Comparative Latin American Constitutionalism

edited by
Silvia Bagni
Serena Baldin

EUT

BIBLIOTECA DELLA SOCIETÀ APERTA
STUDI E RICERCHE 13

This book is one of the outcomes of the research activities carried out within the research project PRIN 2017 "From Legal Pluralism to the Intercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the European Legal Space" (2020/2023). This book emerged out of a shared realisation. The editors found that while a vast legal literature on constitutionalism in Latin America exists in Europe, no single volume has provided an overview of the main institutional models of constitutional law in the region. This book focuses on classic public law issues in order to gain insight into recent constitutional innovations. It is also the result of a precise methodological choice, which embraces a comparative approach. Latin American legal facts – that is, forms and types of state, presidentialism and constitutional justice – are not simply observed as national events. Rather, these institutions are contextualised in a broader way, looking at the relationships between two or more systems in order to identify trends.

Silvia Bagni is Associate Professor in Comparative Public Law at the University of Bologna (Italy) and, since 2022, PI of the research project PRIN 2017 "From Legal Pluralism to the Intercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the European Legal Space".

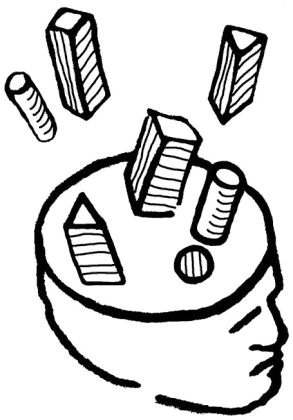
Serena Baldin is Associate Professor in Comparative Public Law at the University of Trieste (Italy) and currently Jean Monnet Module Coordinator of the project "The Rule of Law in the new EU Member States", co-funded by the European Union.

9 788855 114257

Euro 18,00

BIBLIOTECA DELLA SOCIETÀ APERTA

STUDI E RICERCHE **13**



BIBLIOTECA DELLA SOCIETÀ APERTA
Studi e ricerche

This book is the English version of *Latinoamérica. Viaggio nel costituzionalismo comparato dalla Patagonia al Río Grande*, Silvia Bagni and Serena Baldin (a cura di), Giappichelli, Torino, 2021.

This book is one of the outcomes of the research activities carried out within the Research Project PRIN 2017 "From Legal Pluralism to the Intercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the European Legal Space" (PI – prof. Lucio Pegoraro – CUP J34I19004200001).

UPI UNIVERSITY PRESS ITALIANE
Opera sottoposta a peer review secondo il protocollo UPI – University Press Italiane

Coordinamento editoriale
Pasquale Viola

Impaginazione
Elisa Widmar

ISBN 978-88-5511-425-7 (print)
ISBN 978-88-5511-426-4 (online)

EUT Edizioni Università di Trieste
via Weiss 21, 34128 Trieste
https://eut.units.it
https://www.facebook.com/EUTEdizioniUniversitaTrieste

Comparative Latin American Constitutionalism

edited by
Silvia Bagni
Serena Baldin

EUT EDIZIONI UNIVERSITÀ DI TRIESTE

Table of Contents

Chapter 8
The Pantocratic Model of Constitutional Justice in Ecuador and Bolivia*

SERENA BALDIN** AND ENRICO BUONO***

1. Introduction

The comparison between Ecuador and Bolivia can lead to valuable insights, as the constitutions of these countries (in force since 2008 and 2009, respectively) reflect the popular will to create a new state structure, embracing different paradigms from those established in Western legal systems. This derives from the acceptance of Andean ancestral worldviews, indigenous sources of law and ways of handling public af-

* Sections 1, 2, 2.1, 3 and 3.1 have been written by Serena Baldin, sections 2.2 and 3.2 have been written by Enrico Buono, while section 4 has been written jointly.

** Associate Professor of Comparative Public Law at the University of Trieste.

*** Postdoctoral Research Fellow of Comparative Public Law at the University of Perugia.

fairs, which have given birth to 'plurinational and intercultural' states. Another element of novelty lies in the rejection of the sustainable development model implemented in most parts of the world, with the consequent adoption of an institutional design that proposes an alternative path towards sustainability, based on innovative political, legal, economic, social and cultural premises.

Therefore, these constitutions present the elements that best express the counter-hegemonic legal tradition of the so called *buen vivir* (Baldin 2015 and 2019). This counter-hegemonic legal tradition is based on the assumptions of "subaltern cosmopolitanism", opposed to neoliberal globalization (de Sousa Santos 2004). The radical constitutional reforms introduced in Ecuador and Bolivia also affect the relationship between authority and freedom, seeking to address the unresolved issues of the Welfare state. The emerging result is a form of state in which new legal subjectivities, including nature, and the values of sharing community life are brought together, and in which the principle of fraternity prevails over that of solidarity (the so-called Caring state: Bagni, in this book).

