

economic, social or policy initiatives that would embody/facilitate sumak kawsay, they tended to focus on more small scale economic solutions for indigenous communities.[91]

CONAIE's proposal to the 2008 constitution discussed sumak kawsay in a similar fashion as my interviewees. The introduction to the proposal states that CONAIE aims to "change the structure of the state and the model of the economy" (2007, 6). The proposal further notes that "this new economic model should be ruled by the principles of exchange equity, reciprocity and solidarity…" (ibid., 20). However, the more concrete economic proposals in the document do not completely reflect these wide sweeping goals. For example, the document goes on to call for community property rights, a more equitable tax code, the creation of community financial institutions, the nationalization of natural resources, and more equitable water policies (ibid., 20-25). While some of the economic goals in COANIE's proposal may be ambitious, it is unclear that these policy goals really require changing the overall economic model of the state.

While Macas and Oviedo make a clear distinction between the concepts of sumak kawsay and buen vivir, the government's rhetoric surrounding buen vivir closely mirrors the rhetoric of indigenous actors. For example, in the national development plan for buen vivir, the government states that buen vivir ignores classical economic measures of success and development, rethinks man's relationship with nature, and prioritizes justice and equality through recognizing and valuing diverse groups of people (Ecuador 2010a, 6). In the end, the report sums up buen vivir by stating that the concept could be defined as:

[91] Personal interview with indigenous Assembly Member, 5/22/12 (10). Personal interview with indigenous activist and scholar, 7/13/12 (26). Personal interview with indigenous activist, 9/5/12 (36). Personal interview with former member of Pachakutik, 9/18/12 (44). Personal interview with 2008 Assembly Member and buen vivir advocate, 9/25/12 (48). Personal interview with CONAICE, 10/24/12 (61). Interview with representative of CONAIE, 10/29/12 (61).

> "covering needs; achieving a dignified quality of life and death; loving and being loved; the healthy flourishing of all individuals in peace and harmony with nature; and achieving an indefinite reproduction perpetuation [sic] of human cultures. Good living implies having free time for contemplation and personal emancipation, enabling the expansion and flourishing of people's liberties, opportunities, capabilities, and potentialities so as to simultaneously allow society, specific territories, different collective identities, and each individual, understood in both universal and relative terms, to achieve their objectives in life… (ibid 6)

Yet despite this rhetorical recognition that buen vivir represents more than a struggle for traditional development goals, the department's methods of measuring those goals tend to be reported in more economic terms. For example, in The National Secretary of Planning and Development's (SENPLADES) report, "100 Achievements of the Citizens' Revolution" the agency argues that it has fulfilled its goal of "constructing an economic system whose ultimate object is the person and his or her 'buen vivir'" by growing the industrial sector of the economy, enhancing the efficiency of public investment, and ensuring that the economy is less dependent on oil revenue (Ecuador 2010b, 1). In short, like CONAIE's platform, the government plan for buen vivir has sweeping big picture goals but ultimately focuses on fairly mainstream economic solutions. The hybrid nature of the government's buen vivir plan was exhibited in an interview I conducted with a representative of SENPLADES. He argued that in order to promote buen vivir the government should focus on the following: basic education, health (with a focus on infant mortality and hospital care), the wellbeing of workers, social security, access to one's own ancestral land (as well as access to resources such as water and electricity), cultural rights, and environmental conservation (without which the rest of the list is impossible).[92] This list is interesting in that it represents a mix of more common development goals (such as access to basic education) and ideas associated with sumak kawsay (such as access to one's ancestral lands). The interview and the government's economic plan suggest that, like indigenous actors,

[92] Personal interview with representative of SENPLADES, 8/28/12 (34).

government policy makers have trouble conceptualizing what an alternative to development would mean in concrete terms.

Sumak Kawsay in the Constitution

The Ecuadorian constitution mentions "sumak kawsay" in five different instances. The first is in the preamble, where it states that the "sovereign people of Ecuador…… Hereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay…" Later in the document, Article 14 states, "The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay), is recognized." Article 250 establishes the Amazon as a "special territorial district… with land use development and planning that ensures the conservation and protection of its ecosystems and the principle of sumak kawsay." In addition, Chapter 6 of the constitution is dedicated to the country's "development structure." And Article 275, which helps to outline the "general principles" of development structure argues, "The development structure is the organized, sustainable and dynamic group of economic, political, socio-cultural, and environmental systems which underpin the achievement of the good way of living (sumak kawsay)." And finally, Article 387 notes that one of the "responsibilities of the state" is to "promote the generation and production of knowledge, to foster scientific and technological research, and to upgrade ancestral wisdom to thus contribute to the achievement of the good way of living (sumak kawsay)."

The phrase "buen vivir" (which is the Spanish translation of sumak kawsay) is used an additional 19 times in the constitution. In particular, Title 2 Chapter 2 lists "the rights of buen vivir," which include the rights to water, food, access to healthcare, a healthy environment,

education, work, and social security.[93] And, all of Title 7 of the constitution further describes the "system of buen vivir" by going into greater detail as to how the government can provide the rights listed in Title 2 Chapter 2.[94] In addition, Article 83 Clause 7 states that Ecuadorians have the "duty" to "promote public welfare and give precedence to general interests over individual interests, in line with buen vivir." And finally, Article 85 states that "public policies and the provision of public goods and services shall be aimed at enforcing buen vivir and all rights and shall be drawn up on the basis of the principle of solidarity."

One of the most interesting aspects of the 2008 constitution's treatment of sumak kawsay is that the indigenous concept is directly linked to a specific list of socio-economic rights. As Eduardo Gudynas (2011) notes in his study of buen vivir, the concept is used very differently in the Bolivian and Ecuadorian constitutions. In the Bolivian constitution, the concept is mentioned as one of many guiding "moral principles of the plural society," along with other indigenous concepts such as living harmoniously or following the noble path.[95] However as Gudynas notes:

> In the new Constitution of Ecuador, the conceptual framework is different. Although Buen Vivir is referred to as an indigenous concept, the sumak kawsay of the Kichwa, is described as a set of rights, which include those referred to health, shelter, education, food, environment, and so on. Thus Buen Vivir is not an ethical principle for the State as in

[93] The constitution is divided in descending order into titles, chapters, sections, article, and clauses. These rights are enumerated in Articles 12-34.

[94] Title 7 includes Articles 340-415.

[95] Chapter 8 of the Bolivian constitution reads: "The State adopts and promotes the following as ethical, moral principles of the plural society: ama qhilla, ama llulla, ama suwa (do not be lazy, do not be a liar or a thief), suma qamaña (live well), ñandereko (live harmoniously), teko kavi (good life), ivi maraei (land without evil) and qhapaj ñan (noble path or life)." This clause combines Kitchwa, Aymara, and Guarani concepts, and therefore is more diverse than the Ecuadorian constitution which only uses Kitchwa concepts. Suma qamaña is the Aymara equivalent of Sumak Kawsay.

> Bolivia, but a complex set of several rights, most of them found in the Western tradition, although fitted in a different framework (443).

However, in addition to being associated with a list of rights, sumak kawsay is also associated with a citizen's duties to the state. For example, as mentioned above, Article 83 states that all Ecuadorians have a duty to, "promote public welfare and give precedence to general interests over individual interests" in order to support a lifestyle in accordance with buen vivir, while Article 85 states that "all rights shall be drawn up on the basis of the principle of solidarity." In short, sumak kawsay as expressed in the constitution blends western human rights doctrine and indigenous cosmology in interesting ways. Namely, the constitution associates sumak kawsay with a fairly standard list of socio-economic rights but states that those rights are tempered by concerns for the common good.

However, while the constitution makes it clear that socio-economic rights are integral to the concept of sumak kawsay, given the frequency and context with which buen vivir and sumak kawsay are mentioned, it quickly becomes apparent that sumak kawsay requires a larger change to economic policy than just the establishment of socio-economic rights. While Articles 12-34 list socio-economic rights that are essential for the promotion of sumak kawsay, Articles 85, 275-278, and 340-415 make it clear that the entire economic framework of the state will revolve around the concept of sumak kawsay/ buen vivir.

Finally, the constitution reinforces the indigenous perception that living in accordance with sumak kawsay/buen vivir involves more than just creating an economic model for sustainable development. As mentioned above, the preamble reinforces the idea that living in accordance with the sumak kawsay means living in "harmony" with nature. And Articles 250 and 258 state that the Amazon and Galapagos are special ecological territories that should be managed with precepts of the sumak kawsay in mind. In this sense, sumak kawsay/buen vivir as

mentioned in the constitution is closely tied to the concept of the rights of nature. In addition, sumak kawsay/buen vivir is also tied to maintaining traditional lifestyles and respecting interculturalism in the constitution. As mentioned above, Article 387 links the government's duty to promote the sumak kawsay to its duty to support "ancestral wisdom," while Article 278 states that "buen vivir shall require persons, communities, peoples, and nationalities to effectively exercise their rights and fulfilling [sic] their responsibilities within the framework of interculturalism, respect for their diversity, and harmonious coexistence with nature." In this same vein Article 347, which deals with the right to education, stipulates that education shall be intercultural and bilingual, and Article 360, which deals with the right to health, stipulates that individuals shall also have access to "ancestral and alternative medicines." In short, the constitution supports the more expansive indigenous conception of buen vivir as an idea that not only incorporates alternative-development models but recognizes the importance of living in harmony with nature, community, and traditional lifestyles, as well. In this sense, it is significant that the term sumak kawsay, and not just the Spanish buen vivir, is incorporated into the constitution. The incorporation of indigenous phrases into the constitution demonstrates on a symbolic level that the new Ecuadorian State will incorporate indigenous world views and thought processes.

Ultimately, given the Constitution's treatment of sumak kawsay, Catherine Walsh argues that buen vivir, not only addresses the government's economic responsibilities moving forward, but "is the orienting concept of the new Ecuadorian Constitution" (2010, 18). She contends that the constitution's extensive use of buen vivir sets the stage for a "radically different social contract" that redefines the goals and function of the state (ibid.). In essence, for Walsh, the constitution's use of buen vivir and sumak kawsay represents more than a change in the state's

economic policy; it signifies a larger change that pervades the entire document in the way the state interacts with its citizens, indigenous peoples, and nature.

Design Mechanisms for Incorporating Sumak Kawsay

As mentioned above, while individual constitutions (such as the Ecuadorian and Bolivian constitutions) have begun to challenge capitalist economic structures, the constitutional design literature has largely been silent on how constitutions can and should affect economic institutions. While the concept of buen vivir has several ambiguities, the Ecuadorian constitution's treatment of buen vivir and sumak kawsay may offer a starting point for design scholars to consider how different constitutional provisions can affect a country's economic structures. The constitution's use of either sumak kawsay or buen vivir on 24 occasions demonstrates that a variety of design mechanisms will have to be considered in tandem to bring about the type of economic change indigenous people advocate. In particular, the Ecuadorian constitution combines increased provisions for economic rights, new mechanisms for citizen participation, and changes to judicial interpretation in an attempt to promote the ideals of sumak kawsay. In the end, the Ecuadorian case illustrates that if sumak kawsay is to be viewed as the "orienting concept of the new Ecuadorian Constitution," as Walsh suggests, then design scholars need to reconsider how a variety of government institutions can be created to promote not only political goals (such as stability and representativeness) but economic goals (such as sustainable development), as well.

Rights Based Initiatives

While the concept of sumak kawsay represents more than the provision of socio and economic rights, expanded socio-economic rights are still an important part of sumak kawsay. To this end, the literature surrounding the provision and enforcement of socio-economic rights

has generally centered around three main questions: 1) Is it part of the government's purview to guarantee socio-economic rights? 2) How does the constitutionalization of socio-economic rights affect the role of the judiciary? 3) Are socio-economic rights enforceable? The first question is primarily a theoretical question about the nature and duties of government. And here, the literature largely debates whether the state has the obligation to guarantee socio-economic rights or whether the state's primary focus should be on guaranteeing private property, civil liberties, and free enterprise (O'Connell 537). While these debates are important from a theoretical standpoint, as both Davis (2011) and Sardski (2005) argue, the question may be moot from a comparative constitutional design standpoint. These authors contend that the inclusion of socio-economic rights has become such a widespread practice that in most countries a new constitution that did not include some provisions for socio-economic rights would be viewed as illegitimate. In Ecuador, where there was a strong expectation of the inclusion of socio-economic rights, a history of the inclusion of these rights in pervious constitutions, and a heavy reliance on international human rights law, a constitution that did not include some level of socio-economic rights would not have been accepted. Therefore, for the purposes of this discussion, I will bracket this larger theoretical question. However, the more detailed questions of how socio-economic rights might be enforced and how their enforcement may affect the role of the judiciary do have interesting implications for the constitutional implementation of sumak kawsay.

As Young (2012) notes in her book *Constituting Economic and Social Rights*, the enforcement of civil and political rights is a relatively comfortable role for the judiciary to play, as it primarily deals with checking the power of the legislative and executive branches. However, in the case of enforcing socio-economic rights, the judiciary's role becomes infinitely more complicated. In particular, she notes that in most instances the provision of socio-economic

rights requires the provision of goods and services which can require the court to take on a "managerial role." [96] For example, in the *Mazibuko* case, five families in Johannesburg took the government to court arguing that, while the government provided a basic water allowance to the poorest citizens, the water allotment was not enough to meet most families' needs. Furthermore, they charged that, because the government allotment of clean water was too low to meet basic needs, their right to clean water had been violated (Wilson and Dugard 2013). The difficultly in these types of cases is that the decision could require the court to become fairly involved in water management, an area that it is clearly not designed to specialize in. For example, what judicial standard is the court supposed to use to determine if enough water had been provided to citizens? The *Mazibuko* case was not at all clear cut, and part of the difficulty lay in the fact that the government allotted water per household (as opposed to per person) because that is the easiest way to regulate usage. However, the government assumed that a maximum of eight people would be living in each household, although in reality many families in the area had fifteen or more members living in each household (ibid). So the question becomes, what is the reasonable number of people expected to live in each household? Or should the government instead allot water based on a per capita basis? And if so, what is the best way to determine how many people are living informally in a single household? What if the number of household members fluctuates from month to month? And finally, if the court did decide on a new minimum allotment of water, either on a per capita or per household basis, how would the

[96] Young (2012) does acknowledge that, to some extent, dividing rights into negative and positive rights can create a false dichotomy. And she further notes that sometimes the enforcement of civil rights can also lead the court to take a managerial role. For example, the U.S. Supreme Court, in enforcing the civil right to equal treatment under the law, did step into a managerial role when it delineated a strategy for school busing and desegregation in *Brown vs. Board*. However, she contends that the demands generally associated with economic and social rights make it more likely that cases involving these types of rights will require the court to step into a managerial role than cases involving civil and political rights.

court enforce its mandate? In short, cases like *Mazibuko* ask the court to step outside the bounds of judicial review in uncomfortable ways and impose cumbersome managerial duties on the court.

In addition, cases like *Mazibuko*, which ask the court to decide issues of resource distribution, also grant power to the courts to make decisions that would normally be carried out by the legislative and executive branches of government (Sadurski 2005). And again, Young argues that there is a difficult balance to be struck. If the court refuses to take a proactive role in deciding socio-economic rights cases, it could be perceived as abdicating its judicial responsibility to enforce the constitution. If, on the other hand, the judiciary makes too sweeping a recommendation, the court could be seen as usurping the role of the popularly-elected branches of government.[97] Wilson and Dugard argue that a court's desire to avoid overstepping its bounds and taking a managerial role often leads it to err on the side of abdication. For example, in the *Mazibuko* case discussed above, the court chose not to focus on the fact that the individuals suing the government did not have enough water to meet their needs, or that the city's water allotment did not meet basic international standards for water usage, but instead spent the bulk of its discussion focusing on the difficulties that the city would face in providing more water. Given the logistical difficulties faced by the city, the court argued, the current water policy was "reasonable." Wilson and Dugard argue that these types of conservative court decisions discourage others from filing socio-economic rights-based cases

[97] While Young sees judicial usurpation as an accidental consequence of complicated socio-economics rights cases, Ran Hirschl takes a much more cynical view of the recent rise in judicial power. In his book *Towards Juristocracy*, (2004) he argues that courts are fundamentally an elite level institution and, therefore, often side with economic and political elites in their cases. He further contends that political and economic elites have made a concerted effort to strengthen judicial power and push big socio-economic questions onto the courts so that they can receive more favorable outcomes than they would if socio-economic questions were resolved by popularly-elected bodies.

and make socio-economic constitutional rights even more difficult to enforce.[98] Further complicating the issue, it is unclear that a strong judicial decision in favor of socio-economic rights actually improves the enforcement of those rights over time. For example, in some instances, a major court "win" for a right may lead to a social or legislative backlash against the enforcement of that right. And advocates of that right may have ultimately been better off with less judicial interference (Young 2012, Hirschl and Rosevear 2011 and Tushnet 2007). Ultimately, Young (2012) argues that the best way to navigate the complications raised by socio-economic rights, is for the court to adopt what she terms "conversational review" (148). Under a model of conversational review, courts more actively engage with the legislature or executive to mutually work out solutions to human rights violations.

One oft cited example of "conversational review" is the *Government of the Republic of South Africa v. Grootbroom* case. In *Grootboom* a group of 900 impoverished South Africans was squatting in makeshift accommodations on private land that had been originally earmarked for low-income government housing. The owner of the land filed for an ejection order against the squatters, and, subsequently, all of the squatters were removed. What little possessions they had were destroyed. The group then moved to a municipal sports field and proceeded to live under plastic tarps. Eventually, members of the group applied to the Cape Municipality for temporary housing relief and, when they received none, sued the municipality arguing that it was in breach of the right of access to housing guaranteed under section 26(2) of the South African Constitution. The South African Constitutional Court eventually issued a mixed ruling. On the one hand, they refused to rule on what exactly constituted a right to housing nor did they establish a certain minimum standard for access to housing that the government had to meet.

[98] See also O'Connell's (2012) study of court cases in India, Ireland, and Canada.

However, the court did find that the municipality was in violation of section 26(2) in that it did not take "reasonable measures" to provide housing relief to the *Grootbroom* plaintiffs in what was clearly a crisis situation. The court granted declaratory relief to the *Grootbroom* plaintiffs but ultimately left it up to the Department of Housing to draft short-, medium-, and long-range plans for settling the housing crisis (Young 2010 and Dixon 2007).

The *Grootbroom* decision exhibits the characteristics of conversational review in that, while it did find that the government was in violation of the right to access housing, it left the details of how to rectify this rights violation up to another branch of government (in this case the executive). This type of solution avoids some of the difficulties of the *Mazibuko* case, where the court, hesitant to make recommendations about water usage, ultimately dismissed the complaints of the plaintiffs. While in the *Grootbroom* case the court required a representative of the executive branch (the Department of Housing) to make a policy change, in other instances of conversational review, the court may require the legislature to remedy a potential rights violation through new legislation.[99] In a study of this type of review, Tushnet (2007) notes that legislatures generally follow the court's advice and modify an offending law because the political cost of not doing so is too high. However, while the court still exercises a fair amount of power under the conversational model of review, as Young notes, it gives the legislature or executive more input in how the offending law should be changed, thus relieving the court of some of the managerial duties required to enforce socio-economic rights (2012, 148-158).[100]

[99] This type of conversational review is prominent in the enforcement of negative rights in Canada. See Young 2012 for more information.

[100] Tushnet's discussion of what he calls the "dialogic method of review" is very similar to Young's "conversational review." In addition to examining the Canadian case, Tushnet also describes the British court's method of judicial review. Like the Canadian case, the British method also allows for some give and take between the legislature and the courts. In the British case, Tushnet explains, a court decision

Above and beyond the difficulties in interpreting human rights law, socio-economic rights can be difficult to enforce. Not only are courts reluctant to take on a managerial role but other political and economic elites may believe that they have little to gain by enforcing socio-economic rights, an act which generally requires some sort redistributionist public policy. In addition, even if the political will to enforce socio-economic rights exists, most governments lack the resources to guarantee that everyone has access to healthcare, clean water, food, employment, housing, etc. This has led some scholars to be skeptical of socio-economic rights altogether. And they rightly note that levels of human development are not correlated to the number or type of socio-economic rights included in a country's constitution or statutory law. In fact, the last couple of decades have seen a rise in inequality and a popularization of neoliberal economics alongside the increased enumeration of socio-economic rights in national and international human rights law (Hirschl and Rosevear 2011, Sadrski 2005, and Hirschl 2004). However, while a high standard of living does not correlate to a high number of socio-economic rights protections, individuals in a given country would not necessarily be better off without them. As O'Connell and Young both argue, socio-economic rights enshrined in the constitution can become symbolically important. In particular, socio-economic rights can be used to focus social movement campaigns and rally activists to attempt to change economic conditions (Young 2012 and O'Connell 2011).