In light of this, this chapter sets out to investigate whether the reforms have also affected constitutional justice bodies, developing original solutions in line with the trends observed in other fields.

Secondly, and in a broader perspective, the research seeks to verify the degree of adherence of Ecuador and Bolivia to the pantocratic model of constitutional justice. It must be noted that these countries have initially adopted a centralized system of constitutional justice, establishing a specific body to resolve constitutional issues. This model differs from the diffuse model of judicial review, where any judge can exercise constitutionality control and disapply the law if it does not comply with the constitution (Cappelletti 1979). These two classical archetypes have expanded throughout the world considerably over time, in various hybrid forms (Pegoraro 2019). According to a recent taxonomic proposal based on functional criteria, the nature and competences of constitutional justice bodies lie in either the nomocratic or the pantocratic model (Bagni, Nicolini 2021). The first model exemplifies those experiences which present a minimum enforcement of constitutional justice, where only the legitimacy of legislation can be reviewed; the second model, defined as pantocratic, enhanced or total model, refers to those legal systems in which the activity of all public powers is subject to forms of constitutional review. Adopting a *fuzzy* approach to legal taxonomies (Baldin 2017), the pantocratic model, in particular, presents many possible subclasses, marked by

various degrees of intensity, according to the number and kinds of control over state authorities.

The *Corte Constitucional* of Ecuador and the *Tribunal Constitucional Plurinacional* of Bolivia are the institutions specifically in charge of monitoring compliance with the constitution. Their current configuration differs from the past, when a mixed model prevailed, which established both a specific body and the direct involvement of ordinary judges in the constitutional review of laws (Grijalva Jiménez 2012, p. 183; Rivera Santiváñez 1999, p. 208).

The research aims to understand whether an attempt has been made to overcome the problem of politicized judges recorded in the past by intervening in the selection process. It also aims to verify whether, in the selection process, social pluralism is reflected to some extent within these courts. On one hand, plurinationality is a primary element of the institutional organization, which implies the full recognition of natives and their culture in the public sphere. On the other hand, guarantees of gender equality are stated in several constitutional provisions. It is therefore interesting to understand if the theory of reflective judiciary, according to which the legitimacy of judges can be enhanced through selection processes that are sensitive to the representation of society, has taken root in Ecuador and Bolivia and through which policies.

A further aspect of analysis regards the assigned functions and, in particular, the ways in which the constitutional review is exercised. In this sense, the research sets out to ascertain whether the Andean Courts show a tendency to extend the methods of control to include both *a priori* and *a posteriori* review and concrete and abstract review. Thereafter, it seeks to investigate the review of conventionality, which is emblematic of the trend towards the internationalisation of constitutional law, through the transposition of covenants in the block of constitutionality (Pegoraro 2019, p. 202). In the Latin American context, this is done by including the American Convention on Human Rights (and possibly other human rights treaties) in the parameter of judgment. This scrutiny determines the obligation for all authorities of the state Parties to set aside any domestic law in conflict with the Convention and with its interpretation by the Inter-American Court of Human Rights (Ferrer Mac-Gregor 2020, p. 375 f.).

Section 2 therefore illustrates the guarantees of independence of the constitutional judges and the methods for their selection, while Section 3 focuses on the review of constitutionality and conventionality. Section 4 provides a summary of the collected data with the purpose of highlight-

ing both the similarities and the differences between Ecuador and Bolivia, while placing them at the "low" or "high" extreme within the pantocratic model of constitutional justice. In order to achieve this, the comparative law method is employed, especially through the use of the *tertium comparationis*. The *tertium comparationis* is the term of reference for identifying similarities and differences between Ecuador and Bolivia on the basis of a predefined comparison grid. The *tertium comparationis* is outlined at the beginning of the next two paragraphs, each divided into subsections dedicated to Ecuador and Bolivia.

2. Guarantees of independence and reflective judiciary

From a comparative perspective, the structure of Constitutional Courts often presents similar characteristics; this is understandable given that their composition influences the very legitimacy of constitutional justice. The Constitutional Courts are bodies that, by their very nature, must ensure maximum independence from political power and provide the best guarantees of impartiality. How can this be achieved? Through the way in which judges are selected, the provision for a long term of office and the prohibition from reappointment. Therefore, these three elements serve as *tertium comparationis* to verify similarities and differences between the states under analysis.

Hans Kelsen was one of the first scholars to offer an overview of the elements contributing to the formation of a Constitutional Court. He theorized the centralised model of constitutional justice that later became reality in the constitutions of Czechoslovakia of 1919 and Austria of 1920 (Kelsen 1981).

With reference to the procedures for selecting judges, the renowned Prague-born jurist advocated a mixed system of election and appointment by other constitutional bodies (Head of State, Parliament, Government, Judiciary), also allowing for the possibility of co-option by the Court itself for any vacancies. It cannot be argued *a priori* that appointment is preferable to election or vice versa: in both cases only experience can reveal whether in a specific context the subjects or bodies with power of choice have ensured the guarantees of independence of the Court or have instead aimed to influence the political orientation of the judges. Selection procedures guarantee the greatest possible balance, a factor which, usually combined with the periodic turnover of judges, allows the political orientations expressed by public

opinion in Parliament (and also in the Government and/or the presidential office) to be reflected in the composition of the Constitutional Court.

In addition to Kelsen's reasoning, it must also be added another aspect that may affect the composition of the Constitutional Courts, and which calls into question the theory of reflective judiciary. This concept refers to a selection process of judges that takes into account the social heterogeneity given by factors such as gender, ethnicity, religion, language, etc. The underlying intention is to ensure that the different sensitivities in society are represented within the Court by means of the judges' backgrounds. This ensures that decisions are made with a full understanding of the reasons of the parties (Mastromarino 2018, p. 469 f.).

At the same time, a long term of office also guarantees the neutrality of the Court, by avoiding solidarity with the subjects and bodies involved in the selection process. In other words, the duration of the mandate is essential in order to guarantee independence from political power and, therefore, greater objectivity of judgement. For this reason, the mandate of the constitutional judges is generally longer than that of the bodies appointing them, in order to reduce the possibility of influence and interference on the Court's activity.

Furthermore, the requirement of the ban on consecutive terms averts the risk that expectations of reconfirmation could affect the fair judgement of the Court. However, within the comparative panorama it can observed that reappointment is often allowed.

2.1. Ecuador

In Ecuador, the profiles of the *Corte Constitucional* are regulated in Title IX "Supremacy of the Constitution", chapter two "Constitutional Court of the Constitution (art. 429-440) and in the *Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional* (LOGJ) of 2009.

Art. 432 const. foresees a Court composed by nine members, who perform their duties in the plenary court and in chambers. The requirements for office are set out in art. 433 const., which states that candidates must hold Ecuadorian citizenship and enjoy full political rights; they must hold a law degree; they must have exercised with notable rectitude the profession of attorney-at-law, judge or university professor in law for at least ten years. In addition, proof of probity and ethics is required, and the candidates must not have been members of political parties or movements in the previous ten

years. Art. 173 LOGJ supplements the constitution by listing a number of situations which prevent appointment, i.e., causes of incapacity, including active service in the armed forces or the police force or being the spouse or cohabiting partner or a relative up to the fourth degree of a constitutional judge or a member of the selection committee. The office of judge is full-time, making the exercise of other functions incompatible, with the exception of university teaching (art. 174 LOGJ).

The selection process is quite original, based on a public competition on the basis of qualifications and examinations. Several rules form the legal basis of this procedure: art. 434 of the constitution, articles 177-184 LOGJ and the rules and procedures for public competition established by the Council of Citizen Participation and Social Control, a constitutional body which cooperates with the other institutions in the management of public affairs.

Candidacies must come from three constitutional functions, namely Legislative, Executive and Transparency and social control. As specified in the final part of the Constitution, in art. 25 of the Transitional Provisions, each function proposes at least nine candidates. The joint committee in charge of examining the candidates consists of six members, with two commissioners appointed by each of the three constitutional bodies that have the power to make the proposals. The judges are appointed following an evaluation procedure in which, after checking their requirements and awarding a score for their qualifications, candidates are required to take a written and an oral examination. The result of the evaluation can be challenged by any citizen who believes that the candidates do not meet the requirements due to a lack of probity or suitability, or because they have omitted relevant information. The evaluation board itself decides on appeals.

Art. 434 const. also ensures gender equality in the formation of the Court. An issue arises as to whether this requirement applies at the time of proposing candidates or whether it is a criterion to be met at the end of the selection procedure, or at both stages. Reading the LOGJ, attention must be paid to gender balance at both stages, but in different ways. In the initial phase, each of the three constitutional bodies is required to present nine "alternating male and female candidates" (art. 180, par. 3), which means that there must be an alternation of gender in the list of candidates. At the stage of the public examination, on the other hand, the LOGJ is concerned with guaranteeing the representation of women by providing that if "there are two candidates in equal conditions, preference shall be given to the application of the woman" (art. 181, par. 3). The solution with the least impact on the principle of equality is therefore preferred since it is only applicable in

the event of equal ranking. However, this choice does not necessarily lead to an effective gender balance, even though this has been achieved so far.