As part of an effort to ensure that socio-economic rights would be adequately enforced, the framers of the 2008 Ecuadorian constitution constructed a constitutional court that would

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that a law violates human rights essentially makes it easier for the legislature to then amend that law. Once a law is found to violate rights, the amendment process can either be fast-tracked in parliament or carried out by ministerial order, as long as the ministerial order is later ratified by parliament (2007, 27-31). Like Young, Tushnet argues that this type of give and take leads to the more effective and legitimate enforcement of human rights law.

be able to forcefully and rapidly respond to threats to a citizen's social, political, and economic rights. In so doing, the framers created a strong Constitutional Court whose structure mimicked the strong European courts created after the human rights atrocities experienced during World War II. As opposed to the U.S. court system, the Ecuadorian Constitutional Court is not the final court of appeal for litigation, but is an institution, created separately from the rest of the judiciary, aimed exclusively at interpreting questions of constitutionality. This deviation from the U.S. style is designed to allow easier access to the constitutional court by citizens and a quicker resolution of rights claims. For example, Article 428 of the 2008 constitution states that:

> When a judge, by virtue of his/her office or the request of a party, considers that a legal norm is contrary to the Constitution, or international human rights instruments that provide for rights that are more favorable than those enshrined in the Constitution, it shall suspend the case and refer it for consultation to the Constitutional Court, which within no more than forty-five days shall rule on the constitutionality of the norm..."

In so doing, Article 428 accomplishes three important goals: 1) it restricts the interpretation of the constitution to the Constitutional Court (as opposed to the rest of the judiciary) 2) it allows for a quicker response to potential rights violations than if the issue had to be worked out through a series of lower courts and 3) it allows for rights claims against international rights as well as constitutional rights. Along these same lines, the court may sometimes preemptively rule on the constitutionality of a statue. For example, after the National Assembly passes a law, the law is sent to the president for approval. If the president believes that the law will violate the constitution, then he may send the law to the constitutional court, whereupon they have thirty days to rule on the law's constitutionality. If they rule that the law is unconstitutional it is permanently shelved.[101] Finally, Ecuadorian citizens are allowed to file complaints with the court

[101] For more information, see Articles 138 and 139 of the constitution. This action is different from a presidential veto because the presidential veto can be overruled with a two-thirds vote in the Assembly.

directly (Article 439). All three of these measures are aimed at providing a faster response to rights claims, providing greater citizen access to the court, and preventing rights abuses before they happen.

In addition to providing greater access to the courts, the constitution is meant to allow the Constitutional Court a large amount of leeway in interpreting and enforcing rights claims. Here Article 427 states that:

> Constitutional provisions shall be interpreted by the literal meaning of its wording that is most closely in line with the Constitution as a whole. In the event of any doubt, *it is the most favorable interpretation of the full and effective force of rights…that shall prevail* (emphasis added).

In addition, both Articles 424 and 428 allow the court to implement international standards of human rights in a particular case if those international standards offer a stronger protection of human rights than the national constitution does. Finally, all decisions of the Constitutional Court are binding, creating a strong form of judicial review (Article 436). In short, the constitution aims to empower the judiciary to resolve disputes in the way that will most likely protect human rights over other interests.

While both the structure of the court, as well as the court's guidelines on constitutional interpretation are aimed at maximizing human rights protections, it is unclear that the 2008 constitution's way of structuring the judiciary is ultimately the best way to protect socio-economic rights. As mentioned above, the European model of judicial review was popularized after World War II as a response to the civil and political rights violations perpetrated by authoritarian governments during the war. However, it is unclear that this model of a strong

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However, the court's ruling of unconstitutionality cannot be overturned by the Assembly. On the other hand, if the court rules that the law is constitutional it becomes enacted into law.

judiciary will also strengthen socio-economic rights protections. As mentioned above, both Young (2012) and Tushnet (2007) argue that a strong form of judicial review can actually weaken socio-economic rights provisions as it discourages interaction between the judiciary and the legislative and executive branches to reach a common solution on how best to provide public goods. In addition, the Ecuadorian court's power to preemptively review certain pieces of legislation, as well as its ability to hear petitions directly from citizens, may work to take even more power away from the legislative branch, further disrupting the balance of power between the legislative and judicial branches (Lizarazo-Rodriquez 2012 and Sweet 2012). Notably, in his study of Eastern European courts, Sadurski argues that, despite the powerful structure of the constitutional courts of most Post-Communist states (a structure that is similar to that of the Ecuadorian Constitutional Court), the Eastern European courts have been largely ineffective in promoting socio-economic rights. Ultimately, constitutional designers may need to consider ways of combining the Ecuadorian constitution's mechanisms for a speedy redress of rights violations (such as a fast-tracked mechanism for hearing cases that violate human rights) with aspects of conversational review that encourage dialogue between the legislative and executive branches. In short, the Ecuadorian constitution's focus on buen vivir raises a larger question for design scholars: How should a model of judicial interpretation, which was originally developed to protect civil and political rights, evolve to answer the demands of socio-economic rights?

While the discussion of how to enforce socio-economic rights is much narrower than the question of how to design a constitution in keeping with sumak kawsay, the socio-economic rights literature has two main implications for the Ecuadorian case. First, the presence of socio-economic rights in the constitution is not a sufficient condition for ensuring an economy based on the principles of sumak kawsay. As mentioned above, courts have a tendency to be wary of overstepping their judicial boundaries and/or assuming administrative duties, which makes it

difficult for them to radically change the socio-economic conditions in a country. In addition, as both O'Connell and Hirschl argue, judges are political elites, and their opinions very rarely differ radically from the opinions of other elites. Therefore, if a country has already adopted a broadly neoliberal economic strategy, then judges' decisions are not likely to make a major challenge to that overarching economic paradigm. Second, as Young and Tushnet's work on judicial interpretation suggests, a successful enforcement of socio-economic rights will most likely involve cooperation between the judicial and legislative branches. Since the enforcement of socio-economic rights often involves the redistribution of resources, it is both more effective and more legitimate to have a popularly elected branch involved in the process.

Taken together these two points suggest that constitutional designers concerned with the overall structure of the economy should think creatively about how other government branches and institutions (besides the judiciary) can be involved in the creation and enforcement of socio-economic rights. In his work, *Weak Courts Strong Rights*, Tushnet (2007) argues that legal scholars do not often focus on legislatures as interpreters of the constitution because of the way judicial review in the United States is structured. For example, in the United States, the courts are given the opportunity to strike down legislation that they believe is unconstitutional, and, therefore, the common perception is that legislators are the potential violators of the constitution while the judiciary enforces the document. He further notes that the strong form of judicial review causes congressmen and senators to buy into this perception themselves. And that they sometimes vote for legislation that they know the Supreme Court will strike down as unconstitutional in order to make a political statement without having to face the actual consequences of their legislation (ex. a senator could vote for a law banning abortion to gain favor with the pro-life movement, knowing that even if the law were to pass, the Supreme Court would strike it down). In short, a system of strong judicial review leaves much of the

responsibility of enforcing the constitution to the judiciary. However, Tushnet notes that, even in the United States, legislators are sometimes called upon to interpret the constitution. For example, in impeachment hearings, the congress and not the judiciary is called upon to decide which "high crimes and misdemeanors" are impeachable actions.[102] In addition, senators are called on to interpret/debate certain sections of the constitution during constitutional points of order. And, Tushnet argues, records of both impeachment proceeding and debates surrounding constitutional points of order show that legislators take their responsibility to interpret the constitution seriously and that the arguments they make are not that different from arguments made by the judiciary. In the end, Tushnet suggests that legislators should also be seen as potential enforcers of socio-economic rights. While the Ecuadorian constitution does not offer a perfect mechanism for guaranteeing socio-economic rights or changing the economic structures of the state, its treatment of sumak kawsay suggests new areas of research for design scholars interested in economic policy.

Changes to Existing Institutions

The above discussion surrounding the enforcement of socio-economic rights highlights the fact that other government institutions will also need to be involved in realizing the goals of sumak kawsay, and the constitution and its framers make it clear that the adoption of sumak kawsay involves more than just the expansion of socio-economic rights. In this light, Articles 340-415 establish sumak kawsay as the new development framework of the state. Indigenous thinkers such as Macas highlight the fact that the constitutional recognition of sumak kawsay

[102] For example, Tushnet (2007) notes, during the Clinton impeachment process, congress debated whether Article Two of the constitution implies that the president can be impeached for any crime or misdemeanor, or only crimes related to his political office.

was meant, not simply as a nod to indigenous culture, but was instead intended to outline a totally different approach to development by the Ecuadorian state. And, as mentioned in Chapter 1, one of the primary reasons for both indigenous and non-indigenous participation in the constitutional reform movement was that both groups were frustrated that the 1998 constitution did nothing to halt neoliberal economic reforms. All of this raises the question: how much should the goal of alternative/sustainable development impact the drafting of a constitution? While, on the one hand, sumak kawsay appears to be an indigenous issue, on the other hand, non-indigenous Ecuadorians also felt a frustration with economic policy that seemed to leave large sectors of society behind. These concerns about the long term sustainability of development programs has become a concern to scholars and activists world-wide. All of this suggests that the question of how to draft a constitution with certain economic and development goals in mind is one that will become increasingly important to design scholars.

While the question of how to design a constitution with economic policy goals in mind is largely unexplored in the design literature, one can image that if sustainable economic development were taken as seriously as other traditional goals of the design literature (such as promoting stability, ensuring accountability, or widening representation) then, like these traditional political goals, it would also require significant changes to existing government institutions. In particular, the Ecuadorian discussion of sumak kawsay raises two primary questions for design scholars: 1) How could a constitution be designed to give local communities greater control over development policies and 2) How might national institutions be designed to encourage the adoption of economic policies that will benefit the common good over more narrow private interests?

As mentioned above, while the concepts of sumak kawsay, alternative-development, and alternatives to development are still fairly nebulous, in discussing each concept, scholars and activists argue for greater local control over development programs. This more localized control, they argue, can encourage communal economic enterprises, help to guarantee that development programs benefit the least well off in a given community, ensure that development programs are in line with the values of a particular community, and promote the inclusion of local and indigenous knowledge into development programs. Therefore, one of the primary questions raised by sumak kawsay and alternative-development theories is, how can existing government institutions be modified to grant small communities more control over development projects? While there may be several different ways to encourage greater local control over development projects, the Ecuadorian case itself suggests three interrelated methods: decentralization of development planning and resources, redrawing rural boundary lines, and upholding the idea of free prior and informed consent.

As mentioned in Chapter 3, the 2008 constitution has made provisions for the construction of citizens' assemblies which could, among other things, deliberate and decide on development projects. While I have argued in Chapter 3 that these citizen assemblies could further the goals of interculturalism (by giving indigenous peoples and authority structures a larger role in local government) this type of decentralization could also further the goals of sumak kawsay by giving local communities a larger say in development projects. If one of the goals of sumak kawsay or alternative-development is, as Gibson-Graham suggest, to focus on the unique resources, social structure, and goals of each individual community, then these citizen assemblies could be used to help channel development funds into projects that are tailored to the specific needs of each community. As Faguet explains, in the Bolivian case

decentralization of government funds did lead to greater spending on projects that community members themselves labeled as a priority.

However, while decentralization has the potential to give local communities more control over development projects, decentralized development projects also run the risk of being coopted by local elites. A number of decentralization studies demonstrate that elites are most likely to coopt local resources when there is a large amount of economic inequality in a municipality, particularly when those who are economically disadvantaged also belong to a different ethnic or tribal group than local elites. (Ch 4 Grootaert, Oh and Swamy 2002 (Thoms 2008) Araujo et al. 2008 Bardhan, Mookherjee and Torrado 2010). In addition, arbitrary boundary lines may make the management of a common resource (such as a section of a forest or lake) more difficult than if all of those who rely on a common area for resources were zoned to the same canton or parish (Thoms 2008 and Coleman and Fleischman 2012). These findings suggest that the boundaries of any local municipality are therefore important in determining the success of any decentralization initiative. As mentioned in Chapter 3, one of the difficulties with indigenous autonomy provisions in Ecuador is that canton and parish boundaries were drawn during the colonial era with little regard for existing social structures or indigenous groups. As a result, one indigenous group may be spread over several cantons or parishes without making up a majority of the population in any one locality, making it more difficult for them to influence the local government. A remapping of parish and canton boundaries, however, may not only be beneficial in promoting indigenous autonomy, but it may also be valuable in ensuring that decentralization initiatives further local development goals. Canton and parish boundary lines which better represented traditional tribal territories and patterns of land use would help to ensure that local development projects represented the needs of the community at large by decreasing ethnic heterogeneity and inequality in each locality (thereby reducing the risk of elite

capture) and ensuring that all those who rely on a natural resource are able to take part in development and conservational planning (thereby decreasing common pool resource problems).

Finally, as discussed in Chapter 3, an expansion of the idea of free prior informed consent (FPIC) could be used to both guarantee that local communities have a greater hand in development planning and to ensure that large scale development projects (particularly those initiated by extractive industries) actually benefit the local community as well as the national economy. While free prior and informed consent is generally advocated for as an indigenous rights issue, a similar process of FPIC could be used in non-indigenous localities as well, as a means of holding large-scale industries accountable to local communities. In this light, groups such as Oxfam and the World Bank have already declared FPIC as a best practice for working with all local communities, and the right to prior and informed consent of non-indigenous communities was upheld by the Inter-American Court in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001). [103]

While the above provisions (decentralization of development planning, a redrawing of local boundary lines, and an expansion of FPIC) may all serve to grant local communities more control over development projects, advocates of sumak kawsay also call for a seismic change in national development planning. And a sizable change in national development planning will require not only a devolution of power but changes to national institutions, as well. While the constitutional design literature has yet to discuss the specifics of how the design of institutions

[103] For more information on how free prior and informed consent could be structured, see Chapter 4 of this dissertation. For more information on free prior and informed consent projects in both indigenous and non-indigenous contexts, see (McGee 2009 and Perrault, Herbertson and Lynch 2006).

can affect economic policy, scholars of international political economy have begun to examine how different electoral systems may affect a country's economic policy. In particular, studies show that proportional representation (PR) systems are likely to be more redistributive, have higher welfare spending, and run larger deficits than majoritarian systems. On the other hand, majoritarian systems with single-member districts may have lower levels of corruption and higher levels of financial accountability than PR systems. In addition, while politicians in PR systems generally focus on funding economic projects with broad-based benefits and appeal, politicians in majoritarian single-member districts are more likely to prioritize funding to smaller local projects (Persson and Tabellini 2003, Iversen and Soskice2006, and Austin-Smith 2000).

Persson and Tabellini reason that these differences in economic policy outcomes between PR and majoritarian systems stem from the different incentives that representatives from each system have. For example, they argue that in PR systems parties generally need to appeal to a larger percentage of the population to control the legislature. If a country is completely comprised of single-member majoritarian districts, then each candidate only needs roughly 50% of the vote to win his district and a party can control the majority of the legislature with one more than 50% of the seats. Therefore, a party could control the legislature with just over 25% of citizens actually voting for members of that party. However, at the other extreme (a PR system where the country represents a single electoral district), a party would have to gain slightly over 50% of the vote nation-wide to win a majority in the legislature. Therefore, Persson and Tabellini argue that PR systems tend to encourage politicians to promote economic policies that have more broad-based support and to adopt programs that benefit the majority of the populace. The incentive to appeal to common economic interests would be greater in those PR systems with larger district sizes, as the larger the district size, the larger percentage of overall votes a party needs to stay in power. In majoritarian systems, where only 25% of the vote is

needed to control the legislature, it may be easier for elite level economic interests to win out.[104]

However, while the advantage to larger PR electoral districts is that economic policies may be based on a wider range of economic interests, single-member districts may allow more control over local-level spending. As Persson and Tabellini argue, in single-member districts, representatives have an incentive to pursue spending projects that will specifically benefit their district, and, if local economic projects are not successful, citizens have a single representative that they can hold accountable. Therefore, while majoritarian systems have lower overall rates of spending, they can allow for more targeted economic spending.

The above findings on electoral systems and economic policy raise the question: What type of electoral arrangement would best encourage economic policy in keeping with the goals of sumak kawsay? On the one hand, sumak kawsay focuses on the development of community economic projects, which might suggest that a majoritarian political system may better promote the goals of sumak kawsay. On the other hand, advocates of sumak kawsay also argue that

[104] Iversen and Soskice (2006) and Austin-Smith (2000) take Persson and Tabellini's incentives-based argument a step further. They note that, while PR systems tend to encourage at least three political parties, majoritarian systems generally lead to two-party systems. The authors assume that parties will generally be divided along class lines, and they assume that a two-party system will have one party that represents the economic interests of the poor and one party that represents the economic interests of the elites and that the middle class will be the swing voters that politicians appeal to. On the other hand, in PR systems there could conceivably be three parties, representing the poor, middle class, and elites. The authors argue that with three political parties, it would be much easier for the poor and middle class parties to form a ruling collation that demands redistributionist economic policies than in a two party system where the middle class is divided. Therefore, not only the size of the electoral district, but also the plurality of parties determines economic policy. While Iversen and Soskice (2006) and Austin-Smith (2000) provide additional rational as to why PR systems are generally more redistributive, it is unclear how economic policy would be affected by parties that are not primarily divided along economic lines or by a system with more than three parties. For example, would a five party system be more or less redistributive than a three party system?

national economic projects should be more in keeping with the needs of the poorest Ecuadorians, demand greater social spending, and call for more redistributive economic policies, all of which would suggest a PR system. Ecuador currently has a unicameral assembly of 137 assembly members, who are elected in three different ways: fifteen assembly members are elected from a single nation-wide electoral district, 116 assembly members are elected from provincial districts, and six assembly members are elected by Ecuadorians living abroad.[105] For the 116 provincial districts seats, one province generally represents one electoral district, although Ecuador's three largest provinces (Guayas, Pichincha, Manabi) are divided into multiple districts. Each district elects between two and seven representatives depending on population size. Voters receive a vote for each seat in a given district and may either allocate their votes towards a political party or split their votes between candidates.

In terms of sumak kawsay, the potential merits of the Ecuadorian system are that the fifteen national seats, as well as the presence of the provincial multimember districts, may encourage parties to focus on a nationwide development agenda that takes into account the needs of a majority of Ecuadorians. On the other hand, the fact that the districts are relatively small and geographically based may allow legislators to pay more attention to local development projects in each province. However, while Ecuador does prioritize welfare, educational, and other social spending, the legislature has largely failed to realize one of the

[105] Originally each of Ecuador's 24 provinces was considered one electoral district. Each province was given a minimum of two assembly members, plus an additional assembly member for every 200,000 people. However, in 2012 the electoral law was reformed so that provinces which qualified for more than seven assembly seats would be divided into multiple districts. So, for example, the largest province, Guayas, which is entitled to twenty assembly members was divided into four districts of five members each. This move, as well as a change in the way that votes were counted (seats allocation is now calculated using the D'Hondt formula as opposed to the Webster's method), was criticized by some as an effort to take power away from smaller parties to the benefit of Correa's AP party. In addition, Ecuadorian citizens living abroad are divided into three electoral districts of two members each.

primary goals of an economic policy based on sumak kawsay: passing legislation that would curtail the excesses of foreign extractive industries. This policy failure on the part of the legislature could have a number of causes. First, it is possible that, while electoral engineering can incentivize a country to spend more on social welfare projects overall, it may not be able to create the types of incentives that would encourage politicians to prioritize long-term environmental and community causes over short-term economic benefits. The idea that a country which relies heavily on oil and mining for government revenue should heavily regulate extractive industries may be a difficult sell for any politician in either a PR or a majoritarian system.[106] And second, as mentioned in Chapter 1, the legislature in Ecuador overwhelmingly represents the president's party and, therefore, has little incentive to challenge his economic policy. Moreover, one of the reasons that the president has a supermajority in the legislature is the way the electoral system is structured. In 2012, electoral law was changed to shrink the size of Ecuador's largest provincial districts. For example, the province of Pichincha (home to the city of Quito) had 16 assembly seats in the 2009 election. However, in 2012, due to a ruling by the National Electoral Council, Quito's 16 seats were divided into four districts of four members each. This division of the larger electoral seats, as well as a change in the way seats were divided, gave an advantage to larger parties (in this case the President's AP party). Therefore, in the 2013 elections the AP party received 48% of assembly votes but gained control of 73% percent of the seats. Although the AP party would have had a majority without any electoral engineering, the 2012 electoral reforms that prioritized large parties granted the president's party a supermajority in the assembly, granting the president even more power over the

[106] One constitutional design solution to this would be to appoint different types of representatives altogether (ex. legislators that represent future generations, nature, etc.). This solution however, has its own democratic tradeoffs and will be discussed in more detail in Chapter 6.

economic and political agenda. Therefore, the disparity between the number of votes a party has and the number of seats it obtains (which, as mentioned above, is generally larger in majoritarian systems or smaller electoral districts) may make the realization of the goals of sumak kawsay difficult due to elite capture of economic policy (as predicted by the literature above).