The lack of a rule guaranteeing the ethnic component in the Court is puzzling, despite the fact that Ecuador is a plurinational and intercultural state according to art. 1 const. and it provides an extensive set of rights for indigenous groups. On the other hand, this result is in line with the choice of not implementing any mechanism to promote the political representation of natives in Parliament. On a practical level, in the first period of the Court's activity, Nina Pacari was a member of indigenous descent; currently, there is no judge of indigenous descent.

Under art. 432 const., the term of office of constitutional judges is nine years. It is therefore longer than that of other constitutional bodies (four years for the Head of State, four for the members of the National Assembly, four or five years for the members of the Transparency and social control function). The removal of a judge from office on the grounds of criminal liability in connection with the performance of his/her duties is decided by the Constitutional Court with a two-thirds majority of the votes cast by its members (art. 431, par. 2, const.).

Constitutional judges cannot be re-appointed immediately. Their mandate can be renewed but not consecutively, a solution that is not very common in the comparative panorama. The rule can be justified by the fact that in such a sparsely populated country it is difficult to ensure a constant turnover of adequately trained personnel. This, however, leads to a risk of fostering bonds of political partisanship in the hope of a second appointment. A further distinguishing criterion is given by the timing of the renewal procedure. In this case, one third of the members of the Court are renewed every three years.

2.2. Bolivia

In Bolivia, the *Tribunal Constitucional Plurinacional* is regulated by Title III "Judicial Organ and Plurinational Constitutional Court", chapter VI "Plurinational Constitutional Court" of the constitution (articles 196-204) and by the *Ley N° 027 del Tribunal Constitucional Plurinacional* (LTC) of 2010.

Art. 198 const. states the elective principle for constitutional judges by referring to the procedure, mechanism and formalities used for the election of the members of the Supreme Court of Judges (art. 182 const.), which also

apply to the election of the Agro-Environmental Court (art. 188 const.) and the Council of Ministers of Justice (art. 194 const.).

Art. 197.III const. introduces a statutory reservation for the composition, organization and functions of the Plurinational Constitutional Court, all regulated by the LTC: as for its composition, art. 13 LTC establishes the number of titled judges at seven, who operate in three sections (each made up of two judges) or in a plenary session, as well as in a rotating admissions committee (made up of three judges).

The requisites for the appointment of constitutional judges (in addition to the general requisites to become a public servant) consist of a minimum age requirement (thirty-five years) and specialized or credited experience of at least eight years in the disciplines of constitutional law, administrative law or Human Rights law (art. 199.I const.), in addition to the professional title of attorney (art. 17.I.8 LTC).

Art. 201 const. refers to the same system of prohibitions and incompatibilities applied to public servants, as established in articles 236 and 238 const.: the function of constitutional judge is therefore prohibited in case of simultaneous performance of more than one full-time remunerated public job, in case of conflict of interest (both direct and indirect), and in case of the assignment of public positions to relatives up to the fourth degree of consanguinity and second of affinity.

Art. 238 const. lists the following causes of ineligibility: the office of constitutional judge is excluded for those that were or are directors of enterprises or corporations that have contracts or agreements with the state; those who have been directors of foreign international enterprises that have contracts or agreements with the state; those who hold elected positions; the members of the Armed Forces and the Bolivian Police in active service; the ministers of any religious cult. Art. 18.II LTC adds four further causes of ineligibility: being a member of a political organization at the time of candidacy; being part of the administrative or management body of a commercial company whose bankruptcy has been declared fraudulent; sponsoring people who are responsible of crimes against the unity of the state or who have sold natural resources and national heritage; finally, those who have participated in dictatorial governments are excluded from the office of constitutional judge.

As mentioned earlier, the electoral procedure for the judges of the Plurinational Constitutional Court reproduces the procedure for the election of the magistrates of the Supreme Court of Justice (art. 182 const.). Anyone who meets the requirements may submit his or her candidacy to the Plurinational Legislative Assembly (art. 19.I LTC), which approves

(by a two-thirds majority of its members) a shortlist of twenty-eight candidates to be sent to the Plurinational Electoral Organ, in order to organize the electoral process.

Gender equality and the inclusion of indigenous peoples is promoted by specific provisions designed to pursue the plurinational paradigm, enshrined in art. 1 of the constitution: at least two of the seven constitutional judges must identify themselves as members of the so-called native indigenous rural peoples (art. 13.2 LTC), and half of the twenty-eight candidates must be women (art. 19.III LTC). For purposes of determining merit, experience as a native authority under its system of justice shall be taken into account (art. 199.I const. and art. 17.II LTC): this reflects the plurinational composition of the Court established by art. 197.I Const. ("The Plurinational Constitutional Court shall consist of Judges elected on the basis of plurinationality, with representation from the ordinary system and the rural native indigenous system") and the proposal powers attributed to native indigenous rural peoples (art. 199.II const. and art. 19.II LTC).