The assembly's failure to curtail extractive industries is most likely due to a number of causes, not all of which can be resolved through electoral engineering. However, the literature does suggest that larger electoral districts may allow assembly members to be more focused on the type of economic/development projects that benefit a wide range of Ecuadorians (including those who are least advantaged). In Ecuador, one solution might be to consider an electoral system that is divided along Ecuador's three main geographic zones so that the coast, the highlands, and the Amazon would each represent one electoral district. This type of division would create larger electoral districts which could help to break up the supermajority held by the AP, granting the assembly more power to shape development policy as an independent entity. Dividing assembly votes along these lines could also incentivize candidates to appeal to projects which would benefit the unique economic and development challenges of the region they represent (particularly if the open party list system were maintained). At the same time, political parties would have an incentive to support a development project that had appeal to all three regions. While this new division of seats may not be enough on its own to ensure that the goals of sumak kawsay are met, it does illustrate one of the challenges faced by constitutional designers: namely how to encourage assembly members to both advocate for development projects that would benefit local communities and support economic policies that will benefit Ecuadorians as a whole.

Ultimately, this discussion of electoral engineering highlights two major points for constitutional designers. First, electoral systems do have an effect on economic policy, and, therefore, the structure of the legislative branch is important when considering how constitutions in developing countries can promote local/sustainable/alternative-development. In this light, more research should be done by design scholars to determine the more nuanced effects of electoral design on economic policy. For example, how do electoral branches that have properties of both PR and majoritarian systems behave? How would variables such as district size or an open vs. closed list affect future economic outcomes? And are there ways of designing a legislative branch that incentivizes representatives to consider long-term over short-term interest?

Second, the fact that electoral engineering can have an effect on economic policy outcomes also suggests that design scholars should consider how other government institutions can affect the goals expressed by proponents of sumak kawsay. As mentioned above, the Ecuadorian constitution implies that sumak kawsay should be one of the reorienting concepts of the new Ecuadorian state. If one takes that claim seriously then it raises the question: how should institutions be arranged to not only promote traditional democratic goals (such as inclusion, representativeness, or accountability) but to maximize economic goals (such as sustainability or economic equality), as well? While I have focused this section on electoral engineering, a complete answer to this question would require examining other institutions as well. For example, would a presidential or parliamentary executive make a difference as to the type of economic policy that gets promoted? Or is there a way of dividing the cabinet or government ministries that would encourage a certain type of development? As demonstrated in this chapter, one of the difficulties with implementing sumak kawsay is that the concept emphasizes communal growth, development, and harmony (which requires a fair amount of

local autonomy over development programs) while also calling for a change in the country's overall perception of development and economic growth (which requires strong and independent national institutions and/or strong government regulations on foreign industry). The challenge for constitutional designers, then, is to determine how other national institutions can be modified to achieve this balancing act. While the specific concept of sumak kawsay may have originated in the Ecuadorian Quechua community, the issues raised by alternative- and post-development theorists are salient across the developing world, and, therefore, the Ecuadorian case raises import questions for constitutional designers worldwide.

Citizen Participation

While changes to existing institutions may help to promote the goals of sumak kawsay, the Ecuadorian constitution also creates a new branch of government, the Transparency and Social Control Branch, which could also give indigenous and rural Ecuadorians more control over national development policy.[107] While this branch is still being theorized and constructed, it ultimately may provide a means of ensuring that citizens have more input over national development policy and provide a check on transnational corporations aimed at derailing the goals of sumak kawsay.

The inspiration for the fifth branch grew out of the same mistrust for "professional" politicians that drove the AP's rise to power and its subsequent "citizens' revolution." In essence, proponents of the fifth branch argued that political parties and long-term politicians

[107] The Ecuadorian constitution actually establishes five branches of government: the executive, legislative, judiciary, electoral, and citizen participation branches. Most often in interviews the transparency and social control branch was referred to as the fifth branch or fifth power. The elections branch primarily monitors elections, and was not discussed much by interviewees.

were often unable, or unwilling, to act in the best interest of the citizenry due to either corruption or a genuine lack of understanding of the plight of the working classes. The fifth branch, therefore, was designed to be directed by a body of citizens that would be responsible for checking the legislative and executive branches. In theory, members of the fifth branch would be respected scholars, business leaders, or community activists (rather than career politicians) who would be appointed to the fifth branch with the express purposes of monitoring corruption in the other branches of government, communicating the sentiments of the populace to elected officials, and encouraging greater public participation in Ecuadorian politics at the national level. Because office holders would be appointed rather than elected, it was hoped that they would be able to focus on the good of the citizenry as a whole, rather than on the political maneuvering necessary to get re-elected. In short, the fifth branch was designed to be a go-between for the national government and the ordinary citizen.[108]

Unfortunately, while articles 204-210 of the constitution establish the goals and structure of the Transparency and Social Control Branch, they are notably vague on the selection of the branch's members and their subsequent mandate. The constitution states that the fifth branch will be directed by a council made up of seven members, the Consejo de Participación Ciudadana y Control Social (CPCCS).[109] And Article 207 further elaborates, "The selection of council persons shall be done from among candidates proposed by social organizations and the

[108] While the Participation and Social Control Branch of government is an Ecuadorian invention, the older Venezuelan constitution, written in 1999, does have a "Moral Office of the Republic" which also focuses on controlling corruption (although it is not charged with promoting participation). The 2009 Bolivian constitution followed suit by calling for the establishment of a Social Participation and Control Council (Lalander 2012, 167). See also personal interview with NGO focused on civic participation, 4/2/12 (6) and personal interview with AP Assembly Member 8/2/12 (30).

[109] While the fifth branch is headed by the CPCCS, the office of the comptroller general and the human rights ombudsman are all part of the Transparency and Social Control Branch.

citizenry. The selection process shall be organized by the National Electoral Council…." However, the constitution is unclear as to how social organizations and the citizenry should choose or propose candidates. And, in practice, the candidate's appointment was left exclusively to the National Electoral Council, who were themselves appointed by Correa.[110] In addition to having an unclear appointment procedure, the CPCCS has a rather nebulous mandate. Article 204 states that the goals of the fifth branch are to ensure that other government bodies conduct their business with "responsibility, transparency, and equity," "foster and encourage public participation," "protect the existence and fulfillment of rights," and "combat corruption." However, the means by which the branch should accomplish these lofty goals is left up to subsequent legislation. As a result of this unclear mandate, the fifth branch has, so far, implemented relatively few programs and has had little political impact.

Notably, while those that critique the fifth branch largely focus on the questionable method of the CPCCS appointments and its similarly unclear mandate[111], those who helped to design the fifth branch argue that a national-level institution focused on citizen participation is

[110] The president was able to take advantage of the ambiguous appointments process delineated in the constitution. The constitution states that while the National Electoral Council chooses CPCCS members, CPCCS delegates are, in turn, called upon to appoint members of the National Electoral Council. In addition, this process is further complicated by the fact that the CPCCS also plays a role in selecting judges for the constitutional court (Articles 217, 224, and 434). Therefore, if a person or party can take advantage of the confusion surrounding the qualification and appointment of CPCCS members, he can also effectively exercise some control over the National Electoral Council and the Constitutional Court, as well. Because of the circular nature of the appointment process, all the initial CPCCS and National Electoral Council candidates were effectively appointed by Correa.

[111]Personal interview with representative of an NGO focused on civic participation, 4/2/12 (5). Personal interview with NGO focused on civic participation, 5/13/12 (8). Personal interview with 2008 Assembly Member, 6/20/12 (16). Interview with independent Assembly Member and Assembly Member at 2008 convention, 7/3/12 (18).

still an important democratic innovation.[112] And supporters argue that if the institution were given a stronger mandate and more transparent appointment process, it could have an important role to play in Ecuadorian politics. One of the dilemmas faced by the drafters of the constitution is that anyone standing in a general election for a CPCCS seat might be seen as (and behave as) a career politician, whereas other methods of political appointment may be subject to increased levels of clientelism/corruption and a general lack of transparency. One possibility for a new appointments scheme would be to allot seats to different well-respected civil society institutions. For example, a seat could be allotted to each of the following civil society organizations/social movements: the Catholic Church, indigenous organizations, trade unions, organizations of higher education, environmental organizations, and afro-Ecuadorian organizations. The advantage to this type of system is that organizations/movements can each develop their own method for appointing an individual to their allotted seat on the CPCCS. There might initially be some controversy as to how each group selects its seat holder. For example, if there were one seat dedicated to environmental organizations, then there may be some controversy over which environmental organization ultimately gets to choose the representative (should a CPCCS member be chosen from Pachamama Foundation or Accion Ecologica, both of which are well-respected environmental organizations). On the other hand, these environmental organizations are already used to working with each other on large campaigns and have established internal hierarchies/decision making processes and should, therefore, be able to come to some sort of agreement about who should take the council seat (or at least how to decide who will take the seat). This would be particularly true in a small country such as Ecuador, where these activist communities are fairly close knit. In addition,

[112] Personal interview with AP Assembly Member, 8/2 /12 (30). Personal interview with indigenous activist, 9/5/12 (37).

given that the appointment process would vary from group to group, it would be difficult for the president or the legislature to completely highjack the entire selection process. In short, this type of seat allocation would help to clarify the CPCCS selection process while still keeping to the spirit of the 5th branch as outlined in the constitution. The organizations listed above are well respected by Ecuadorians, and their inclusion in the CPCCS would be able to capitalize on their support and provide some stability in a system where citizens tend to distrust professional politicians. Furthermore, these types of organizations would be able to represent citizens' interests on the environment, the economy, and politics in a way that the legislature would not. However, while this method of CPCCS selection would be more clear and transparent than the current method, one area of concern would be how to choose exactly which groups get a seat at the table. Even if there existed a general consensus on which civil society groups were most important at the founding of the CPCCS, new organizations or groups could develop over time, and a CPCCS with a predetermined seat allocation would run the risk of becoming irrelevant. One possibility would be to allow another branch of government to decide which types of organizations gain a seat. In the Ecuadorian case, the National Electoral Council could decide seat allocation since this already falls within their purview, whereas, if other countries were to adopt a similar model, the legislature may determine seat allocation.[113]

In addition to clarifying how CPCCS members were appointed, Ecuadorians would need to give the CPCCS a clear mandate to affect political change. And, while the current CPCCS is still mired in controversy, there are a number of initiatives that the fifth branch could undertake to

[113] As mentioned above, the National Electoral Council already chooses CPCCS members, so this would be only a slight alteration of their duties. Part of the difficulty with the current National Electoral Council and CPCCS members is that the appointment process between the two is circular and Correa was able to take advantage of this. One solution would be to have the National Electoral Council either be elected or appointed by the Assembly to avoid confusion over appointments.

grant ordinary citizens more control over development planning and projects. In this light, the CPCCS member I spoke with, as well as a lawyer who often works with indigenous groups, suggested in interviews that the fifth branch may, in the future, adopt a more active role in guaranteeing a modicum of fairness and transparency in consultation processes with oil, gas, and mining companies.[114] Having a government branch dedicated to the consultation process may give local communities more bargaining power in dealing with multinational corporations. This oversight is important because, while tribal consultation is often touted as a means of protecting local and environmental resource rights, consultation programs frequently make local communities vulnerable to large corporations and the forces of globalization.[115] CPCCS members could have more oversight of the consultation process by creating a protocol for FPIC negotiations based on international best practices, monitoring any ongoing FPIC process, and declaring any FPIC process invalid. CPCCS members would be in a unique position to oversee consultation as civil society members are more likely to represent long-term environmental and indigenous interests than either corporations or the legislature. And, given that sumak kawsay is concerned with environmental conservation and non-exploitive development practices, any measure which gives local groups more leverage in dealing with the representatives of extractive industries is likely to advance an economic agenda represented by sumak kawsay.

Furthermore, one of the assembly women responsible for drafting the Participation and Social Control chapter of the constitution suggested that the branch could also play a future role in developing participatory budgeting processes akin to those in Brazil.[116] To this end, the CPCCS

[114]Personal interview with a member of the CPCCS, 7/9/12, (21). Personal interview with representative of a NGO that gives legal advice to indigenous groups, 7/12/12 (25).

[115] For more on tribal consultation and extractive industries, see the discussion in Chapter 4.

[116] Personal interview with AP Assembly Member 8/2/12, (30).

has recently begun to work with canton governments in establishing local citizen assemblies that would, through deliberation, determine local development goals. These local assemblies should also give indigenous communities a greater ability to ensure that local development goals are in keeping with the concept of sumak kawsay.[117] Along these same lines, Articles 279 and 280 of the constitution specify that the National Development Plan will be constructed with participation of the citizenry at both the national and local level. In particular, Article 279 calls for the creation of citizen councils that "shall be bodies for the discussion and creation of long term strategic guidelines and agreements that shall provide guidelines for national development." In addition, the article calls for a "National Planning Council" which would coordinate the efforts of the local citizen councils to influence development policy. While the constitution is unclear as to whether or not the National Planning Council and local citizen councils would fall under the CPCCS and the already organized citizen assemblies, Article 279 does point to the importance of citizen input in development planning. Since the CPCCS is designed specifically to coordinate citizen participation efforts, it could potentially have a future role in implementing Article 279 and ensuring that citizens have a significant input on development policy. And, once again, this level of citizen involvement may help to check the influence of extractive industries and those national-level politicians that have a vested interest in derailing the sumak kawsay project.

Finally, the CPCCS member that I was able to interview saw his role as being a kind of citizen advocate. He argued that the CPCCS should continue to advocate for citizens by facilitating meetings between ordinary citizens and government officials, promoting transparency by providing SMOs with solicited information, and organizing individual and group

[117] For more on the structure and function of these local assemblies, see the discussion in Chapter 3.

meetings to the national assembly.[118] While this role of "citizen advocate" is still not well defined, at its best, the CPCCS could make development planning more transparent through facilitating interactions among the public, the National Assembly, and NGOs. And this increased transparency could be another mechanism for ensuring that special interests do not put up additional barriers to the development of a new economic strategy based on the principles of sumak kawsay. One particular way that the CPCCS may promote transparency in development would be to investigate the background, previous employment, and potential conflicts of interests of government ministers. As Urteaga-Crovetto notes, one of the most common economic problems in Latin America is that government ministers of development, trade, natural resources, etc. often have financial and social ties to large multinational corporations and international financial institutions that cause them to act against the interests of poor groups, particularly indigenous communities. The CPCCS, therefore, could have a range of responsibilities from conducting a full audit of proposed government ministers to having the power to block appointments of ministers with extensive ties to multinational corporations.[119] This type of investigation and oversight by the CPCCS could help to ensure that the goals of sumak kawsay are not railroaded by powerful international interests.

Ultimately, the fifth branch of government, plagued by an unclear mandate and controversial appointment procedures, has not been as effective an institution as the constitution's framers intended. However, the ideas surrounding the creation of the fifth branch

[118] Personal interview with CPCCS member, 7/9/12 (21).

[119] Since the CPCCS would be an unelected body, designers must consider a balance between giving the CPCCS enough power to be effective and granting an unelected body too much power. Therefore, I do not mean to suggest that the CPCCS should be able block any type of ministry appointment for any reason but to suggest that it might be useful for the committee to be able to veto a minister's appointment if that appointment would break specific conflict of interest rules.

provide interesting possibilities for those concerned with alternative-development and constitutional design. The fifth branch has the potential to provide a creative way to incorporate citizen participation at the national level. Not only is it designed to coordinate local participatory development initiatives, but it is also meant to encourage citizen activism by granting power to non-traditional office holders (such as civil society leaders). An institution designed to enhance citizen participation at the national level could provide some transparency for both citizen consultation and development planning, helping to ensure that national economic and political elites do not derail the process of economic reform. In addition, sumak kawsay is a fairly ambitious proposal, requiring not just the addition of a few socio-economic rights to the constitution but an overhaul of the country's entire economic model. As Sousa Santos and Rodriguez-Garavito (2007) argue, changing a country's economic paradigm will not be achieved solely by the efforts of local business and communities to "opt out" of the current model of neoliberal economic development. Instead, fundamentally changing a country's economic model will require a coordinated effort among local communities, local businesses, national policy makers and NGOs. An institution like the fifth branch, which is designed to strengthen already existing participatory institutions and has the potential to give citizens more control over development policy, may be the first step in helping to facilitate this coordinated effort.

Conclusion

Ultimately, sumak kawsay demonstrates more clearly than any other plank in CONAIE's platform that plurinationalism is about much more than the recognition of group-differentiated rights for indigenous peoples. Like interculturalism, sumak kawsay is not so much about preserving indigenous ways of life as it is about changing the larger economic and development goals of the state to be more in line with indigenous norms. And in challenging Western

concepts of “progress” and “development,” sumak kawsay challenges scholars to consider not only how the state can behave more justly in its relations with indigenous peoples but also how the structure of the state can be changed to accommodate all those who have been left behind by traditional development models.

The wide-sweeping ambitions of those who advocate for sumak kawsay challenge constitutional designers to consider how government institutions can be structured to address these goals of economic sustainability and equality. As the above discussion indicates, in order for the concept of sumak kawsay to be realized, constitutional guarantees of socio-economic rights will need to be bolstered by a legislative, executive, and judicial branch dedicated to indigenous people’s economic vision, as well as a government structure that allows for citizen control over economic policies. The issues raised by Ecuador’s indigenous peoples regarding the economy are echoed not only by non-indigenous Ecuadorians but also by environmentalists, indigenous groups outside of Ecuador, and proponents of alternative-development across the global south. Therefore, while the question of how to incorporate the goals of sumak kawsay are important for Ecuadorian constitutional scholars, they are also likely to be crucial for future constitutional designers world-wide. The Ecuadorian case, therefore, points to both solutions to the question of how historically disenfranchised peoples can gain control over their economic destiny, as well as the enormous amount of research left to be done.

Chapter Six

Does Mother Nature Have Rights?

The 2008 Ecuadorian constitution was the first in the world to recognize Mother Earth as a rights-bearing entity, and despite initial concerns about the enforceability of such a right, a provincial court in Loja became the first to uphold the rights of Mother Earth in March 2011. In *Wheeler c. Director de la Procuraduría General Del Estado de Loja,* Richard Wheeler and Eleanor Huddle sued the provincial government of Loja for violating the rights of nature. In brief, the provincial government had begun a major construction project to widen the Vilcabamba-Quinara road, without conducting any sort of environmental impact assessment or making plans to dispose of rubble, dirt, and uprooted trees in an environmentally friendly manner. Instead, the resulting debris was dumped on the banks of the Vilcabamba River, narrowing parts of the river and causing flooding and soil erosion downstream. Wheeler and Huddle, who owned land affected by the environmental destruction, chose to sue the province of Loja on the grounds that the construction project violated the rights of nature by destroying the habitat along the river (rather than filing a suit based on property rights). The court found that the construction project did violate Article 71 of the constitution and ordered the provincial government to clean up existing rubble and debris and to work with the Ministry of the Environment to insure that the project would be environmentally friendly going forward. In addition, the court set a couple of important judicial precedents for the rights of nature. It ruled that in rights of nature cases the burden of proof is on the defendant to show that environmental harm did not happen, rather than on the individuals suing on behalf of nature. Moreover, the court argued that the rights of nature should be given special precedence over other constitutional rights, given that

the rights of nature are deeply intertwined with issues of generational justice (Daly 2012 and Green n.d.).

The *Wheeler* case is significant in that it represents the culmination of indigenous and environmentalists' efforts to have the rights of Mother Earth recognized in the constitution and the courts. The rights of nature were initially part of a larger movement to have indigenous beliefs incorporated into both the constitution and the national identity of Ecuador. Indigenous activists at the constitutional convention argued that the idea that humans should strive to live in harmony with nature was a key tenant of indigenous cosmology and that the indigenous rights movement would not be complete without a recognition of the importance of nature in indigenous culture and a way to protect nature from further environmental degradation. The ensuing recognition of the rights of nature in the Ecuadorian constitution created new ways of protecting the environment, made it easier to enforce existing environmental legislation, and changed the way that mainstream Ecuadorians viewed the environment. While the idea of the rights of nature is still being developed as a legal concept, it highlights some of the difficulties for constitutional designers in balancing human and environmental needs.

Environmental Rights in Constitutional Law

While the Ecuadorian constitution is the first that recognizes nature as a rights bearing entity, roughly three quarters of the world's constitutions either recognize environmental protection as a goal of the state and/or grant citizens the right to a clean environment (M and D, 2014, 2). However, while the right to a clean environment is becoming a popular addition to national constitutions, the right itself raises a number of theoretical and political questions surrounding the nature of constitutional environmental rights and the consequences of enforcing those rights.

In his work *Constitutional Environmental Rights*, Tim Hayward (2004) notes that, while the inclusion of environmental rights has become increasingly popular in national constitutions, there has been little theoretical discussion as to whether or not the right to a healthy environment should be considered a human right or whether or not environmental provisions deserve to be included at the constitutional level. Ultimately, he argues that access to a clean, or at least adequate, environment meets the criterion to qualify for a human right in that it represents a "universal human interest" of "paramount moral importance," given that destruction of the environment could be as detrimental to human wellbeing as mass murder. He also argues that access to an adequate environment would fit neatly into the human rights framework, as it elicits a corresponding moral duty on the part of the government and private citizens to not destroy the environment.[120] Hayward further argues that, once we recognize that access to an adequate environment should have status as a human right, we should include it in our national constitutions. In short, he argues that only by granting human rights constitutional status can we treat them with the seriousness and moral authority that they deserve.

While Hayward makes a largely theoretical argument for a constitutional right to an adequate environment, Boyd (2012) and May and Daly (2014) enumerate several more practical reasons for including a right to a healthy environment in national constitutions. The authors argue that, because constitutions are generally seen as a reflection of "shared national values,"

[120] Hayward argues that, for many theorists, in order for something to be a right, it must elicit a corresponding duty for either humanity as a whole or a collection of individuals (typically a government). Hayward argues that, for example, freedom from torture can be considered a right whereby the government has a duty not to torture suspects. On the other hand, there is no "right to sleep" because, even though sleep is necessary for human wellbeing, no one has a corresponding duty to allow you to sleep. In this light, he notes that the right to an adequate environment actually fits better into the rights/duty framework than many socio-economic rights, in that it imposes a negative duty (i.e. don't destroy the environment) whereas socio-economic rights impose positive duties on the states (i.e. the state must provide me with housing).

a right that is included in the constitution is more likely to be respected by the citizenry, "guide public behavior" and withstand challenges than a right which is not included in the constitution (May and Daly 2014, 33). In addition, a constitutional right to a clean environment will make it more likely that already existing environmental laws are enforced and will provide for some environmental protections in areas that have yet to be legislated on (Boyd 21). Finally, Boyd argues that if socio-economic rights and political rights (such as the right to private property, employment, or housing) are included in the constitution but environmental rights are not, then larger environmental concerns are in danger of perpetually being trumped by these other rights, even when the harm done to the environment may far outweigh the harm done to existing socio-economic rights (Boyd 2012, 22).

However, despite these authors' advocacy for the inclusion of environmental rights into the constitution and the growing prevalence of environmental provisions in constitutions worldwide, there is still some confusion as to the properties and structure of environmental rights, and they can, therefore, be difficult to fit into existing rights frameworks. For example, as May and Daly note, "traditional constitutional rights litigation pits the private individual against the public authority," in that the implementation of constitutional rights generally involves individuals suing the government for a breach of either socio-economic or civil/political rights. On the other hand, when enforcing environmental rights, the public may often sue a private entity (generally a corporation) for its role in violating the environmental rights in question. May and Daly also note that, in many cases, the government may have benefited the private corporation in some way over the needs of the public. May and Daly, therefore, argue that "as a result, environmental litigation is increasingly forcing courts to adjust long-held views about the proper allocation of public and private power" (99). And this dynamic between public and private power also raises the question as to whether or not environmental rights should be

applied vertically or both vertically and horizontally. Along these same lines, it is also unclear whether or not environmental rights would be best conceptualized as individual or collective rights (or both). In most constitutions with environmental rights, these rights are framed as individual rights. However, given that environmental degradation generally affects entire communities, it may make sense, under some circumstances, to view environmental rights as collective rights (May and Daly 96).

In addition, it is unclear whether environmental rights should be treated as independent constitutional rights, or whether or not they should reinforce already existing human rights. For example, the Constitutional Court of South Africa has ruled that the right to housing may be infringed upon by environmental degradation; similarly, the Supreme Court of Pakistan ruled that environmental destruction can infringe upon the constitutionally guaranteed right to life. May and Daly argue that tying environmental rights to other human rights, rather than attempting to enforce them independently, may effectively limit the scope of environmental rights and, therefore, make them easier to interpret and adjudicate.

Finally, while environmental rights are typically thought of as an extension of socio-economic rights, Hayward argues that the right to an adequate environment has more in common with civil and political rights and, in most cases, should be viewed as a negative right. Here Hayward uses Saward's (1998) premise that environmental rights could be stated as follows: "The state must not deprive citizens, or allow them to be deprived, of an undegraded [sic] environment." (Hayward 2004, 149). Hayward argues that by framing environmental rights in such a way these rights are seen as less likely to require the government to provide something (as the right to social security or housing might) and, instead, suggests that the government can uphold environmental rights by refraining to do something (as in the right not

to be subjected to torture or not to have one's free speech inhibited). Hayward argues that framing environmental rights as negative rights takes some of the pressure off of the courts by no longer requiring them to be the agents of economic redistribution (as they might be if the environment were framed as a positive right).[121]

Despite Hayward's contention that environmental rights are simplified when framed as negative rights, the above-mentioned confusion on how to view and conceptualize environmental rights still leads to several difficulties in enforcing and adjudicating them. In particular, environmental rights can lead to the same sets of challenges regarding the balance of power between the judiciary and legislature, the need for the judiciary to take on an administrative role, and the judiciary's possible under enforcement of rights due to its elite level status, as the enforcement of socio-economic rights.[122] In addition, the judiciary may face a new and additional set of challenges when deciding on environmental rights cases. First, environmental rights cases can be complicated because the term "environment" is broad and can encompass nearly everything we come into contact with. Therefore, claims detailing damage to the environment can be fairly diverse (May and Daly 96). Along these same lines, it is difficult to know what level of environmental degradation would constitute a rights violation. Because the environment encompasses nearly everything we come in contact with, any type of

[121] In making this argument Hayward acknowledges that enforcing negative rights may, in practice, require a similar outlay of government resources as enforcing positive rights. However, he argues that "for negative rights an allocation of resources is necessary only as a means to the end represented by the rights, whereas for positive rights the redistributive allocation is itself inherent in the aim of the right…The right to an adequate environment, however, is not a right to a particular share of economic resources, and so does not need to be seen as a positive right on this ground. While social rights necessarily presuppose the existence of a welfare state and developed economy, all that environmental rights necessarily presuppose are the existence of the natural world and a normative order which recognizes rights (151)."

[122] See my discussion of the difficulties in enforcing socio-economic rights in Chapter 4.

human activity will, in some way, affect and shape the environment. Any natural area populated by humans will no longer be pristine. Hayward attempts to solve this dilemma by stating that people should have the right to an "adequate environment" for human flourishing rather having the right to a "clean environment," but this solution is also a little unsatisfactory. Does the right to an adequate environment mean that one's rights have not been violated unless they are made demonstrably ill by a specific environmental event (ex. community members exhibit higher rates of cancer after a chemical spill) or is an environment only adequate if it also allows for aesthetic enjoyment of nature (which one could argue is also necessary for human flourishing)? While setting the bar for what qualifies as an "adequate environment" fairly low might make judicial enforcement of the right more likely, there is something dissatisfying about potentially allowing endangered species to die off or national treasures to be polluted so long as any human population's health is not negatively impacted by it.

Finally, environmental rights can be difficult to enforce because of their strong potential to clash with economic and social rights. While it is not uncommon for economic, social, and political rights to clash under certain circumstances, the effort of balancing environmental and socio-economic rights can be particularly challenging. Specifically, many cases that deal with environmental degradation have the potential to impact an individual's livelihood or private property. For example, if a mining project is shut down due to environmental concerns, miners would lose their jobs, and the country or community could lose an import revenue stream. The closing of the mine could potentially affect the miner's right to employment as well as the citizen's right to social security, or housing, or education (assuming some revenue or tax had been going to fund social programs). Balancing these competing environmental and economic claims can be particularly challenging in countries with high poverty rates and/or in countries where a large part of the economy is based on natural resource extraction.

However, while he acknowledges many of the difficulties in enforcing environmental rights, Boyd argues that they can have important implications outside of litigation. In particular, Boyd contends that constitutional-level environmental rights can encourage politicians to draft stronger legislation aimed at protecting the environment. And he finds that in "at least 78 of the 94 nations" where environmental rights are recognized "environmental laws were strengthened" (Boyd 2012, 91). Therefore, he concludes that scholars place too much emphasis on the difficulties of enforcing constitutional-level environmental rights in courts and fail to recognize these rights' extraneous benefits, largely in the form of stronger environmental legislation.

As evident from the above discussion, environmental rights can be particularly difficult to conceptualize and enforce, and the literature on the subject raises a plethora of questions for future research, namely: Are environmental rights best conceptualized as negative or positive rights? Should environmental rights be applied horizontally? Should environmental rights be enforced in conjunction with, or independent of, other human rights? What is the scope of environmental rights? Should environmental rights cover what is beyond "adequate" for human flourishing? How do environmental rights cause us to reevaluate competing rights such as private property? How do they change our conceptions of public and private power? Do environmental rights raise questions of judicial overreach above and beyond the complications raised by socio-economic rights? And what types of secondary benefits do environmental rights provide outside of litigation?

Rights of Nature in Constitutional Law

While the current constitutional law literature has begun to focus on environmental rights for human beings, the literature is less focused on the more eco-centric approach to

constitutional law taken by the Ecuadorian constitution. As mentioned above, Ecuador was the first country to grant rights to Mother Earth itself, and there are currently no constitutions that recognize animal rights specifically.[123] In place of granting rights to animals or Mother Nature, several constitutions instead list sustainable development, environmental protection, or animal welfare as goals of the state. For example, Part IV, Section 35(5) of the Nepalese constitution states, "Provision shall be made for the protection of the forest, vegetation and biodiversity, its sustainable use, and for equitable distribution of the benefit derived from it." (May and Daly 2014 page 330). Similarly, Part II, Article 20a of the German constitution states, "Mindful also of its responsibility toward future generations, the State protects also the natural bases of life and the animals within the framework of the constitutional order by legislation, and in accordance with law and justice, by executive and judicial power." (345) Both of these provisions are similar in that they represent a mixture of both anthropocentric and eco-centric goals. For example, in the Nepalese constitution, the government is charged with both protecting the forest and biodiversity and seeing that the benefits derived from their use benefit everyone. In this sense, the state is portrayed as having a duty to human citizens to use natural resources wisely, but the wording of the clause could provide possible grounds for one to argue that the state is given the duty of protecting the forest and vegetation for its own sake, independent of human interests. In this same light, the German article charges the state with protecting nature and animals based on its duties towards future generations. This also charges the state to protect nature in a more expansive way than if the clause were only concerned with the rights of current citizens

[123] While Ecuador is currently the only constitution to recognize the rights of nature, Bolivia has drafted legislation granting nature rights. However, these rights do not appear in the Bolivian constitution. The constitutions of Germany, Luxemburg, Sudan, and Mauritius make statements regarding animal welfare but do not specifically grant animals rights. For more information on what types of environmental provisions are included in national constitutions, see May and Daly 2015.

(who may be less impacted by environmental degradation than future generations). However, while both of these articles, and others like them, are potentially more expansive than those that grant a human right to a clean environment, they stop short of granting rights to animals or nature. Instead, they merely express the goals and duties of the state and, as such, are generally considered non justiciable.

While the constitutional law literature is largely silent on granting constitutional rights to nature or animals, some scholars do call for the narrower provision of granting animals or natural objects standing in the courts. In his book *Should Trees Have Standing?*, Christopher Stone (2010) argues that the U.S. Congress should grant natural objects standing in the courts.[124] Stone states that granting natural objects standing would involve meeting three criteria: allowing for "a suit in the object's own name," "damages calculated by loss to a nonhuman entity," and "judgment applied for the benefit of the nonhuman entity (1)." So, for example, if a construction project damaged a part of Yosemite National Park, the National Park itself could be a plaintiff in the case against the construction company, the damages awarded to the park might be calculated based on the total cost of cleanup for the park, and the monetary award might be put into a special fund earmarked for park clean up. Stone notes that, while

[124] Stone is not calling for the implementation of the rights of nature in the Ecuadorian sense, nor is he calling for a constitutional amendment. Instead he notes that a combination of congressional statues and judicial precedent are generally used to determine who has standing in the courts. He therefore argues that the case could be made that congress already has the power to grant animals and natural objects standing. He further notes that in *Cetacean Society v. Bush,* the 9th Circuit Court of appeals argued that, while the cetaceans (dolphins, whales and porpoises) did not currently have standing, there is no reason why congress could not pass a law to give them standing in future cases (160). There have been a few additional cases with animal plaintiffs, but in those cases they were listed co-plaintiffs with humans. In those cases, the court largely ignored the animal plaintiffs and judged the case based on the merits of the human plaintiffs. See, for example, *Loggerhead Turtle v. County Council of Voluisa County Florida* (1998*), Northern Spotted Owl v. Lujan* (1991), *Mt. Graham Red Squirrel v. Yeutter* (1991), and *Florida Key Deer v. Sickney* (1994) (Stone 2010, 159).

congress has not granted standing to natural objects, other inanimate objects, such as trusts, corporations, and governments have been granted standing in the past (1). And like these other inanimate objects, Stone reasons that a guardian could be appointed to represent specific natural objects or species. He suggests that existing agencies or NGOs, such as the Sierra Club or the World Wildlife Foundation, could apply for guardianship of an object, animal, or species (8, 172).

Stone argues that granting natural objects standing would allow for a more honest assessment of damages in cases involving a breach of environmental law. In this same light, Cass Sunstein, in his article "Can Animals Sue?", argues that granting legal standing would be the most effective method of strengthening animal rights legislation already on the books. For example, both authors note that when animals are not granted legal standing courts may have to accept a fairly tortured logic in order to allow a human plaintiff to sue on an animal's behalf.[125] For example, in the case *Animal Legal Defense Fund v. Glickman*, members of the Animal Legal Defense Fund sued a zoo arguing that the zoo was mistreating primates and was therefore in violation of the Animal Welfare Act. One of the plaintiffs, Marc Jurnove argued that he had visited the zoo repeatedly and that he found the zoo's treatment of the primates deeply disturbing, thus ruining his aesthetic enjoyment of the zoo. The court ruled that Jurnove's ruined enjoyment of the zoo was enough to demonstrate that Jurnove had suffered an "injury in fact" (a precondition of being granted standing in court) and was therefore granted standing (Sunstein 259). In a separate case, *Lujan v. Defenders of Wildlife*, a group of individuals brought a suit arguing that U.S. funding of certain development projects abroad violated the Endangered

[125] As Sunstein points out, the only other methods for enforcing animal welfare rights, besides granting animals standing, is to rely on the public prosecution of violations of laws regarding animal welfare. And he notes that, in practice, this public prosecution very rarely happens (253).

Species Act. The court ruled that the plaintiffs did not have standing because they could not demonstrate that they had had any plans to travel abroad to either view or study the endangered species in question, and, therefore, they could not prove that they had suffered any injuries in the case (Sunstein 258). The court's ruling in the two cases causes Stone to speculate that the plaintiffs in *Lujan* may have been granted standing if they had been able to show an intent to visit the endangered species in question (by booking a wildlife tour, plane tickets, etc.) (Stone 2010, 159).

Both Stone and Sunstein argue that the tortured logic that the courts have to employ to grant human plaintiffs standing distorts the true damages in these legal cases. In both instances the harms suffered by the animals were much greater than the potential aesthetic injuries suffered by the humans, and in both cases the plaintiffs were arguing that laws aimed at protecting animal welfare (not enhancing human aesthetic enjoyment) were being violated. Both authors argue that granting animals (or in Stone's case animals and natural objects) standing would allow for a much clearer discussion of the issues at stake. In short, if animals or objects were granted standing, the court could evaluate the direct harms done to the animals or objects themselves and assign damages accordingly, thus better enforcing laws aimed at animal welfare or natural preservation. In addition, granting animals or natural objects standing would allow for guardians to sue on behalf of nature or animals even when human plaintiffs cannot demonstrate direct injuries to themselves. For example, in *Cetacean Society v. Bush* an attorney claiming to represent cetaceans (dolphins, porpoises, and whales) charged that the Navy had violated the Endangered Species Act and the Marian Mammal Protection Act by using a form of sonar that damaged the hearing and health of cetaceans. The court dismissed the case finding that the cetaceans did not have standing, and the fact that the Navy's sonar did jeopardize the lives of various species of cetaceans was never addressed. In this instance, it would have been

difficult to find injuries suffered by human plaintiffs, and, therefore, the Endangered Species Act and the Marine Mammal Protection Act were effectively not enforced (165 Stone, and Michigan). Finally, Stone argues that granting animals and natural objects standing might eventually change the way that our society views the natural world. For example, he states that at one time children, slaves, women, and the mentally incompetent were effectively not treated as persons under the law. However, he notes that as Americans started to view human equality differently, these classes of people began to gain legal status, and as they gained legal status as persons, Stone argues, they gained more respect within society. Stone argues that, as environmental issues become more important and as we become more cognizant of the sentient nature of many animals, natural objects may gain more recognition under the law, and this recognition may, in turn, encourage us to reevaluate how we consider animals and nature (23).

Ultimately, given that Ecuador was the first country to treat nature as a rights-bearing entity, the idea of rights being granted to animals or nature at the constitutional level is fairly new, which may reflect why there is not much discussion in comparative constitutional design literature about if or how a constitution should treat this category of rights. However, the work done by Stone and Sunstein on standing for natural objects suggests that there is at least a need to strengthen the legal protections for nature and animals above and beyond the animal rights and environmental protection measures traditionally taken in secondary law. And, while Stone and Sunstein's arguments do not necessitate that the rights of animals or natural objects be grated at the constitutional level, they do point to some potential advantages of the Ecuadorian model.

Rights of Nature in the Ecuadorian Context

During the constitutional assembly, both indigenous activists and environmental NGOs campaigned to have Ecuador recognize Mother Earth as a rights-bearing entity.[126] While the idea of endowing nature with rights was originally seen as a fringe idea fomented by indigenous activists, the rights of nature steadily gained support from the Alianza Pais (AP) and came to be seen as a major accomplishment of the 2008 convention.[127] By the time I conducted my interviews in 2012, it was a point of pride to many actors that Ecuador was the first to recognize the rights of Mother Earth. As an indicator of the rights of nature's ability to gain broad-based support, one interviewee, who was an independent assemblyman and who was very critical of both Correa and the new constitution, still remarked that recognizing the rights of nature was a great step forward for Ecuadorians.[128] Ultimately, the rights of nature may have been able to gain so much support relatively quickly due to the fact that they not only appeal to indigenous peoples' ideas about nature and community but they tap into mainstream anti-colonialist sentiment, as well.

The idea of endowing nature with rights sprang out of indigenous teachings about community and relationships. When discussing the intellectual roots behind the rights of nature, two key concepts of indigenous cosmology, relationality and reciprocity, come into play. Relationality is perhaps best described by the way in which it clashes with western culture. Indigenous people argue that the West often sees concepts as dualities: "public space vs. private space," "human vs. animal," and "community vs. individual" (Avila 2011, 211). On the other hand, Andean cosmology tends to look at how different concepts are related (instead of how

[126] Personal interview with environmental NGO leader and activist, 10/3/2012 (52).

[127] Personal interview with an Assembly Member for the AP, 9/13/2012 (40); Personal interview with a government specialist on development, 8/28/2012 (34).

[128] Personal interview with an independent assembly member, 7/03/2012 (18).

they are opposed). So for example, the separation between individual needs and communal needs would not make sense in an Andean community, but instead they would be viewed as one and the same. Similarly, while westerners typically see themselves as separate from nature (i.e. the human vs. animal dichotomy), indigenous cultures tend to view man as part of nature, or man as just another animal.[129] Nina Pacari (2009), an indigenous activist and constitutional court judge, further explains that in the Kichwa belief system everything in nature is vested with "an energy that is called *SAMAI*," and therefore everything in nature, whether it be rocks, trees, mountains, or the sun, has life (ibid., 32-33). Humans, like all other natural things, have samai and are thus part of nature. In short, because indigenous groups see themselves as a part of nature and because they believe all natural things to be alive, they view the rights of nature as an inevitable extension of human rights discourse. In addition to relationality, reciprocity is a key tenant of Andean morality, and traditional communities often share resources and food and emphasize the importance of treating community members with equal respect and dignity. Indigenous actors argue that the ways in which nature has been treated denies the norm of reciprocity (i.e. humans have taken from the environment with no concern for how their actions affect the environment) and that the idea of reciprocal respect should be incorporated into man's relationship with the Pacha Mama.[130]

The rights of nature are also intertwined with the concept of sumak kawsay and the struggle for indigenous rights. As mentioned in Chapter 5, living a life in accordance with the sumak kawsay means living a life in harmony with one's community. If one's community includes both human and non-human members, then one can only live in accordance with the

[129] Personal interview with indigenous activist, 7/13/12 (26).

[130] Personal interview with environmentalist NGO, 10/3/12 (52).

sumak kawsay if one respects nature. In addition, a healthy respect for the rights of the Pacha Mama would necessarily redefine Ecuador's development agenda and make it more sustainable. Thus the concepts of sumak kawsay and the rights of nature are mutually reinforcing. In addition, CONAIE, in particular, has argued that, if indigenous groups are given more control over their territories, they will use resources more wisely and show greater respect for the rights of Mother Earth (CONAIE 2007, 21). In this sense, while the rights of nature and indigenous rights represent two different types of rights claims, the issues are often discussed together.

While the rights of nature are highly influenced by indigenous cosmology, environmental groups in Ecuador also advocated for the rights of nature to be included in the new constitution. Like indigenous activists, they argue that the rights of nature are the next logical extension of the existing human rights discourse. For example, one interviewee who lobbied for an environmental NGO at the constitutional convention compared environmental rights to the rights of women, minorities, and children. She argued that, at one time, the rights of women were looked upon with scorn, and it was said that women could not be the subject of rights because of their inferiority. Now women's rights are considered a necessary part of liberal democracy. In that same way, she concluded that the rights of the environment now seem impossible but eventually will be taken as inevitable.[131]

In addition, while the rights of nature was initially a foreign concept to many of the non-indigenous assembly members at the convention, indigenous and environmental activists were able to gain support for the measure by tapping into the anti-colonial sentiment in the

[131] Personal interview with an indigenous rights and environmental NGO, 6/21/2012 (17).