Candidates may not campaign (not even indirectly: see art. 20.II LTC), otherwise being sanctioned with ineligibility: the Electoral Organ is the sole responsible for the dissemination of the candidates' curricula and merits (art. 182.III LTC). The seven candidates with the highest number of votes are elected as full judges of the Plurinational Constitutional Court, and the following seven candidates are appointed as substitute judges (art. 20.V LTC). According to art. 20.VII LTC, citizen participation in the pre-selection process is guaranteed in order to exercise social control of public governance (articles 241-242 const.), but there is no appeal procedure as in Ecuador.

According to art. 14 LTC, constitutional judges hold office for six years (one year longer than other elective offices), and there is a ban on consecutive terms.

It has been argued that constitutional judges are subject to recall, an issue closely related to the position of the Plurinational Constitutional Court in the Judicial Organ. The first commentators of the new constitution have, in fact, defined the Plurinational Constitutional Court as the impartial and independent head of the Judicial Organ, specialised in constitutional review. According to this interpretation, the revocation of constitutional judges could only be imposed by the Council of Ministers of Justice, pursuant to art.195.I const.

On the contrary, art. 11 LTC reaffirmed the opposed principle of independence of the Plurinational Constitutional Court ("independent from the other constitutional bodies and subject exclusively to the constitution and this

law"). If the Constitutional Court is independent from the Judicial Organ, the principle of general revocability of elective offices (enshrined in art. 240 const.) would apply: "the mandate of anyone who occupies an elected position, with the exception of those of the Judicial Organ, may be revoked". This possibility is purely theoretical: no constitutional judge has ever been revoked.

3. The review of constitutionality and conventionality

The assumption that legitimates constitutional justice bodies is that they facilitate, or should facilitate, the consolidation of democracy through the constitutional review as well as other, sometimes very numerous, competences aiming to regulate the relations between institutions and between institutions and society. This is due to the fact that Constitutional Courts are perceived as more suitable than other bodies to settle controversies that affect fundamental rights, the democratic stability of the state, the separation of powers and the distribution of competences among territorial entities.

As for the review of the constitutionality of laws and other types of acts, this control can be either prior or subsequent to the adoption of the act. Moreover, it may be abstract and/or concrete, i.e. exercised over rules irrespective of conflicts in which those rules have to be applied or over rules which should be applied in cases before the Court.

In addition, the work of constitutional judges may also cover the review of conventionality. In this regard, it is interesting to mention the application of this review in Ecuador and Bolivia. Generally speaking, the constitutions of the states that are parties to the Inter-American Convention on Human Rights may give treaties an infra-constitutional status, or a super-primary status by including them within the sphere of constitutionality, or they may require that the constitutional provisions on human rights be interpreted in accordance with this Convention or that the Inter-American Convention prevails if its provisions are more favourable than those of the constitution.

For more than a decade, there has been a significant expansive force of the conventional system, leading to a discussion of its hierarchical superiority rather than its complementarity with national constitutional justice systems. This is due to a number of developments in case law, starting with the legal doctrine of the diffuse review of conventionality. This theory, developed within the Inter-American Court of Human Rights (IACHR), holds that, in applying domestic law to a concrete case, national courts must verify whether it complies with the Treaty and, if not, must not apply it *inter*

partes. This assumption is accompanied by the duty, incumbent on all judges, of interpretation in conformity with the Convention. In addition, the IACHR affirms that the states parties are bound by its case law even when they are not directly involved in any adjudication. Very few states, including Argentina, Uruguay and Venezuela, oppose this centralising tendency of the IACHR (Bagni, Nicolini 2021).

In light of these considerations, the analysis dwells on the status of human rights treaties in Ecuador and Bolivia and on the relationship established between the review of constitutionality and that of conventionality, in order to assess the degree of adherence to the conventional system.

3.1. Ecuador

The *Corte Constitucional* is entrusted with several functions aiming to safeguard fundamental rights and the balance of powers between constitutional organs. Its duties are set out in art. 436 const. and in other precepts in various parts of the fundamental charter.