Ecuadorian population at large.[132] In so doing, activists for the rights of nature argue that man's relationship with nature has, for the last 500 years, been one of subjugation and conquest mimicking the colonial relationship between Europe and the Americas. For example, Alberto Acosta (2011), the president of the constitutional assembly, contends in his essay "The Rights of the Environment" that environmental degradation is tied to Ecuador's colonial past. Western European countries were initially only interested in Latin America as a source of natural resources and used the continent to feed their ever-expanding economies. Furthermore, Europe's system of mercantilism caused it to use both indigenous and African slaves to farm the land and extract its resources. Even today, Acosta argues, capitalism, in its insatiable quest for raw materials and continual economic growth, requires man to exploit nature. In so doing, capitalism and western economic values drive an artificial wedge between man and the natural world, of which he is invariably a part. What is significant about Acosta's account is that capitalism has a multifaceted relationship with colonialism. Not only did resource extraction cause Europeans to subjugate native and African populations, but Europeans and Ecuadorians both past and present have sought to dominate nature itself. Even today, the exportation of oil and other raw materials encourages a neocolonial relationship with the West. Therefore, the rights of nature have come to symbolize a public policy fueled by indigenous intellectual resources, which breaks with both capitalism and Ecuador's colonial past.

Finally, environmental activists make the more utilitarian argument that a healthy environment is necessary for human life, and they contend that a constitution which recognizes the rights of nature demonstrates Ecuador's commitment to environmental sustainability and provides additional legal safeguards against the problems of global warming, deforestation,

[132] Personal interview with environmental NGO leader and activist, 10/3/2012 (52).

pollution, and over population. Environmental protection, they contend, is particularly important in Ecuador, given that the small country boasts an incredible amount of biodiversity and is home to both the Galapagos Islands and part of the Amazon Rainforest. Ecuador's immense biodiversity is often rhetorically connected to its ethnic diversity, and both are described as a point of national pride and as an aspect of a larger Ecuadorian identity that must be protected.[133] In other words, proponents of the rights of nature are not necessarily arguing that protecting the natural environment will be beneficial to indigenous groups (or vice versa) but that both types of diversity are important defining characteristics of Ecuador (Ramon 2009). While this utilitarian argument clearly cannot stand as a justification on its own for endowing nature with rights, it served as a particularly persuasive one for non-indigenous assembly members and other Ecuadorians who may not accept the indigenous belief system surrounding the Pacha Mama.[134] In the end, then, the dialogue surrounding the rights of nature represents a mixture of Andean ecological beliefs, a utilitarian concern for environmental sustainability, and a desire to break away from what are perceived as colonial economic patterns.

Rights of Nature and Constitutional Design

Expansion of Rights

In contrast to the concepts of sumak kawsay and interculturalism, which call for multifaceted constitutional reforms, the call to recognize the Pacha Mama as a rights-bearing entity is an initiative specifically based on expanding the number of constitutional rights.

[133] Personal interview with a democracy building NGO, 4/2/2012 (5).

[134] Personal interview with an Assembly Member for the AP, 9/13/2012 (40).

Chapter Seven (Articles 71-74) of the Ecuadorian constitution enumerates the rights of nature. Article 71 states that:

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes. All persons, communities, peoples, and nations can call upon public authorities to enforce the rights of nature…

Article 72 states:

> Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

And Article 73 states:

> The State shall apply preventative and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems, and the permanent alteration of natural cycles…

Taken together, these articles establish the shape, nature, and characteristics of the rights of the Pacha Mama. First, Article 71 makes it clear that these new rights are to be granted to the Pacha Mama as a single entity. And this holistic approach may make the rights easier to litigate. For example, as mentioned above, one of the difficulties with environmental rights is that "the environment" is a fairly broad category that will be affected by almost any human action, and it is therefore difficult to evaluate what constitutes an actionable environmental harm. In contrast, Article 71 of the Ecuadorian constitution's mandate to protect the Pacha Mama's "existence and ... the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes" suggests that the rights of nature are meant to prevent actions which significantly disrupt environmental cycles (such as those causing climate change or species extinction). While Article 71 may ultimately cause a similar confusion as other

constitutional clauses pertaining to the environment (ex., any carbon emission could arguably be seen as contributing to global warming) granting protection to Mother Nature as a single entity may help to focus subsequent legal discussions on "big-picture" environmental harms.

Second, Article 72 makes it clear that the rights of Mother Earth are distinctly different from the rights of individuals or communities who rely on Mother Earth for their wellbeing by mandating separate damages for environmental destruction independent of how it affects human communities. This approach is distinctly different from even the more expansive provisions of the Nepalese and German constitutions (as discussed above), which prioritize environmental and sustainable development from a more anthropocentric angle. In addition, when read in conjunction with Article 71, Article 72 should mitigate the problems with the enforcement of environmental laws as noted by Sunstein and Stone. The clause in article 71 which reads "all persons, communities, peoples, and nations can call upon public authorities to enforce the rights of nature" has since been interpreted to mean that any individual or community can bring a suit against the government for violating the rights of nature. This clause, along with provision for separate damages in Article 72, eliminates the need to find human plaintiffs for cases involving environmental degradation and empowers any citizen to become a legal advocate for nature.

Third, Article 73 charges the state with taking preventative action against activities which could cause widespread environmental destruction. This article is significant in that cases regarding the human right to a clean environment tend to be reactionary. For example, the government may sanction a mining project that pollutes the water supply for a local community. Ten years after the project, community members may have an abnormal number of cases of cancer and heavy metal poising and may sue the government for approving the mining project,

arguing that their right to clean drinking water has been violated. Unfortunately, by the time harms to human communities have manifested, the environmental damage may be irreparable (Martinez 2011). However, Article 73, in conjunction with the provision for separate damages in Article 72, could free the court to rule against potentially harmful environmental projects before they have taken place.

In addition, the wording of Article 73 is in keeping with Hayward's assertion that environmental rights can be framed as negative rights. In this instance, the state is required to prevent environmental destruction rather than outlay resources to promote environmentalism. In this sense, the rights of Mother Earth may have more in common with negative political rights (such as the right to life) rather than positive economic rights (such as housing), which almost always require a redistribution of resources. Hayward's argument that one can conceptualize environmental rights as negative rights may make the rights of nature less theoretically challenging for the judiciary than some socio-economic rights. Finally, Article 73 is interesting in that, while environmental damages are often caused by private corporations and/or citizens, the onus is still largely on the state to prevent environmental destruction. While cooperation from the citizenry is required to help enforce the rights of nature in Article 71 and while Article 72 does hold "legal entities" responsible for compensating nature for damages, Article 73 suggests that the rights of nature are still structured similarly to other vertical political rights.

While the Ecuadorian constitution has gained a lot of attention for being the first constitution to recognize the rights of Mother Earth, the constitution also includes an additional human right to a clean environment. Article 14 provides for a general right to a clean environment when it states, "The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay),

is recognized....” Whereas, Article 32 ties the right to health to the right to a clean environment when it states that:

> Health is a right guaranteed by the State and whose fulfillment is linked to the exercise of other rights, among which the right to water, food, education, sports, work, social security, healthy environments, and others that support the good way of living.

In addition, Article 66 clause 26 states that the right to property is limited by “environmental function and responsibility.” And finally, Article 395 addresses the effects that environmental destruction may have on communities and future generations:

> [The State shall] guarantee a sustainable model of development…that is environmentally balanced and respectful of cultural diversity, conserves biodiversity and the natural regeneration capacity of ecosystems, and ensures meeting the needs of present and future generations.

Taken together, the above-mentioned articles paint a picture of how environmental rights fit into the larger political context created by the Ecuadorian constitution. By establishing an additional human right to a healthy environment, the above-mentioned articles help to solidify the point made in Article 72: a human right to a healthy environment is distinctly different from the rights of nature, and both interests need to be protected. In addition, Articles 14 and 395 tie the right to a healthy environment to the larger Ecuadorian agenda to promote sustainable development and a life lived in keeping with sumak kawsay (as explored in Chapter 5). Furthermore, while Article 14’s allusion to an “ecologically balanced” environment is vague and may be correspondingly difficult to adjudicate, Articles 32 and 66 tie environmental concerns to other human rights (the right to health and property). As mentioned above, linking environmental concerns to other human rights may help to clarify environmental rights for the courts. Finally, while Articles 14 and 32 conceptualize the right to a healthy environment as an individual right, Article 395 does highlight the importance of the environment to different cultural groups as well as future generations.

In addition to addressing environmental concerns through an expansion of human environmental rights and the creation of the rights of nature, the Ecuadorian constitution also ties environmental preservation to the expansion of indigenous territorial rights. Specifically, Article 57 clause 7 states that indigenous and Afro-Ecuadorian communities have the right to FPIC.

> Free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing, and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them…

Whereas clause 8 of the same Article gives these communities the right to:

> Keep and promote their practices of managing biodiversity and their natural environment. The State shall establish and implement programs with the participation of the community to ensure the conservation and sustainable use of biodiversity.

Furthermore, Article 57 demonstrates how closely environmental rights, the rights of Mother Earth, and indigenous territorial rights are tied together. In particular, Article 57 assumes that indigenous peoples will be the best stewards of traditional lands and that protecting the right to free prior informed consultation will also facilitate environmental conservation.

In the end, the Ecuadorian constitution seeks to protect the environment through multiple types of rights expansion: the recognition of Mother Earth as a rights-bearing entity, the addition of the human right to a healthy environment, the inclusion of rights aimed at supporting sumak kawsay, and the guarantee of free prior and informed consent for indigenous peoples. The difficulty with this approach to protecting the environment is that it assumes that all of these rights are mutually reinforcing and does not give any guidance for how courts should respond in cases of conflict. For example, Article 32 protects the, “right to water, food, education, sports, work, social security, [and] healthy environments,” and it is easy to see how

some of these rights could come into direct conflict. For example, given that the Ecuadorian economy relies heavily on extractive industries, the rights to work and social security could easily come into conflict with the right to a healthy environment. And, in the case of a potential mining project, it is unclear whether the government's first obligation is to the economic rights of the miners and their communities (which would be benefited by allowing a proposed mining project to proceed) or to the environmental rights of all Ecuadorians (which would be greatly benefited by the cessation of all mining projects). In this same way, the right to food could conflict with the right to a healthy environment if industrialized farming techniques prove to be the best method of supplying enough food to feed the population.

These questions about rights conflicts get even more complicated when we consider the potential conflicts between human rights and the rights of Mother Earth, which create new and difficult questions for judges and law makers. Namely, if Mother Earth is treated as a rights-bearing entity, then should her rights be considered to have the same priority as human rights? Or should human rights automatically prevail in a conflict between the two? While at times human rights and the rights of Mother Earth may be mutually reinforcing, at other times a scarcity of resources may cause them to conflict. For example, in order to uphold a community's right to clean drinking water, a government utility might slowly deplete a natural reservoir, thus depriving plant and animal species of this same water and potentially destroying the local ecosystem. If this case were brought before the courts, it is unclear how judges should decide. Should the government utility be forced to find a new supply of water? And what if that new supply of water had to be trucked in and thereby created a substantial carbon foot print? Should the community be forced to move? Or should communal water needs trump the rights of nature?

When I asked interviewees about potential rights conflicts, they had trouble understanding or answering the question, and the most common answer was to competently deny the potential for a rights conflict altogether. Instead, they argued that because human beings are a part of nature there could be no conflict between humans and nature. Ultimately what was best for the Pacha Mama was also what was best for mankind. This answer and the general puzzlement at my question seem to be reflective of the indigenous beliefs that are at the foundation of the rights of nature. As mentioned above, Kitchwa cosmology tends to reject dualities (like man vs. nature) and instead focuses on the commonalities and relationships between different categories. And along these same lines, it tends to view human beings as simply one part of the Pacha Mama. Because of this intellectual foundation for the rights of Mother Earth, the question of a potential rights conflict between man and nature might have gotten lost in cultural translation. However, given that the court system does tend to be based on a more adversarial model, individual cases could wind up pitting human rights against environmental concerns, and judges would have little guidance as to how to formulate their decisions, ultimately making the rights of nature more difficult to adjudicate.

In addition to the theoretical difficulties in adjudicating the rights of nature, these rights are also difficult to enforce given the political and economic realities within Ecuador. While the rights of nature were upheld in the Wheeler case (as discussed above), the courts were less sympathetic in the *Mirador* case. In March of 2012, the Ecuadorian government signed a mining deal with a Chinese-owned mining company, Ecuacorriente, to develop copper and gold mines in a 25,000-acre area of highland forest. Ecuacorriente plans to invest $1.4 billion in the mining project and has agreed to pay royalties of between five and eight percent on cooper extracted from the region. Notably, while this contract represents the beginning of the first large-scale mining project in Ecuador, Correa has made it clear that he sees mining as a way to diversify the

country's economy (which largely relies on oil exports), and he has also entered into negotiations with Canada's Kinross mining company. In addition, the copper mining agreement also represents Ecuador's increasing reliance on the Chinese government: at the signing of the Mirador deal, the Ecuadorian government already owed China $7.3 billion in loans and future oil payments (Garcia 2012).

Right after the signing of the Mirador deal, indigenous and environmental activists sued the government claiming that the mining project would be in direct violation of the rights of nature, particularly Article 73, which outlaws actions that could lead to species extinction. The highland forest is a highly diverse biological area, and the mining project is estimated to cause the extinction of three species of amphibians, one species of reptile, and up to 4,000 species of vascular plants. The mining project will also produce an estimated 144 million tons of rock residue in its first 17 years of operation, erode the top soil in the entire mining area, and cause run-off of acidic waste into surrounding ponds and streams. Finally, environmental and indigenous advocates also argue that the project will jeopardize surrounding communities' right to water by requiring 140 liters of water per second for operations (Global Alliance 2013).

In March of 2013, a lower court in Pichincha ruled that the government could proceed with the mining agreement despite the project's many demonstrable environmental harms and the constitution's clear injunction against actions that would cause species extinction. The court argued that, ultimately, the mining agreement was in the national interest of Ecuador and that tight regulations on mining companies may mitigate the worst of the environmental impacts (Earth Law Center 2013). Given the court's willingness to uphold the legality of the mining contract in the face of overwhelming evidence of environmental degradation, the *Mirador* case

has dampened hopes that the courts or the president will uphold the rights of nature when doing so violates an overriding economic interest.

While the outcome of the *Mirador* case was disappointing to environmental activists, when taken together, the *Mirador* and *Wheeler* cases still point to some initial ways in which recognizing the rights of nature may strengthen environmental protections. First, as both cases demonstrate, the issue of who can file a suit on behalf of nature did not seem to be as large of a concern as critics feared. Although nature cannot advocate for its own rights, in both the *Mirador* and the *Wheeler* cases humans were successful in filing claims on behalf of nature, were granted legal standing to do so, and were allowed their day in court. This in and of itself is a victory for environmentalists, given that, as Stone and Sunstein argue, the issue of standing and legal representation for natural objects is often a significant barrier to the enforcement of environmental protections. Furthermore, although indigenous and environmental activists lost the *Mirador* case, Articles 71-74 of the constitution did provide them with the legal means of filing a case against the government before any mining actions had even taken place. This ability to file suit before the environmental destruction occurred was one of the initial reasons advocates argued for the inclusion of the rights of nature in the constitution, and it demonstrates that the rights of nature may be one possible solution for the often reactive nature of environmental law.

Expanding Citizen Participation

As noted above, both the constitutional discussion of the rights of nature as well as CONAIE's writings on the topic presuppose that the rights of nature, indigenous rights, sumak kawsay, and interculturalism are all linked together and, further, that granting local communities (particularly indigenous communities) more control over development planning,

resource management, and local governance will all serve to further the combined interests of sumak kawsay, interculturalism, and the rights of nature. Along these same lines, political theorists who study green thought also frequently advocate for an expansion to participatory-deliberative decision making. For example, Robert Goodin (1996) in his work *Enfranchising the Earth and its Alternatives* argues that, ideally, societies that value nature would be able to "enfranchise" the earth in order to protect its interests. However, he reasons that since the enfranchisement of nature is impossible, the next best thing is to encourage citizens to take nature into account when actively participating in politics (much in the same way that we hope parents and community members will consider the needs and rights of young children when participating in politics). In addition, he argues that political communities should try to empower those who already have a large stake in natural preservation and that participatory-deliberative processes are more likely to empower these individuals. Goodin contends that participation tends to change the dynamics of power, shifting power away from entrenched interests, who may not care about nature, to individual citizens, who may have more of an interest in protecting nature. He also believes that making politics more participatory will encourage greater discussion of issues affecting the environment, thereby making environmental decision making more transparent and public spirited.[135]

In conjunction with Goodin's argument, as mentioned in Chapters 3 and 5 the efforts to operationalize sumak kawsay and interculturalism involve creating mechanisms for more participatory-deliberative decision making aimed at giving local communities, indigenous groups, and ordinary citizens more control over development planning. And these mechanisms

[135] Eckersley (2004) makes a similar point in her work *The Green State*, where she argues that participatory and deliberative models of the state will allow for common interests, such as the environment, to take precedence over the economic interests of the few. See also Ekeli (2009).

(particularly local and tribal consultation, the creation of a CPCCS capable of standing up to the elite level interests in extractive industries, and the creation of local development councils) all have the additional potential of bolstering the rights of nature by transferring more power in to the hands of local stakeholders who will be more affected by the negative environmental effects of development projects. However, while opening up development planning to participatory-deliberative processes may, on-balance, aid environmentalist causes, it is important to note that the needs of human communities may at times be at odds with the rights of nature. In addition, despite the frequent collaboration between indigenous groups and environmental NGOs, when discussing environmental preservation and indigenous rights, it is important not to homogenize, essentialize, or romanticize indigenous groups and cultures. There is, for example, a robust literature critiquing the idea that indigenous land rights will ultimately lead to environmental protection. First, some scholars argue that, while tribal communities have less of an impact on the environment than modern societies, traditional societies are not consciously or deliberately conservationist. In fact, they argue that "environmental conservation" is a modern, western concept. In addition, critics warn that the image of indigenous peoples as "guardians of the rainforest" can also be problematic for indigenous groups. Essentially, groups who claim this status may be locked in the past and criticized if they are not perceived as "indigenous enough."[136] Therefore, while the creation of more participatory-deliberative processes may ultimately aid the environmental cause, it is important for indigenous groups, environmentalists and constitutional designers to also recognize the limits of participatory-deliberative decision making for bolstering environmental goals. Ultimately, the very act of granting formal rights to

[136] For a detailed literature review on the issues of indigeneity and environmentalism, see Dove 2006.

Mother Earth may help to reinforce environmentalism in public discussion. And, like other rights, the rights of Mother Earth may create a minimum standard for environmental protection.

Constitutional Identity

While the Ecuadorian constitution's inclusion of the rights of nature is predominately about rights expansion, like interculturalism, it also addresses the constitutional identity of the state. As mentioned in Chapters 1 and 3, the overarching constitutional identity of the state (as traditionally expressed in the preamble and a list of basic statements/guiding statements) has not only become increasingly symbolically important to citizens, drafters, and politicians but substantively important to the courts, as well. In this case, the establishment of the rights of nature potentially changes the answer to Rosenfeld's first question regarding constitutional identity, "To whom should the constitution be addressed?"[137] As stated above, while other constitutions mention nature, they tend to do so in a way that is still anthropocentric, by recognizing a human right to a clean environment. In contrast, Ecuador's constitution recognizes Mother Earth itself as a rights-bearing entity, and in this sense, the Ecuadorian constitution seems to be addressed to the territory of Ecuador itself, rather than simply its human inhabitants. And, this sentiment is further established in the preamble, which states that Ecuadorians have set about to build "a new form of public coexistence, in diversity and in harmony with nature." This constitutional treatment of nature raises intriguing questions about who the Ecuadorian state is meant to represent. Namely, if Mother Earth is guaranteed rights, is she or some of her component parts (i.e. species, national parks etc.) a part of the political

[137] As mentioned in Chapter 1, Rosenfeld states that constitutional identity revolves around three main questions: "To whom shall the constitution be addressed? What should the constitution provide? And how may the constitution be justified?" (761)

community? Are Mother Nature's interests meant to be represented by the constitution? And, if the state represents human as well as non-human elements, what does this mean for our definition of the state and our conception of the polity moving forward?

While these questions concerning constitutional identity and the nature of the state so far only apply in the Ecuadorian case, they are important to constitutional designers for two reasons. First they demonstrate the extent of the difference between a more conventional model of the state and the political community that indigenous peoples sought to build through the 2008 constitution. As with interculturalism and sumak kawsay, addressing indigenous demands went far beyond recognizing group-differentiated rights and, instead, required a change in the way Ecuadorians viewed the role and nature of the state. Second, as the challenges associated with global climate change intensify, and as more thinkers become concerned with animal rights, natural conservation, and man's place in the biosphere, other countries are likely to grapple with the questions raised by the Ecuadorian constitution. In her work *The Green State,* theorist Robin Eckersely argues that, in order for humans to come to grips with the challenges posed by global climate change, our very conceptions of our role of the state will have to change. Eckersely argues that the liberal state will have to give way to a post-liberal "Green State," which would take a normative stance on environmental issues and elevate environmental concerns to the level of national security or economic interests. In addition, she argues that the green state would necessarily be built on a more republican understanding of civic virtue and responsibility that would prioritize the global good. In conjunction with the recognition of the rights of nature in Ecuador, Eckersely's work suggests that the questions raised by environmentalism will need to be addressed by future constitutional designers. In particular, issues raised by climate change, environmentalists, and animal rights activists may

cause them to reconsider the question of who the constitution speaks to and represents, as well as what type of state a constitution should seek to build.

Conclusions

Ultimately, the issue of the rights of nature demonstrates how closely the concept of indigenous identity is tied to environmental protection. In Ecuador, the call for indigenous rights was not only paired with a call for a new type of development and a new view of Ecuadorian culture but also attached to a movement to expand the very idea of who should qualify for rights and who the state should represent. While the importance of indigenous land and resource rights are often discussed in the indigenous rights literature, the significance of environmental protection for indigenous land claims is often ignored. The Ecuadorian case, therefore, points to the importance of considering indigenous and environmental claims in tandem and further highlights just how revolutionary the goals of plurinationalism are.

In addition, in an era that is increasingly concerned with the impacts of climate change and the ethics of our treatment of animals and nature, the recognition of the rights of nature challenges future constitutional designers to reconsider what types of legal innovations may best address the challenges of modern environmental degradation. While global constitutions themselves are beginning to incorporate more provisions for dealing with the environment, these provisions tend to be under theorized in the literature, anthropocentric, and allow for government action only after environmental harms have taken place. While recognizing the rights of nature may not ultimately be the solution to environmental destruction for every polity, designers may want to consider how existing constitutional provisions could be modified to include some of the potential benefits of the rights of nature (ex. the preemptive prosecution of possible environmental harm and the granting of standing to natural objects). And finally, the

recognition of the rights of nature points to the need to consider a better means of balancing the demands of human rights against the needs of the environment and future generations.

Chapter 7

Conclusion: Future Implications of Plurinationalism

In Chapters 2-6 of this dissertation, I examine CONAIE's participation in the drafting of the 2008 Ecuadorian constitution, as well as the four main planks of their plurinationalist platform: interculturalism, indigenous rights, sumak kawsay, and the rights of nature. I then compare each plank to current trends in the constitutional design literature, demonstrate how each topic was included into the constitution, and point to areas of future research for constitutional deign scholars based on the issues raised by the plurinationalism platform. In so doing, I am able to examine current issues in the constitutional design literature from a new angle, as I explore what both indigenous and mainstream Ecuadorian ideas can contribute to a field that has largely been defined by Western constitutions and scholars.

In his article "Law as Hope," Colombian scholar Mauricio Garcia-Villegas (2001) sums up some of the differences between Latin American and western constitutions:

> Viewed worldwide…the vision has prevailed, under which the essential objective of the constitution of a given country is to avoid abuses of power and to protect the rights of citizens, not to serve as a step in the direction of social progress….Our vision, however, considers the constitution as a political, creative and foundational document that connects the origins of our society to its future (353).

In other words, while western constitutional theory tends to focus on preventing the abuse of power and human rights, Latin American constitutions tend to be more aspirational, delineating a more idealistic vision for the country's future. In this sense, Garcia-Villegas's article echoes Waldron's critique of Western constitutional theory, namely that it focuses on limiting government power to the determent of considering how constitutions can be structured to positively empower citizens. Structuring my chapters in a way that compares indigenous ideas, western constitutional design theory, and mainstream Ecuadorian responses helps to shine a

light on some of the potential short comings of current constitutional design literature. In examining how indigenous concepts have been carried out in the Ecuadorian constitution and making suggestions for the better institutionalization indigenous goals, I am able to point to potential future areas of constitutional design research regarding the positive empowerment of a country's citizenry.

For example, the indigenous concept of sumak kawsay raises important questions about whether a constitution should promote a particular vision and/or model for economic development and, if so, how. With current economic anxieties causing political instability in both the west and the global south, the question of if and how constitutions can influence the state's overall economic vision is likely to become increasingly important. Yet the constitutional design literature, which tends to focus on the constitution as a fairly limited political document, has not really engaged with these types of questions. In addition, the Ecuadorian constitution's inclusion of the participation and social-control branch of government offers an interesting commentary on traditional notions of division of power. As mentioned in Chapter One, Latin American neoconstitutuionalism places a heavy emphasis on checking government power by increasing citizen participation. The participation and social-control branch of government challenges the typical tripartite division of power (legislative, executive, and judiciary) and, in so doing, points to a creative means of reordering the checks and balances system. Finally, the indigenous arguments behind the rights of Pacha Mama challenge basic assumptions regarding who/what should be considered a rights bearing entity, thereby challenging who exactly the constitution is written for.

In challenging some of the underlying assumptions of constitutionalism, the Ecuadorian case highlights important issues of overlap between the constitutional design and political

theory literatures. For example, the Ecuadorian constitution's focus on creating a plurinational constitutional identity and securing economic rights as well as the anti-colonial subtext of the constitutional convention raise questions about what the goals of what a national constitution should be. In addition, the recurring emphasis on participatory deliberative institutions as a means for encouraging minority voices, checking the power of the executive, and empowering citizens economically, point to the need for further research into how participatory-deliberative institutions may complement or conflict with other constitutional priorities. And the multidimensional focus of the plurinationalism platform challenges both constitutional designers and political theorists to go beyond a model of indigenous politics centered on power-sharing and group rights. In the end, the Ecuadorian case demonstrates how engaging with those outside of the bounds of western political theory can shed light onto these discussions surrounding indigenous empowerment and comparative constitutional design.

Goals and Implementation of the Constitution

One of the themes running throughout this dissertation is the question of what the overarching goals of a constitution should be. For example, should the constitution be strictly a document that outlines the functioning of democratic institutions and enumerates citizens' rights in a way that will place checks on government power (And, interrelatedly, who or what can count as the bearer of constitutional rights?)? Should the constitution go further by including statements about national values and identity, or is this potentially destabilizing? Is there room in the Constitution for establishing an economic vision for the future of the state? Should the judiciary be empowered to aggressively persue economic and social rights, or is this in conflict with the constitutional goal of limiting state power? And to what extent is the constitution designed promote stability between groups over other democratic goals?

In general, as I explore in my chapters, the bulk of the constitutional design literature primarily focuses on how constitutions can limit government power, provide for individual rights, and promote stability, without really considering the other questions mentioned above. On the other hand, as Waldron notes, political theorists in general tend to focus in abstract terms on what the goals of a liberal state should be, without really exploring if/how those goals can be carried out in institutional/constitutional terms. The Ecuadorian case is significant, therefore, in that it speaks to some of the gaps in the current literatures. For example, as mentioned in Chapters One, Three, and Six, CONAIE's platform and the Ecuadorian constitution challenge scholars to consider the issue of constitutional identity. First, in rewriting the constitution, CONAIE called for Ecuador to be recognized as a plurinational state. This demand was a symbolic way of acknowledging that indigenous culture had heavily influenced mainstream society and identity. The plurinational nature of the constitution was further enforced by the incorporation of indigenous language and cosmology into other parts of the document. In addition, as discussed in Chapter Five, CONAIE as well as non-indigenous Ecuadorians saw the constitutional convention as a way of breaking with past neoliberal economic models and, therefore, used the document, not only to outline rules for political power, but to create a new economic vision for the country as well. Finally, as mentioned in Chapter Six, the act of granting rights to the Pacha Mama opens the door for a discussion regarding who the constitution is meant to represent and protect. Should the needs of animals, or nature, or future Ecuadorians be protected under constitutional law? And, if so, how does this change our conception of what a constitution is supposed to do and be?

The aforementioned issues raised by both COANIE and non-indigenous organizations necessarily led to a constitution that is aspirational in nature. For example, as mentioned in Chapter Five, the concept of sumak kawsay led to the incorporation of many socio-economic

rights that are, in practice, difficult to enforce. In addition, the whole project of imaging an intercultural state that upholds the tenets of rights of nature and sumak kawsay is largely an aspirational project, based not so much on a current political and cultural reality but rather on a hope for what Ecuadorian society and economy could become in the future.

Unfortunately, the idealistic nature of the Ecuadorian constitution raises some difficulties in enforcing the document. In particular, the newness of the institutions created in the constitution, the country's economic realities, and the tendency towards hyper-presidentialism have all made the promises of the 2008 Ecuadorian constitution more difficult to fulfill. And, like many other aspirational constitutions this unfortunately puts the Ecuadorian constitution in danger of not being taken seriously (Garcia-Villegas 2001).

While there has been a fair amount of discussion surrounding the operationalization of indigenous group rights in the existing literature, the indigenous concepts of sumak kawsay, interculturalism, and the rights of nature do not fit neatly within the existing Western constitutional law framework. As discussed in the proceeding chapters, indigenous activists themselves had trouble articulating how an economy based on sumak kawsay or social relations based on interculturalism would be expressed in terms of constitutional law or change. Therefore, one of the roadblocks in implementing plurinationalism lies in the inherent difficulty of translating indigenous concepts into the framework of constitutional law. Ultimately, melding Western and indigenous cosmologies will require creative constitutional solutions and, potentially, new institutions. For example, as mentioned in Chapters 3 and 4, Ecuador's fifth branch of government, the citizen's participation branch, represents a creative possibility for increasing citizen oversight, amplifying civil society voices on matters of economic policy, and creating local councils for closer intercultural relations. However, while the idea that what the

citizen's participation branch represents (i.e. the formal incorporation of civil society into government) is important, constitutional designers were uncertain how to make civil society leaders members of the government, without turning them into politicians. In the end, the method they chose for the appointment of CPCCS members was manipulated by the executive to strength the presidency. The story of the fifth branch demonstrates that taking the idealism of the plurinationalism platform and attempting to translate that into new and creative institutional arrangements may wind up weakening the overall strength of the constitution.

Furthermore, even more common constitutional provisions, such as an expansion of social or economic rights or an expansion of indigenous group rights, have proven difficult to enforce in other countries. As mentioned in Chapter Five, the enforcement of socio-economic rights can be problematic, in that it often puts the courts in the difficult position of intervening heavily in the legislative function of government and/or playing a largely administrative role in government. The idea of an economy based on sumak kawsay and the precepts of alternative development has the potential to exacerbate these concerns. In addition, while indigenous justice has been supported by other national constitutions, the larger questions surrounding how to operate two parallel justice systems in the same country are difficult to work out in any political context. In short, even under optimal conditions in which all Ecuadorian politicians and an Ecuadorian president wholeheartedly supported the plurinational platform, many of the provisions in the Ecuadorian constitution would be difficult to operationalize and enforce.

In addition to the difficulties inherent in creating new government institutions, the government's heavy reliance on extractive industries has made the promises of the 2008 Ecuadorian constitution regarding the rights of nature difficult to uphold. In 2014, the oil industry alone represented 28% of public revenue. This heavy reliance on oil and mining creates

real conflicts between the different goals of plurinationalism. For example, the constitution requires that the government honor a whole host of socio-economic rights, most of which require government spending, while at the same time environmental advocates argue that drilling and mining projects violate the rights of nature and the precepts of sumak kawsay. In addition, most of the drilling projects are on indigenous lands, and, therefore, the right to free prior and informed consent could easily clash with the socio-economic rights of non-indigenous Ecuadorians. All of this is compounded by the fact that the indigenous world-view is slow to recognize that the potential for a conflict of rights between humans and nature even exists, making it more difficult to discusses these potential rights conflicts in political forums.

However, despite the above-mentioned concerns, the aspirational elements of the Ecuadorian constitution are still important for designers and scholars to consider for two main reasons. First, the question of how a country should define itself in its constitution has become increasingly important and is not likely to disappear. As mentioned in Chapter One, it is becoming more common for constitutions to include statements of principle or refer to national values in either their preamble or opening articles and for judiciaries to take these statements seriously.[138] In this case, recognition of Ecuador as a plurinational country was a sticking point for CONAIE, and, therefore, the question of how a constitution should define itself inherently became important for the discussion of indigenous empowerment in Ecuador more broadly. In essence, if the concept of constitutional identity is important to the actors negotiating and

[138] For more on this trend and the differences between statements of principle and value statements, see Jacobson 2012.

creating new constitutions, then designers and theorists need a better understanding of what role the constitution can play in national identity formation.[139]

Second, and interrelatedly, as argued by both Tully and Ivison, due to the historical legacy of colonialism, empowering indigenous peoples means not only granting indigenous groups rights but also re-evaluating how we think about the relationship between indigenous people and the state more generally. In Tully's case specifically, indigenous politics and minority rights, he argues, should challenge how scholars think about constitutionalism in general; he contends that the west should shift from a modern conceptualization of constitutionalism to a contemporary model of constitutionalism. And this shift to a post-colonial liberalism or contemporary constitutionalism should challenge thinkers to reconsider the ways in which countries and constitutions should redefine themselves in the future. Notably in the Ecuadorian case, the emphasis on the plurinational state, the rights of nature, the importance of indigenous culture, and sumak kawsay were used to create a constitution that, not only incorporated indigenous interests, but set the foundations for a post-colonial Ecuadorian identity, as well. Therefore, a better understanding of how constitutions and/or the processes of making them can change national identity is important to understanding how liberal societies could truly become post-colonial in their relationships with indigenous people.

In the end, Garcia-Villegas argues that, while aspirational constitutions have their potential pitfalls, they are valuable in the sense that they "keep alive a political conscience of social change" (359). In the Ecuadorian case, while the constitution may have failed to live up to

[139] For example, is the adoption of a non-neutral stance in the constitution more likely to cause stability and inclusiveness (as in the Ecuadorian case, were it made indigenous SMOs less likely to protest the 2008 constitution) or is the majority population of a country more likely to use identity statements to encourage assimilationist policies? And under what circumstances might each of these policies happen?

some of its promises, it did succeed in articulating a new vision of the future of Ecuadorian politics, one that relied heavily on indigenous points of view. Unlike the 1998 constitution, which recognized indigenous rights in the context of a largely neoliberal document, the 2008 constitution established a list of indigenous rights within the context of a document that sought to re-found the state in an anti-colonial image. Along these lines, while interviewees expressed frustration with individual aspects of the 2008 constitution (most frequently its promotion of hyper-presidentialism), their overall feeling towards the 2008 document was one of pride. Interviewees were proud that their constitution was the first to recognize the rights of nature; that it honored the cultural and historical contributions of indigenous groups; and that it incorporated the platforms of indigenous, Afro-Ecuadorian, feminist, environmentalist, and labor organizations. In the Ecuadorian case, it is important not to overestimate the significance of identity statements in the 2008 constitution. Despite the fact that the preamble declares Ecuador to be a "plurinational" country and the entire document draws heavily on indigenous cosmology, indigenous communities still face racism and discrimination, at the hands of the Ecuadorian government specifically and elements of Ecuadorian society more broadly. However, it is also important not to underestimate the accomplishments of the 2008 constitution. As demonstrated in the previous chapters, indigenous leaders felt that the constitution represented their ideas, viewpoints, and interests even if the Correa administration did not. This sense of incorporation and representation is significant for a group that has been historically marginalized at the national level, and it represents a stark contrast to indigenous rhetoric surrounding the 1998 constitution. It is even more notable given that non-indigenous interviewees were also proud of the 2008 document.

Participation, Deliberation, and Dialogue

A second theme running throughout both the plurinationalism platform and this dissertation is the idea that indigenous rights can be facilitated through more intercultural dialogue between groups as well as more participatory-deliberative government institutions. However, the meaning of each of these terms can be vague, and the goals of participation, deliberation, and dialogue can often clash with each other or with the wider democratic goals of the state. Yet, despite the lack conceptual clarity surrounding calls for participation and dialogue, Tully and Ivison both demonstrate that a dialogic approach to indigenous empowerment is distinctly different from the indigenous rights approach offered by either by consociationalism or Kymlicka style multiculturalism.

As mentioned in Chapter 2, the Ecuadorian constitution itself was written in a highly participatory manner, in part as an effort to break free of the influence of the country's traditional political elites. Not only were a number of NGOs, SMOs, and individual citizens consulted as part of the constitution writing process, but the individuals chairing these discussions were, in large part, recently elected members of a new political party. In addition, the constitution itself focused heavily on themes of participation. Most notably, constitutional designers created a fifth branch of government aimed at enhancing citizen participation and government transparency. In addition, Articles 103 to 107 deal specifically with provisions to enhance direct democracy by allowing citizens or grass roots organizations to propose changes to legislation, suggest constitutional amendments, call for a nationwide referendum, request a recall of elected officials, or recall the president.[140] As mentioned in Chapter One, the Ecuadorian constitution was also written in the context of the neoconstitutionalism movement

[140] Each of these measures requires that a group collect a specified number of signatures. A proposed change to legislation requires signatures of .25% of registered voters (Article 103), whereas, to request a presidential recall would require the signatures of 15% of registered voters (Article 105).

in Ecuador, which emphasizes citizen participation as a way of protecting individual rights and checking governmental power.

Furthermore, the theme of participation and dialogue runs throughout the plurinationalism platform. In the same way that Correa's citizens' revolution took issue with professional politicians, CONAIE frequently expresses dissatisfaction with modern representative government, which it sees as fomenting disunity by creating a system of clear "winners" and "losers." In its proposal for the constitutional convention, the organization instead argued that Ecuadorians should learn from consensus-based models of participatory democracy common in indigenous communities, and it called for a return of local indigenous government based on communal consensus (2007, 14). In addition, one of the primary group rights that CONAIE has advocated for is the right to Free Prior Informed Consent, an activity which involves not only deliberation among community members but dialogue between indigenous communities and national and state governments, as well. Similarly, as argued in Chapter Four, many of the goals inherent in the concept of sumak kawsay may be best achieved by giving indigenous peoples more control over the creation of development policy by increasing opportunities for participation and oversight via the Citizen's Participation and Social Control Council. Finally, the whole idea of interculturalism is founded on the principle of mutual cultural exchange through dialogue between groups and, therefore, encouraging a government policy steeped in interculturalism requires opening spaces for communication between diverse groups.

Although various authors and thinkers have highlighted the role of participation and dialogue in providing for indigenous empowerment, the terms "participation," "deliberation," and "dialogue" can be frustratingly vague at times. It is relatively easy to claim that more

"participation" or "dialogue" is a good thing, but the difficultly resides in sorting through the competing ideas surrounding these terms and the contradictions that are sometimes imbedded in trying to encourage all three. For example, while Ecuador has tried to encourage both citizen participation and deliberation, these ideals can come into direct conflict. In essence, the principle of participation demands that as many people as possible engage in a political activity, whereas increasing opportunities for deliberation may require the creation of smaller groups or councils capable of engaging in in-depth discussions.[141] In Ecuador, this conflict is apparent in the area of development policy. For example, in the case of free prior informed consent, indigenous groups are demanding some sort of deliberation with the state and/or international corporations operating on their land. Yet, as mentioned in Chapter 3, there is often a conflict regarding who should represent the indigenous groups, and, to some extent, this conflict represents a clash between the principles of participation and deliberation. Should a few indigenous representatives be selected to negotiate with the government over oil contracts, or should all indigenous peoples in the affected areas be allowed to participate in the FPIC process? If the circle of participants is widened, it will allow for increased representation in the FPIC process but also potentially destroy the ability of tribes to speak with a unified voice during deliberations. This conundrum is further widened when we consider development policy as a whole. If the CPCCS were harnessed to allow for greater citizen input in development policy (as suggested in Chapter 4), then the needs of non-indigenous peoples could easily drown out those of indigenous groups. In short, wider participation in development policy may be led by

[141] For more insight on the potential conflicts between participation and deliberation, as well as more insight on how Latin American democracies have attempted to combine the two in new participatory-deliberative institutions, see Van Cott 2010.

Ecuadorians who rely on the extraction of natural resources for economic growth, and this greater participation could drown out progress made by a more deliberative FPIC process.