Art. 436 const. states that the Constitutional Court is the highest authority for the interpretation of the constitution and international treaties on human rights ratified by Ecuador. It is also responsible for: ruling on unconstitutional public actions against general regulatory acts issued by authorities of the state; declaring *ex officio* the unconstitutionality of norms related to those under scrutiny; ruling on the unconstitutionality of administrative acts with general effect issued by any public authority; ruling on claims of noncompliance that are filed to guarantee enforcement of norms or administrative acts with general effect, as well as for enforcement of rulings or reports by international human rights organisations that are not enforceable by ordinary courts; ruling on cases relating to protection, compliance, *habeas corpus*, *habeas data*, access to public information and other constitutional procedures, as well as on cases selected by the Court for review; solving conflicts of competence or attribution among the branches of government or bodies established by the constitution; monitoring *ex officio* the constitutionality of the declarations of state of emergency; recognising and sanctioning failure to comply with constitutional decisions; declaring unconstitutionality by omission incurred by state institutions or public authorities.

Pursuant to art. 134 const., the Ecuadorian Constitutional Court also holds the power of initiative to submit draft laws on matters pertaining its functions. This list is not exhaustive, as the powers are extendible by legislation.

The decisions adopted by the Constitutional Court are final and irrevocable, pursuant to art. 440 const.

The constitutional review is exercised in three ways: as a preventive control; as an abstract *a posteriori* control; and as a concrete *a posteriori* control (Grijalva Jiménez 2012, p. 190 ff.).

The preventive control of the constitutionality of acts or the opinion on certain issues or decisions is exercised on: international treaties, prior to ratification by the National Assembly (art. 438 const.); calls to national consultations or consultations at level of decentralized autonomous governments (articles 104 and 438 const.); objections of unconstitutionality submitted by the Head of State during the drafting of laws (articles 139 and 438 const.); the identification of the applicable procedure for constitutional revision (art. 443 const.); the admissibility of the impeachment of the President of the Republic by the National Assembly (art. 129, par. 2, const.); the removal of the Head of State from office by the National Assembly for having taken up duties that do not come under his/her competence (art. 130, par. 1, const.); the presidential decree dissolving the National Assembly for having taken up duties that do not pertain to it (art. 148 const.); removal of the President of the Republic from office (art. 145, par. 3, const.); draft statutes of regional autonomies (art. 245, par. 3, const.); draft reforms of regional statutes (art. 246, par. 2, const.); decrees of economic urgency adopted by the President of the Republic (art. 148, par. 4, const.).

The abstract type of *a posteriori* constitutional review implies the possibility guaranteed to anyone, individually or collectively, to file a constitutional claim, pursuant to art. 439 Const. The declaration of unconstitutionality of the challenged act determines its repeal from the national legal system. In accordance with the provision of par. 3 of art. 436 Const., the Court can declare *ex officio* the unconstitutionality of the norms related to those declared unconstitutional. The Court may also review the omissions of public authorities who may disregard the constitution by failing to implement the constitutional provisions (art. 436, par. 10, const.). Art. 166 const. also states that the Court expresses its opinion on the constitutionality of the declaration of a state of emergency made by the President of the Republic.

The concrete type of *a posteriori* constitutional review arises from a process in which the judge in charge of deciding on that case submits to the Constitutional Court doubts on the constitutionality of a provision to be applied (art. 428 const.).

With regards to the review of conventionality, from the point of view of the status assigned to human rights treaties, Ecuador has adopted a

two-fold approach. Firstly, it considers the international sources of law as interposed norms in the control of constitutionality, given that treaties and international conventions have an infra-constitutional status under art. 425 const. Secondly, in art. 417 const. is affirmed that "In the case of treaties and other international instruments on human rights, principles in favour of human beings, non-restriction of rights, direct applicability and the open clause as set forth in the Constitution shall be applied". From constitutional case law emerges the principle that international human rights instruments (even where they are not ratified treaties), as well as the advisory opinions of the IACHR and all its decisions (thus not only those relating to Ecuador) fall within the block of constitutionality (Barona Martínez, Tescaroli Espinosa 2018). It has also already been pointed out that the Ecuadorian Constitutional Court is the highest instance of interpretation of human rights treaties, pursuant to art. 436, par. 1, const. It follows that it would be inconceivable to delegate this competence to the IACHR.

It should also be added that ordinary judges do not have the power to set aside norms that are in contrast with human rights treaties. Art. 428 const. states in a very clear manner that "When a judge, by virtue of his/her office or at the request of a party, considers that a legal norm is contrary to the Constitution or to international human rights instruments that provide for rights that are more favourable than those enshrined in the Constitution, it shall suspend the case and refer it for consultation to the Constitutional Court". For this reason, the review of conventionality in Ecuador is defined at "low intensity", since it is reserved to the Constitutional Court (Villacís Londoño 2018, p. 89). However, it must be pointed out that ordinary judges are obliged to interpret national norms in the light of human rights treaties, in compliance with the *pro homine* principle, and they may also apply the standards set out in conventional case law if there are any shortcomings in national legislation (Aguirre Castro 2016, p. 307 f.).