In addition, there is also a question as to how much participation and/or deliberation may serve to provide oversight of government actions. On the one hand, in the Ecuadorian case, the notions of deliberation and participation have both been used to enhance citizen oversight, as indicated by the constitution drafting process itself. As mentioned in Chapter 2, the 1998 constitution was quickly dismissed by indigenous groups and civil society organizations, not only because of its content, but because of the non-participatory way in which it was drafted. The 2008 Assembly, therefore, was designed to be more participatory, in part to break the influence of traditional political elites and return more power to Ecuadorian citizens. On the other hand, increased participation can also serve to decrease oversight. For example, the convention, in part because it was so participatory, produced a constitution that failed to check the power of the executive. Likewise, the Citizen's Participation and Control Branch was designed to create more transparency but was ultimately used by Correa to increase his control on the Ecuadorian government. And, finally, the direct democracy provisions in the constitution can also be seen as a double edged sword that has been wielded both by Correa to gain more presidential power and by environmental groups to challenge the government's politics of extractive industries.[142]

In addition to providing an avenue for citizen oversight, deliberation and dialogue are seen as serving other goals in the Ecuadorian case. In particular, plurinationalism focuses on

[142] For example, on May 7, 2011, Correa called a referendum with the stated goal of reducing crime rates and rooting out corruption in the judicial system. Unfortunately, the proposed constitutional amendments gave Correa greater control in the appointment of national judges and limited corporate ownership of media outlets, strengthening his political power (Becker 2011a and Becker 2011b). However, indigenous and environmental groups have recently invoked the power of the referendum to challenge an unpopular presidential decision in the Yasuni National Park.

intercultural dialogue as a means of challenging the current relationship between indigenous and non-indigenous peoples. While this type of dialogue may not come in direct conflict with the above-mentioned goal of providing citizen oversight, it does represent a very different opinion on what participation and deliberation are for. And institutions may be shaped differently depending on whether designers are trying to maximize citizen oversight or cultural exchange.

Finally, the goal of expanding participation and dialogue can be in tension with other aims expressed in the constitution, notably long-term stability and rights protection. For example, as mentioned above, the creation of the 2008 Ecuadorian constitution was meant to be a symbolic moment in which citizens re-founded the Ecuadorian state in an anti-colonial image. The constitution set out to, among other things, enhance the number and type of rights given to non-Ecuadorians, reform the judiciary, curtail the power of traditional political elites, and repudiate the economic neoliberalism of the past. In so doing the constitution set out to establish new guiding principles for the state based on the new national image Ecuadorians hoped to create. This aspect of constitutionalism, however, in some ways stands in sharp contrast to the goals promoting participation and dialogue, which often add an element of constitutional flexibility. The act of engaging in participation and/or deliberation suggests that the political rules are, to some extent, not set (i.e. citizens are meant to forge political rules as part of the participatory-deliberative process), whereas the act of enumerating an extensive number of rights (as is found in the Ecuadorian constitution) suggests that there are a number of political rules that are non-negotiable. In short, the Ecuadorian case raises the question: where does participation and/or deliberation belong in the constitution-writing process? Should the constitutional convention be highly participatory but then establish fairly concrete rights provisions? Or should the constitution focus less on rights and more on the establishment of fair

deliberative and participatory institutions? And further, should the constitution be fairly easy to amend, thereby allowing for more citizen input down the line, or should the amendment process be more difficult, allowing for more stability?

This tension between rights and participation also plays out on a smaller scale between the goals of interculturalism and indigenous rights, as expressed in the plurinational platform. On the one hand, the provision of specific group rights to indigenous peoples suggests that the relationship between indigenous and non-indigenous peoples is fixed. Indigenous peoples should have the rights to indigenous justice, territorial autonomy, etc. On the other hand, interculturalism involves continual negotiation and exchange across cultures. While both goals exist in the plurinationalism platform and are not necessarily mutually exclusive, it does seem that a truly intercultural relationship between indigenous and non-indigenous peoples would require less rigidity than a relationship based solely on group rights.

The tensions in the Ecuadorian case surrounding deliberation, participation, and dialogue also play out in the political theory literature. As mentioned in Chapter One, Tully and Ivison both argue that political theorists interested in indigenous empowerment should focus more on dialogue between indigenous and non-indigenous people. In Ivison's case, he argues that indigenous and non-indigenous people should determine through deliberation what the necessary capabilities are for each citizen in that particular society through what he calls a '*discursive modus vivendi*.' Here, Ivison argues that attempts to discover or agree upon a common standard of justice, either through public reason or discursive democracy, are too inflexible and do not adequately take into account the pluralism found in modern democracies. Instead of focusing on a common standard of justice, plural societies should seek agreement through deliberation on the basic capabilities each citizen needs to lead a meaningful life.

Government and society should then set about guaranteeing that those capacities are met. Ivison argues that this approach allows for a reasonable level of pluralism in that each party does not have to come to an agreement on a more comprehensive moral agreement that assumes a common worldview. In the end, while Ivison argues that a post-colonial liberal society does not need to come to an agreement on a comprehensive theory of justice, the goal of his '*discursive modus vivendi*' is still to reach an agreement on the fairly basic principles that should govern each political society. However, Ivison does recognize that the list of basic capabilities each society agrees upon may be renegotiated over time.

In contrast to Ivison, Tully is influenced more strongly by the Canadian common law tradition, and this is reflected in his ideas on intercultural dialogue. Rather than focusing on either establishing a comprehensive theory of justice or Ivison's more flexible list of capacities, Tully argues that intercultural dialogue can be used to negotiate the relationship between indigenous and non-indigenous peoples:

> The aim of negotiations over cultural recognition is not to reach agreement on universal principles and intuitions but to bring negotiators to recognize their differences as similarities, so that they can reach agreement on a form of association that accommodates their differences in appropriate institutions and their similarities in shared institutions (131).

In short, Tully's approach is less focused than Ivison's on working out some shared guiding political principles, and he is, therefore, less concerned about whether or not indigenous and non-indigenous deliberators speak a common political language. Instead, Tully argues that despite their differences, indigenous and non-indigenous peoples, by virtue of occupying the same territories, have already learned to work through and negotiate their differences. And his model of intercultural dialogue seems to be a formalization of this constantly on-going process. Tully's approach also allows for more disagreement than Ivison's in that he recognizes that in

some instances indigenous and non-indigenous people may not agree on some basic political principles and may, therefore, wish to establish some separate political institutions.[143]

The Ecuadorian case seems to reflect elements of both Ivison's and Tully' philosophies. On the one hand, as mentioned above, the participatory constitution writing process seems to echo the type of '*discursive modus vivendi*' that Ivison describes. Indigenous and non-indigenous people came together through a participatory-deliberative process to agree on some basic principles in the form of the preamble to the constitution and a list of agreed upon rights for everyone.[144] On the other hand, much of CONAIE's discussion of interculturalism, as discussed in Chapter 2, fits more neatly with Tully's writings. In plurinationalism, as in Tully's writings, the focus of intercultural dialogue seems to be on negotiating the relationship between indigenous peoples and non-indigenous groups and creating a culture in which indigenous peoples are able to significantly influence the political traditions of mainstream society while still maintaining their own political spaces. Tully's writing is reminiscent of CONAIE's call for intercultural education and institutions when he states that "The various cultures of the society need to be

[143] Both Tully and Ivison are responding to authors like Benhabib (1996) and Habermas (1996), who argue that the goal of discursive/deliberative democracy is for citizens to arrive at a shared idea of the common good. For Ivison, this is too high of a standard in a plural democracy, which is why he argues that instead citizens need to reach a '*discursive modus vivendi*.' For Tully even a '*discursive modus vivendi*' may require too much agreement. Significantly, Jung offers the same type of critiques as Tully and Ivison to Benhabib's and Habermas's work. However, her skepticism of these two thinkers leads her to argue that membership rights secured by contentious politics would be a better way of guaranteeing indigenous empowerment than deliberative democracy.

[144] While Ivison argues that he is looking at capabilities and not rights, as mentioned in Chapter 1, these two concepts seem to blur together a bit in his theory. For example, several rights wind up on his list of capabilities. Furthermore, the Ecuadorian constitution blends the two, since many of the rights are listed as helping people live a life in accordance with sumak kawsay (which under Ivison's theory would probably fall under a capability).

recognized in public institutions, histories, and symbols in order to nourish mutual cultural awareness and respect" (190).

Ultimately, the Ecuadorian case contains a bundle of tensions and sometimes outright contradictions between different models of participation, deliberation, and dialogue. However, despite the conflicts between the different ideas of how to engage in participatory-deliberative dialogue or what the goals of such a dialogue should be, arguing that one should take a more dialogic approach to indigenous empowerment is still meaningful. First, despite the theoretical disagreements between Tully and Ivison and the tensions between the sometimes competing goals of plurinationalism, an approach to indigenous empowerment that relies highly on participation and dialogue differs from an approach centered on group rights. For example, Tully, Ivison, and plurinationalism all see the relationship between indigenous and non-indigenous groups as fairly flexible. A traditional multiculturalist approach to indigenous empowerment tends to focus on whether liberal societies should allow for group rights and, if so, which types of group rights they should allow. In focusing on intercultural dialogue, however, both Tully and Ivison note that each multicultural society will probably come to different agreements about what a fair relationship between indigenous and non-indigenous peoples would look like. And they both recognize that the contours of this relationship will most likely change over time. Allowing for pluralism becomes less about ensuring that certain rights are guaranteed and more about managing the relationship between indigenous and non-indigenous peoples. Rather than asking what liberalism will allow, Ivison and Tully's dialogic focus allows more room to engage the other on their own terms.

Furthermore, the Ecuadorian case's focus on intercultural dialogue paints a very different picture of the differing ideas between groups than does the bulk of the current

constitutional design literature. For example, consociationalism assumes that cultural differences are a threat to national unity and seeks to manage this threat by taking most cultural issues out of the national debate. Under a consociational arrangement, each cultural/ethnic/linguistic group has control over many aspects of family law, education, linguistic policy, etc., thus removing these potentially explosive aspects from the national stage. However, the approaches advocated for by Tully, Ivison, and plurinationalism are less wary of potential cultural disagreements between groups. While all three theories allow for a measure of indigenous autonomy, they also encourage discussion of cultural issues between groups. And all three approaches suggest that the way to decrease cultural tension is for more interaction between groups. As Ivison argues:

> One idea lying behind this chapter is that there may be certain kinds of disagreements and arguments that can actually contribute to political stability and community rather than undermine it…in societies where citizens have reasonably effective freedoms of speech and association, people learn through a combination of bargaining and arguing, to manage…conflicts. (92)

These different approaches to conflict (taking cultural issues off the table vs. encouraging intercultural dialogue), necessarily lead to different ideas about the best types of governing institutions for a plural society. As mentioned in Chapter 3, the current design literature tends to focus on vote sharing, power sharing arrangements, or reserved seats as means of accommodating pluralism, whereas plurinationalism places a greater emphasis on shared participatory-deliberative institutions.

Beyond a Rights Based Approach

As mentioned in Chapter One, this dissertation project was originally motivated by a question that has become increasingly important in the political theory literature: How should liberal democracies incorporate indigenous communities? I argue that, in answering this

question, it is important for political theorists to consider how indigenous empowerment could be included in constitutions and institutions, to understand whether or not the overarching theories will actual aid indigenous groups. In the Ecuadorian case, there seems to be a disjoint between the political theory literature, the constitutional design literature, and the platform advocated for by indigenous groups. And this mismatch between theory and indigenous platforms leads design scholars and theorists alike to overlook how indigenous empowerment is tied to broader questions regarding the economy and the environment. In missing indigenous people's larger critiques of western society, political theory underestimates the changes that western democracies may need to make to accommodate indigenous groups.

Despite theoretical disagreements between thinkers, such as Kymlicka, Young, Ivison, and Tully, the field as a whole tends to see the question of how to empower indigenous people as a question of rights. This is best demonstrated by Kymlicka's work *Multicultural Odysseys*, in which he argues that group differentiated citizenship is an extension of "civil rights liberalism," and, therefore, fits neatly within the liberal paradigm (91). When taken together, political theorists tend to advocate for the expansion of three types of rights: group cultural rights like bilingual education (Kymlicka, Ivison, Jung, and Tully), individual economic and political rights (Ivison and Jung), and the right to self-determination (Ivison, Kymlicka, and Tully). Similarly, the constitutional design literature has focused on the expansion of human rights more generally (Choudhry 2008). While a few scholars do address the question of constitutional design in diverse societies, the literature does not examine indigenous people as a separate case study. Instead, scholars such as Lijphart (1985) treat diverse societies as divisive societies and attempt to mitigate conflict through minority veto powers, the right to self-determination for minority groups, and power-sharing arrangements in government. In this sense, there is an overlapping logic between the theory and design literatures. By focusing on rights expansion and self-

determination, these literatures are focused on what liberal societies can do to protect group cultures, societies, land rights, and economies as independent entities from the majority. This is different than plurinationalism, which challenges the underlying logic and nature of the state and, by extension, mainstream society. As mentioned in Chapter Four, this is not to say that plurinationalism does not call for group rights, but, instead, the paradigm argues that these rights are meaningless outside the context of larger social, economic, and political reforms.

It is important to note that both Tully and Ivison recognize that the issue of indigenous empowerment highlights the colonial history of the liberal state and modern constitutionalism. And they contend that addressing indigenous political issues will mean changing that underlying power dynamic. Yet, despite this argument, both thinkers emphasize the importance of the indigenous right to self-determination. As mentioned in my introductory Chapter, Tully goes so far as to argue that indigenous and non-indigenous relations should be guided by the principle of mutual recognition: indigenous groups should be recognized by the non-indigenous state, and indigenous people then have the option of whether or not to recognized the non-indigenous state in return. However, the Ecuadorian case demonstrates that indigenous self-determination is a much more nuanced issued. For example, as noted in Chapter Four, while CONAIE has called for both the recognition of indigenous justice and the right to self-determination, it also emphasizes that plurinationalism means "unity in diversity'' (CONAIE 2007). So, while CONAIE argues for indigenous control of certain local areas, it is also an important actor in national-level politics and main-stream Ecuadorian government. It sees indigenous concerns as intertwined with non-indigenous interests. In addition, the issues surrounding free prior informed consent (FPIC) demonstrate that it is often difficult to determine who should speak for indigenous groups. Since many indigenous institutions have been destroyed in the 500 years since conquest or have atrophied over time, in many areas there is no one "legitimate" voice to engage in the

FPIC process. This lack of undisputed authority means it would be hard to know just who would "recognize" the non-indigenous government in Tully's mutual recognition scenario. In addition, as FPIC demonstrates, a lack of a clear indigenous authority has made it easier for extractive industries to take advantage of indigenous populations. Therefore, it would be advantageous for indigenous groups to pair local autonomous district with a state presence that is strong enough to protect indigenous interests. And it is not clear that either Tully, Ivison, or Kymlicka's discussions of self-determination allow for a strong national presence.

In contrast, the shear breadth of institutional changes covered in Chapters 2-6 demonstrates that taking the plurinationalism platform seriously would require a much wider range of political changes than is suggested by the political theory literature. Aside from expanding group rights (FPIC, bilingual education, resource rights, and the right to practice indigenous justice), plurinationalism requires changes to Ecuador's development goals, constitutional identity, and an overhaul of the state's environmental policy. Realizing these wide-sweeping goals would require a wide range of political and institutional changes, from opening up spaces for cultural change at the local level, to institutionalizing citizen oversight of development policy, to changing the way the court interprets civil, political, environmental, and economic rights. All in all, plurinationalism suggests that if western societies were to engage in the types of dialogue that Ivison and Tully encourage, they would discover that accommodating indigenous world views would require more than an extension of the liberal human rights agenda. Viewing indigenous empowerment through the lens of plurinationalism reminds political theorists that the original question is not, 'how can liberal societies justify group rights?' but rather, 'how can liberal societies make space for a plurality of world views?' In addition, some of the creative ideas in the Ecuadorian constitution, from the recognition of the rights of nature to the creation of the citizen's participation branch, demonstrate possibilities for

effecting the kind of wide-sweeping constitutional change that Ivison and Tully's work begins to touch on.

The largest blind spot in the political theory literature is its failure to recognize the full extent of the economic and environmental critiques indigenous people levy against modern society. Environmental and economic themes run throughout the plurinationalism platform. While my dissertation focuses on the rights of nature and sumak kawsay as two separate parts of the plurinationalism platform, these concepts are interrelated. Indigenous groups in Ecuador argue that living a life in accordance with sumak kawsay means living in harmony with nature as well as human communities. Furthermore, the indigenous right of free prior and informed consent is not only about protecting indigenous autonomy over ancestral lands but is often also about challenging the environmental impact of extractive industries. However, with few exceptions, the political theory literature on indigenous people does not really address indigenous people's environmental and economic concerns. This is important because environmental destruction does not respect arbitrary boarders. If oil companies are allowed to drill everywhere in the Amazon except a small section controlled by indigenous groups, then indigenous people will not be able to effectively protect their lands, and their territorial and resource rights will be practically meaningless. Interestingly, Jung makes note of the important political power that indigenous people have garnered as the perceived guardians of nature, but she doesn't really imagine how they could influence a country's broader environmental policy. Instead, she focuses on the economic impact for specific indigenous communities awarded territorial rights (239-241).

Tully comes closest to echoing CONAIE's discussion of the rights of nature in his later work *Public Philosophy in a New Key*. In the book, he doesn't focus on indigenous rights but,

instead, examines a number of other contemporary issues facing modern society, including liberal democracy's relationship to nature. He argues that liberal societies need to be more self-reflective and recognize their biases concerning nature and how these biases have led to a destructive relationship with nature. He then contends that liberal peoples should enter into dialogue with other cultures concerning their views on nature and discover how other cultural views may inform a new ecological ethic. He argues that these types of dialogues "enable us to think critically about our relation to nature in the present by showing that our current practices are neither necessary nor universal, but historically contingent and capable of being otherwise" (Location 2421). While Tully's chapter on nature does not specifically focus on indigenous rights, he does argue that the colonization of indigenous culture strongly parallels the colonization of new world lands and that both forms of imperialism should cause us to re-evaluate some of the underlying assumptions of liberalism. Tully's argument is interesting in that his statements about reevaluating the West's relationship with nature are similar to indigenous activists' arguments for the recognition of the rights of nature. Like Tully, indigenous activists in Ecuador argued that indigenous cosmology could represent a cultural resource that all Ecuadorians could draw upon to change their relationship with nature. In addition, as mentioned in Chapter 5, Ecuadorian thinkers such as Alberto Acosta also linked the Ecuador government's past treatment of nature to other aspects of colonialism.

However, while Tully does briefly discuss indigenous rights and ecological ethics in tandem, the focus of his writing in *Public Philosophy in a New Key* is about the West's relationship to nature, rather than the relationship between environmentalism and indigenous groups. Furthermore, while he notes that liberalism's current relationship is problematic, he does not elaborate on how liberal societies should address ecological concerns outside of dialogue with non-Western groups.

The political theory literature on indigenous people is also sparse concerning the larger economic critiques raised by sumak kawsay. Ivison and Jung both focus on addressing economic disadvantage in indigenous communities. For example, Ivison's capabilities approach is designed to get disadvantaged groups the economic, social, cultural, or political goods that they need in order to have the same opportunities as everyone else in society. Whereas Jung builds much of her theory of membership rights around the structural inequalities faced by indigenous groups. For Jung, one of the primary goals of membership rights is to guarantee that indigenous groups, who have systematically been left out of economic progress and policy making, can begin to benefit from modern development policy. However, while both of these authors acknowledge the economic disadvantages faced by indigenous groups, their theories focus on better integrating indigenous people into the current economic system, rather than changing the underlying assumptions of modern development policy.

Instead, Jung makes an economic argument against Kymlicka's brand of multiculturalism. She argues that in Latin America many indigenous groups were formerly constructed as peasant organizations but were not successful in bettering their economic position. As a result, many of these peasant organizations later identified as indigenous organizations since multiculturalist policies were gaining more national and international attention. Jung uses this as evidence that identities are malleable and politically constructed and that one of the goals of indigenous groups is economic growth. However, while she criticizes Latin American development policies for leaving indigenous people behind, her argument misses the larger critique that indigenous people have against current development policies. For example, both indigenous people and alternative development scholars argue that governments need to focus more on local economic projects that would allow indigenous and/or peasant communities opportunities for economic sustainability without forcing members to leave their

communities and cultures for larger cities. Because Jung's theory (in purposeful contrast to Kymlicka) doesn't really account for how to value culture and community membership, it is not clear that her theory of membership rights would take into account these types of broader concerns with development policy.

In missing indigenous people's larger critiques of Western society, political theorists not only miss an opportunity to comment on wider implications of the indigenous cosmovision on political and economic institutions, but they also miss making important connections to other types of groups and literatures. For example, particularly in traditional multiculturalism, indigenous peoples are often framed as part of a larger discussion about how liberal societies treat minority groups in general. Kymlicka argues that indigenous people, national minorities, and immigrant groups are all owed different types of rights by liberal societies based on their ability to retain their societal cultures and the amount of historic injustice faced by each group. However, Jung raises the interesting question as to how indigenous rights should stack up to the rights of other groups left behind by modern development policies (ex. should indigenous land rights precede the rights of equally impoverished groups?). Instead of delineating a model of differentiated citizenship based on culture, Jung compares the economic situations of indigenous and peasant groups. The ideas expressed in plurinationalism also challenge political theorists to think of indigenous groups in a new light. Like critical liberalism, plurinationalism, with its focus on sumak kawsay asks how indigenous groups and non-indigenous rural communities could be benefited by a change in the state's development model. The idea of the rights of nature further challenges theorists to consider how indigenous people's fates are tied to the rights of other groups. For example, as noted in Chapter 5, the discussion of the rights of nature in Ecuador raises the question of how the rights of indigenous peoples are tied to the rights of Pacha Mama or, alternatively, how indigenous rights might be tied to the rights of

future generations. In short, the four different planks of the plurinationalism platform encourage political theorists to think of how the question of empowering indigenous peoples and/or cultural minorities may be more closely tied to the question of how to accommodate all those left behind by political and economic liberalism.