Finally, the analysis of the *Resoluciones de Supervisión de Cumplimento de Sentencia* issued by the IACHR shows that Ecuador largely meets the requirements imposed by international judges. This does not mean, however, that the state is open to the entry of the conventional legal system in terms of its hierarchical superiority over the domestic judicial system, as outlined above.

3.2. Bolivia

Although it bears a degree of resemblance to the centralised model of constitutional review, the system outlined by the Bolivian constitution presents elements of considerable originality (Attard Bellido 2012, p. 156). The Plurinational Constitutional Court stands at the apex of constitutional justice, but all jurisdictional, administrative and indigenous authorities must interpret the law in light of the constitution, by virtue of the principle of direct application. The so-called *modelo plural de control de constitucionalidad* (art. 178.I const.) represents an innovative paradigm in the comparative horizon, inspired by the principles of pluralism, interculturality and decolonisation.

Twelve attributions of the Plurinational Constitutional Court are listed in art. 202 const.: in 2012, the enactment of the *Código Procesal Constitucional* (CPC, *Ley N° 254*) has completed the regulatory framework of constitutional procedure, pursuant to the statutory reservation in art. 204 const. In a similar way to the Ecuadorian Court, the attributions of the Bolivian Court can be traced back to three models of constitutional review: preventive control; abstract control; concrete control (incidental). In addition, the Constitutional Court decides over jurisdictional disputes and conflicts of attribution.

According to art. 202.1 const., the Plurinational Constitutional Court is the court of jurisdiction in "the matters of pure law", concerning the unconstitutionality of laws and of any other nonjudicial resolution: actions for unconstitutionality (articles 132-133 const.) of abstract nature (articles 74-78 CPC) may only be raised by the President of the State, senators, deputies and the highest executive authorities of autonomous governments. Concrete actions (articles 79-84 CPC) may be raised during judicial or administrative proceedings. Art. 133 const. establishes that the decision that declares a norm unconstitutional makes it inapplicable *erga omnes*. This effect is reinforced by the principle of *stare decisis* (articles 15, 78 and 84 CPC): the judgments of the Plurinational Constitutional Court represent universally binding precedents for lower courts, public authorities and every citizen.

As previously observed, the Plurinational Constitutional Court deals with conflicts of jurisdiction and powers among state bodies (art. 202.2 CPC): in accordance with art. 12 const., the state organizes and structures its public power through Legislative, Executive, Judicial and Electoral bodies. Consequently, the Constitutional Court has the power to resolve the conflicts arising between these bodies (articles 86-91 CPC) and the conflicts

of jurisdiction between the Plurinational government and the autonomous and decentralized territorial entities (art. 202.3 const.; articles 92-99 CPC).

The appeals of fees, taxes, rates, licenses, rights or contributions in violation of the constitution (art. 202.4 const.) ensures that any regulation that creates, modifies or suppresses a tax complies with constitutional principles (articles 133-138 CPC). The appeals of resolutions of the Legislative Organ, filed when they "affect one or more rights, regardless of who" (art. 202.5 const.; articles 139-142 CPC), can be included within the category of subsequent abstract reviews. The difference between this latter remedy and the *acción de amparo constitucional* (art. 129 const.; articles 51-57 CPC) lies in the jurisdiction: the *amparo* (as well as the *acciones de protección de privacidad, popular* and *de cumplimiento*) may be brought before any competent court and can be appealed to the Plurinational Constitutional Court (art. 202.6 const.); the *recurso* ex art. 202.5 const. on the other hand, introduces a direct form of protection against the violation of fundamental rights. Laws passed by the Plurinational Legislative Assembly can, in fact, be reviewed (as a last resort and without the possibility of appeal) only by a constitutional body of equal rank (such as the Plurinational Constitutional Court).

Preventive forms of constitutional review (articles 202.6, 202.7, 202.8, 202.9 and 202.10 const.) include auxiliary and advisory functions: for example, legal consultations on the constitutionality of proposed bills (art. 202.7 const.; articles 111-115 CPC) have a binding effect, forcing the legislative body to adapt or eliminate the provisions of draft laws that have been declared unconstitutional.

Of particular interest is the role of the Plurinational Constitutional Court in overseeing the framework of legal pluralism known as "*pluralismo jurídico igualitario*", given the uniqueness of such regime in comparative constitutional experiences: art. 179.II of the Bolivian Constitution., in fact, establishes the equal status of ordinary, agro-environmental and rural native indigenous jurisdictions. The potential for conflict of this framework has been emphasized by the lack of a proper inter-jurisdictional coordination protocol (Buono 2018, p. 1079 f.). The powers attributed to the Plurinational Constitutional Court to resolve jurisdictional conflicts are thus of fundamental importance (art. 202.11 const.).