In this same light, the breadth of the plurinationalism platform demonstrates the ways in which the indigenous rights debate is related to other areas of political theory. For example, Ivison and Tully both begin to consider how indigenous rights may be tied to post-colonialism more generally. In addition, while the indigenous rights literature in political theory does not contain much of a discussion on environmentalism, the green liberalism literature is fairly critical of modern democracy's treatment of nature. And the wider political theory literature has much to say on economic injustice. I do not mean to suggest that one theorist should or could examine all of these lines of thought in tandem, but plurinationalism does raise questions about some of the ways these theories may be interrelated. And future researchers may want to consider what these literatures say collectively about those left behind by globalization, colonialism, and neoliberalism.

Finally, by focusing on a narrow indigenous rights paradigm, the political theory literature misses the way indigenous cultures may contribute to the political ideas/institutions/culture of the society at large. For example, as Tully notes in *Public Policy in a New Key* and as CONAIE also argues, Western democracy's treatment of the environment has proven destructive, and there are few cultural resources from within Western political philosophy to really address this. Therefore, liberal democracies may do well to enter into a dialogue with other cultures to consider how their societies should treat questions of environmental ethics and policies moving forward. In asking what types of indigenous rights

liberalism may support, political theorists largely ignore this type of mutual exchange, instead focusing on how indigenous demands can fit neatly within the mainstream political culture of a society. However, really listening to critiques raised by indigenous people concerning the environment, economics, or politics, may involve adopting pieces of the indigenous cosmovision, such as sumak kawsay or the rights of Pacha Mama, that do not fit quite as unambiguously within liberal paradigms. As noted throughout this dissertation, indigenous and non-indigenous people alike were proud of the ways that indigenous cosmovision had been combined with mainstream political ideas to produce a uniquely Ecuadorian political identity. For many people plurinationalism was best defined as "unity in diversity." In other words, it was not a paradigm strictly for indigenous rights, but for unifying Ecuador through adopting a diverse set of political ideals. As more countries search for post-colonial political identities, different indigenous and other minority ideologies may be blended with mainstream ideas to form new national identities, and political theory needs a way to account for this process.

Engaging the Other

In the end, both Tully and Ivison's writings call on political theorists to really engage with indigenous people to consider how liberal societies can accommodate minority groups in a just way. As Ivison notes in Post-Colonial liberalism, "liberals can not simply prescribe *a priori* a place within their existing conceptual schemes and political structures into which to slot indigenous people's claims but rather [need to] grasp the ways in which they challenge fundamental liberal notions of public reason, citizenship and justice" (2002, 1). However, he notes that his "sketch" of post-colonial liberalism is "offered from only one side of the table" (ibid., 2). While I am obviously limited by my own situation as a scholar (I am neither an indigenous writer nor activist) this dissertation is an attempt to further fill out that sketch. Therefore, while this

dissertation is primarily focused on how indigenous ideas were incorporated into the 2008 Ecuadorian constitution, I believe that in a small way it also contributes to a larger theoretical discussion about how western political theorists can work to incorporate multiple philosophical viewpoints, by "engaging the other."

Recently, the field of political theory as a whole has struggled with the concept of the best way to incorporate non-western voices into the literature through engaging in comparative political theory (CPT). Comparative political theory arose in the late 1990s out of a recognition that the globalization of political life necessitated a more international approach to questions surrounding issues such as environmentalism, human rights, and redistributive justice.[145] Comparative political theorists argue that as both political problems and political discourse become more globalized it is important for scholars to recognize that the political frameworks with which we engage in global discourse and problem solving are still fairly Eurocentric. Comparative political theorists, then, call for all political theorists to become more self-aware of their own Western biases and more open to considering how non-Western philosophy can be used to tackle global problems (Black 2011). As William and Warren (2013) argue, "it [is] possible to view comparative political theory as responding to the globalizing demands for shared moral resources that respond to shared fates (14)."

Yet despite the shared goal of engaging with Non-Western thinkers, there are still substantive methodological disagreements in the field, concerning how comparisons between cultures should be made and what should count as political theory. In her work *Cosmopolitan Political Thought*, Farah Godrej (2011) notes that comparative political theorists often conduct

[145] See, for example, Dallmayr 1997 and Euben 1997.

research in one of three ways. First, scholars may choose to study a similar concept (ex. human rights, citizenship or duty) across multiple traditions. Second, scholars may conduct a more in-depth study of a concept or group of concepts from a non-Western tradition. And third, theorists may ask how non-Western thinkers can shed new light onto Western and/or global political issues. Each different approach to comparative political theory, however, raises its own set of methodological concerns. For example, March (2009) asks if/how an in-depth study of a single culture could be considered comparative political theory. What distinguishes this type of research from the types of research already being conducted by area studies specialists? In addition, it is unclear how scholars should make comparisons of different topics across cultures when there may be no direct equivalent of a certain concept (ex. how can one compare the idea of "human rights" across cultures when non-Western countries didn't traditionally use that term). Godrej also worries that asking how non-Western thinkers can contribute to Western debates still essentially puts Western political theory at the center of international discourse, since it is still setting the agenda for international debates. These last two objections raise a further methodological question: is the goal of comparative political theory to produce an ideologically "pure" account of how cultural others think about politics, or is the goal to work towards a hybrid political theory that can shed light on international issues? And finally, this question raises a further methodological concern: What types of documents, evidence, writings, and thinkers should be considered political theory? Should scholars study only canonical works from certain thought traditions, or should the idea of what constitutes political theory be more broadly conceived?

While this dissertation is not a work of comparative political theory *per se*, it addresses some of these same methodological concerns raised by CPT. For example, I examine a question that is predominate in the Western political theory literature (i.e., How should democratic

societies incorporate indigenous groups?) from indigenous and non-indigenous Ecuadorian viewpoints. However, while I examine this question from different cultural viewpoints, the question does not belong equally to all cultures. Instead, this question springs out of debates surrounding minority rights, universalism, and the nature of state neutrality that are in some ways fairly specific to political liberalism. However, while the question of how democracies should incorporate indigenous peoples may not have initially been posed by thinkers within the indigenous tradition, it has, for obvious reasons, become politically important to indigenous groups. And so far, the theoretical discussion regarding how indigenous peoples should be incorporated into national constitutions has been largely dominated by Western political and legal theorists. Therefore, despite Godrej's critique, I argue that examining this predominately liberal question from the viewpoint of indigenous groups is a valuable exercise for political theorists. In this case, the benefit of studying indigenous political platforms is twofold. It helps to flesh out the accounts of Tully and Ivison by examining the other side of the dialogue. And the account of plurinationalism suggests that both Tully and Ivison may place too much emphasis on self-determination rights to the detriment of other parts of the indigenous platform (ex., economic reform). Second, viewing the question of how democratic societies can incorporate indigenous groups through the lens of indigenous commentary has the potential to provide creative solutions to this collective dilemma. For example, the priority indigenous groups place on national preservation suggested creative solutions like the legal recognition nature as a rights bearing entity. And this commentary on nature further shines a light on one of the weakness within liberalism itself: it does not have much to say about man's relationship with nature even in the face of existential threats like global warming. Finally, by studying this question, not only through the lens of indigenous politics, but in the context of Ecuadorian politics, I am able to study how an increasingly international question might be answered in the

global south. This adds a fresh viewpoint to the indigenous politics literature, which generally focuses on the United States, Canada, and Australia.

Just as the question of how indigenous groups can be incorporated into democratic government is, at heart, a liberal question, so too is the indigenous response shaped by political liberalism. In other words, when indigenous groups call for the right to territorial autonomy or intercultural/bilingual education, they are using the Western language of "rights" to advocate for their political views. There is, therefore, a debate among both comparative political theorists as well as anthropologists as to how to characterize "indigenous thought."[146] On the one hand, current indigenous scholars, writers, and political movements often speak in terms that are influenced by both indigenous beliefs and contemporary Western influences, so to characterize these scholars/activists/texts as representing traditional indigenous thought might be slightly misleading. On the other hand, it is equally problematic to state that because these indigenous writers/movements/leaders are addressing liberal audiences they are somehow not "authentically" indigenous. Ultimately, indigenous peoples now live side by side with non-indigenous communities, and it is only natural that indigenous (as well as non-indigenous) beliefs will evolve over time as each group has more contact with the cultural "other." A failure to recognize this could ultimately trap indigenous cultures in the past.

[146] In comparative political theory, this debate is not so much about how to characterize indigenous thought as it is about how to treat "non-Western" thought more generally. For example, March (2009) argues that the project of CPT is difficult because contemporary "non-Western" scholars often reflect on the same questions/debates as Western scholars, and, therefore, they are often no longer engaging in a different thought tradition which can then be compared to a distinct tradition of "Western" political theory. In other words, CPT is difficult because thought traditions are no longer "distinct" and, therefore, no longer comparable against each other. On the other hand, Black (2011) and Euben (2002) argue that political theory has always been a syncretic exercise and that the existence of a certain amount of overlap does not preclude the possibility of comparison between intellectual traditions.

This dissertation project is not an attempt to trace the origins of a particular indigenous concept or to construct an intellectual history of indigenous thought. Rather, I recognize that current indigenous discussions regarding indigenous political empowerment will necessarily be influenced by the language of Western thought. However, the indigenous platform for constitutional change was also heavily influenced by indigenous cosmology, and indigenous peoples were still able to incorporate uniquely indigenous ideas about political, communal, and natural life into discussions at the Constitutional Convention. Tully (1995) ultimately argues that it is because of this overlap in indigenous and non-indigenous thought, garnered through 500 years of living together, that indigenous and non-indigenous peoples can understand each other enough to participate in meaningful dialogues and work mutually acceptable compromises[147]. And this dissertation attempts to traces how those compromises can lead to constitutional and institutional reform.

While this dissertation is primarily a contribution to the discussion in constitutional design and political theory about the incorporation of indigenous groups into democratic governments, my study also briefly speaks to some of the larger methodical debates in the CPT literature. In bringing the ideas of indigenous activists to bear on the question of indigenous rights, I hope to demonstrate the value of approaching a single questions from different cultural viewpoints, even if that question originated in Western political theory. And I hope to further demonstrate that question can be effectively studied, not just by drawing on the established

[147] Roxanne Euban makes a similar argument in the context of political theory. She contends that the syncretic nature of modern thought may even make comparisons between schools of thought more tenable. Fifteenth century European thought would have been unintelligible to fifteenth century indigenous communities, and vice versa, to the extent that comparison may have been impossible. On the other hand, modern indigenous and mestizo communities are thinking about and addressing the same questions, and this may make a comparison of their answers a more valuable intellectual exercise.

cannons of non-Western societies, but by considering the writings and political viewpoints of scholars and activist working and thinking in highly synchronistic environments.

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Interviews

1 Interview with former Minister in Correa’s First Cabinet (2012 March 6) Personal Interview.

2 Interview with Expert in Constitutional Law (2012 March 12) Personal Interview.

3 Interview with Expert on Plurinationalism (2012 March 23) Personal Interview.

4 Interview at US Embassy (2012 April 2) Personal Interview.

5 Interview with NGO Activist Focused on Citizen Participation (2012 April 2) Personal Interview.

6 Interview with NGO Focused on Citizen Participation and Law (2012 April 2) Personal Interview.

7 Interview with Women's Rights NGO (2012 April 5) Personal Interview.

8 Interview with NGO Activist Focused on Citizen Participation (2012 May 13) Personal Interview.

9 Interview with Indigenous Rights Activist and Scholar (2012 May 16) Personal Interview.

10 Interview with Indigenous Assembly Member (2012 May 22) Personal Interview.

11 Interview with Civil Rights Lawyer (2012 May 24) Personal Interview.

12 Interview with Former President of Ecuador (2012 May 28) Personal Interview.

13 Interview with NGO Focused on Culture (2012 June 6) Personal Interview.

14 Interview with a Representative of CONAIE from the Amazon (2012 June 10) Personal Interview

15 Interview with Representative of FEINE (2012 June 19) Personal Interview.

16 Interview with and Assembly Member at the Constitutional Convention (2012 June 20) Personal Interview.

17 Interview with an NGO Focused on the Environment (2012 June 21) Personal Interview.

18 Interview with Assembly Member at the Constitutional Convention (2012 July 3) Personal Interview.

19 Interview with Current AP Assembly Member (2012 July 6) Personal Interview.

20 Interview with Indigenous Activist and Anthropologist (2012 July 6) Personal Interview.

21 Interview with a CPCCS Member (2012 July 9) Personal Interview.

22 Interview with a Board Member of the Elections Tribunal (2012 July 11) Personal Interview.

23 Interview with an NGO Representing Afro-Ecuadorians (2012 July 11) Personal Interview.

24 Interview with a CONAIE Representative from the Amazon (2012 July 12) Personal Interview.

25 Interview with Environmental NGO (2012 July 12) Personal Interview.

26 Interview with Indigenous Writer and Activist (2012 July 13) Personal Interview.

27 Interview with Indigenous Activist (2012 July 17) Personal Interview.

28 Interview with Indigenous Youth Activist (2012 July 20) Personal Interview.

29 Interview with MPD Assembly Member (2012 July 31) Personal Interview.

30 Interview with Assembly Woman at the Constitutional Convention (2012 August 2) Personal Interview.

31 Interview with Representative of FIENE (2012 August 15) Personal Interview.

32 Interview with the World Bank (2012 August 27) Personal Interview.

33 Interview with Assembly Member at the 1998 Constitutional Assembly (2012 August 27) Personal Interview.

34 Interview with Representative on SENPLADES (2012 August 28) Personal Interview.

35 Interview with an Assembly Man at the Constitutional Convention (2012 August 28) Personal Interview.

36 Interview with Prominent Indigenous Activist (2012 September 5) Personal Interview.

37 Interview with Indigenous Justice Lawyer and Activist (2012 September 5) Personal Interview.

38 Interview with an NGO Focused on Development (2012 September 7) Personal Interview.

39 Interview with Afro-Ecuadorian Activist and Advisor to the 1998 and 2008 Constitutional Assemblies (2012 September 12) Personal Interview.

40 Interview with Current AP Assembly Member (2012 September 13) Personal Interview.

41 Interview with Pachakutik Assembly Member in 2008 (2012 September 14) Personal Interview.

42 Interview with Advisor to the 2008 Constitutional Assembly with a Focus on Development (2012 September 14) Personal Interview.

43 Interview with Expert on Ecuadorian Constitutional Law (2012 September 18) Personal Interview.

44 Interview with Former Pachakutik Assembly Member (2012 September 18) Personal Interview.

45 Interview with Advisor to Delegates at the Constitutional Assembly (2012 September 19) Personal Interview.

46 Interview with Expert on Buen Vivir (2012 September 20) Personal Interview.

47 Interview to an Advisor to the 2008 Constitutional Assembly with a Focus on Interculturalism (2012 September 20) Personal Interview

48 Interview with and AP Assembly Member at the Constitutional Convention (2012 September 25) Personal Interview.

49 Interview with Human Rights Representative at the ONU (2012 September 26) Personal Interview.

50 Interview with Advisor to Delegates at the Constitutional Assembly (2012 September 27) Personal Interview.

51 Interview with a Representative of FENOCINE (2012 October 3) Personal Interview.

52 Interview with Environmental Activist Present at the Convention (2012 October 3) Personal Interview.

53 Interview with Indigenous Women's Rights Activist at 2008 Constitutional Assembly (2012 October 9) Personal Interview.

54 Interview with NGO Focused on Democracy Promotion (2012 October 9) Personal Interview.

55 Interview with Indigenous Women's Rights Activist (2012 October 13) Personal Interview.

56 Interview with Indigenous Assembly Member (2012 October 16) Personal Interview.

57 Interview with AP Assembly Member (2012 October 17) Personal Interview.

58 Interview with Indigenous Activist (2012 October 23) Personal Interview.

59 Interview with Indigenous Activist (2012 October 23) Personal Interview.

60 Interview with Representative of CONAIE (2012 October 24) Personal Interview.

61 Interview with Representative of CONAIE from the Coastal Region (2012 October 24) Personal Interview.

62 Interview with Representative of CONAIE (2012 October 29) Personal Interview.

63 Interview with Representative of CONAIE (2012 October 30) Personal Interview.

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Curriculum Vita

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Education

Indiana University- Bloomington, IN 2007-2017
Ph.D. Candidate in Political Science
Primary Field: Political Theory
Secondary Field: Comparative Politics
Advisors: Lauren M. MacLean and William E. Scheuerman

Dissertation Title: *Indigenous Rights and Constitutional Change in Ecuador*

Abstract:
In 2008 the Republic of Ecuador convened a participatory constitutional convention. The nation's indigenous groups were actively involved in the drafting process, and used the opportunity to put forth a compressive political platform for constitutional change in Ecuador. My dissertation examines the four different planks of the indigenous platform: indigenous group rights, interculturalism, sumak kawsay (good living) and rights of nature, and asks the implications of these four planks for constitutional design research. I then examine five different political theory paradigms for indigenous empowerment, and outline their implications for the future of constitutional design. I argue that while western political theory almost exclusively concentrates on indigenous group rights, the Ecuadorian indigenous platform offers a much broader critique of liberal government that focuses on alternative methods of development, environmentalism, and social change, as well as, indigenous group rights. I conclude that in missing this larger indigenous critique, the political theory literature often underestimates the ways in which questions raised in other areas of political theory may be tied to the question of indigenous empowerment. In so doing, my dissertation represents a work of both comparative political theory and comparative constitutional design.

Austin College -Sherman, TX 2003-2007
B.A. in Political Science
Honors Thesis: *Indigenous Autonomy on Taiwan*
Advisor: Donald Rodgers

Research Interests

Democratic Theory; Comparative Politics; Comparative Political Theory; Social Movements; Latin America; Constitutional Law; Indigenous Politics; Qualitative Research Methods

Working Papers

"Indigenous Rights and Constitution Making." Working Paper.

"Participatory Constitution Making in Diverse Societies." Working Paper.

"Green Multiculturalism." Working Paper.

Grants, Fellowships and Awards

College of Arts and Sciences Dissertation Completion Fellowship, 2013-2014 Academic Year

Fulbright Institute for International Education and Andrew W. Mellon Foundation Fellowship, 2012: Awarded to facilitate eight months of dissertation fieldwork in Ecuador

J.M. Robinson Award, 2007: Top female student in the 2007 graduating class at Austin College

Mellon Foundation Summer Grant, 2006: Funded Taiwan fieldwork for honors thesis

ASIANetwork Freeman Foundation Grant, 2005: Funded Taiwan fieldwork for honors thesis

Hatton Sumners Scholar, 2005-2007**:** Political science scholarship and seminar program

Research Experience

Editorial Assistant for *Perspectives on Politics* Summer 2009 - Fall 2011 and Fall 2014-Present
Perspectives on Politics is a flagship journal of the American Political Science Association.

- Reviewed approximately 350 scholarly articles and helped make review process decisions
- Coordinated with authors, compositors, reviewers, and copy editors at all stages of the publication process
- Assisted the Journal's transition from Rutgers to Indiana University

Dissertation Fieldwork in Ecuador March 2012-October 2012

- Interviewed political elites including presidential candidates, legislators, and leaders in the indigenous and non-profit communities regarding difficulties in implementing the new Ecuadorian Constitution

Research Assistant to Lauren MacLean Fall 2008, Spring 2009 and Fall 2010

- Compiled data on state government compliance with federal tribal consultation guidelines
- Wrote literature reviews on deliberative democracy, participatory democracy, tribal consultation, and international indigenous rights

Teaching Experience

Instructor, “Introduction to Political Theory,” Summer 2011

Assistant Instructor, “Introduction to Political Theory,” Spring 2008

Assistant Instructor, “American Political Controversies,” Fall 2007

Head Delegate for “Model United Nations,” Fall 2006

Conference Presentations

“Indigenous Rights and Constitution Making.” Presented at the Midwest Political Science Association conference in Chicago, April 2016

“Radical Democracy and Indigenous Rights in the Context of the Ecuadorian Constitution.” Presented at the Southwestern Social Science Association conference in San Antonio, April 2014

“Green Multiculturalism.” Presented at the Midwest Political Science Association conference in Chicago, April 2014

“Protest Framing in Ecuador and Peru.” Presented at the Midwest Political Science Association conference in Chicago, April 2009

“Indigenous Politics in Taiwan.” Presented at International Studies South Conference in Birmingham, October 2006

“Indigenous Politics in Taiwan.” Presented at the Southwest Political Science Association conference in San Antonio, April 2006

Invited Presentations

Discussant. “History, Borders, and Varieties of Field Research in Political Science,” (Chapter in forthcoming book on Field Research in Political Science by Diana Kapiszewski, Lauren M. MacLean and Ben Read), Book Party at Indiana University, December 2011.

Presentation of Nancy Fraser’s book, *Scales of Justice*, Graduate Seminar at Indiana University, January 2011.

Language Skills

Spanish – Advanced Written and Intermediate Spoken Proficiency
5 semesters of classes and 8 months of immersion experience