While exercising the auxiliary function to rural native indigenous authorities on the application of their juridical norms in a concrete case (art. 202.8 const.), the decisions of the Plurinational Constitutional Court must result in an intercultural interpretation that takes into account the

internal logic of rural native indigenous justice systems. The *Secretaría Técnica y Descolonización*, formed exclusively by anthropologists, sociologists and legal scholars with an expertise in indigenous languages and legal practices, assists the judges in carrying out this delicate hermeneutic activity. This function is complemented by the constitutional review of the draft statutes proposed by rural native indigenous autonomies (AIOC), enforced by art. 53.II of *Ley N° 031 Marco de Autonomías y Descentralización "Andrés Ibáñez"* of 2010 (LMAD) and regulated by articles 116-120 CPC (Baldin 2019, p. 135 f.).

The Plurinational Constitutional Court rules on direct appeals of nullity (Art. 202.12 const.), declaring null and void the acts of persons who usurp functions, which are not their responsibility, as well as the acts of those who exercise jurisdiction or power that does not emanate from the law (art. 122 const.; articles 143-148 CPC). These rulings represent extraordinary and informal jurisdictional actions, exceptionally attributed to the Constitutional Court, as the final authority enforcing the principle of constitutional supremacy (art. 410 const.).

With regards to the control of conventionality, it should first be noted that Bolivian constitutional law expressly includes international Treaties and Conventions in the matter of human rights and the norms of Communitarian Law ratified by the country (art. 410.2 const.). The aforementioned constitutional norm reflects previous case law, which incorporated the doctrine of the *bloc de constitutionnalité* and granted the American Convention on Human Rights full constitutional status. The case law of the Plurinational Constitutional Court has further broadened the constitutionality block, including the IACHR's own rulings in axiomatic, extensive and systematic interpretation of the Bolivian constitution.

Articles 13.IV and 256 of the constitution state, respectively, that "rights and duties consecrated in this Constitution shall be interpreted in accordance with the International Human Rights Treaties ratified by Bolivia" and that "The international treaties and instruments in matters of human rights that have been signed and/or ratified, or those that have been joined by the state, which declare rights more favorable than those contained in the Constitution, shall have preferential application over those in this Constitution". From the interpretation of these two norms, the Constitutional Court has reconstructed a "diffuse" model of conventionality review: each administrative and jurisdictional authority is obliged, in fact, to analyse whether the provisions to be applied comply with the international treaties on human rights, as well as with the principles elaborated

by IACHR case law. In other words, they must guarantee the effective enjoyment of the rights enforced by the constitutionality block, according to the *pro homine* and *pro actione* principles.

Lastly, it should be noted that, from an analysis of the *Resoluciones de Supervisión de Cumplimento de Sentencia* by the IACHR, Bolivia has complied with the rulings of the international Courts.

4. Ecuador and Bolivia in a comparative framework

The preceding analysis offers some brief comparative reflections on Ecuador and Bolivia, in terms of the composition of the constitutional justice bodies and of the review of constitutionality and conventionality.

With regard to the composition of the two Constitutional Courts, it can be noted that these Andean countries have chosen rather unique ways of selecting the components of their Courts. Not only have they adopted two different solutions – public competition by qualifications and examinations in Ecuador; direct election in Bolivia – but both differ from the more standardized solutions found in the international panorama. Moreover, the elective nature of the Bolivian Court has given rise to allegations of "politicization", as in the occasion of the ruling that led to the fourth candidacy of Evo Morales, considered *contra constitutionem*. Such accusations have not, at least up to now, affected the Ecuadorian Court.

The common elements, on the other hand, include the prohibition of consecutive terms for constitutional judges and the adoption of the paradigm of reflective judiciary, although the provisions envisaged to guarantee gender balance raise some doubts over their effective application. Notwithstanding these doubts, in practice this principle has been respected so far.

Concerning indigenous representation within the Courts, Ecuador and Bolivia present a different approach. Indeed, only in Bolivia this representation is guaranteed by the Constitution. However, the criterion of personal self-identification (for candidates of indigenous origin) has been criticised.

Equally critical is the *dedicación exclusiva* to the function of constitutional judge, prescribed by Bolivian law. It prevents judges from holding the position of university professors, which is instead allowed in Ecuador.

With reference to the functions performed, both states are emblematic of the tendency to entrust constitutional justice bodies with the most diverse competences and to extend constitutional control to a maximum extent. The main difference between Ecuador and Bolivia seems to lie not so much in the

procedural tools available to the two Courts (substantially overlapping, despite their heterogeneity), but rather in the authentically "plural" ambition of the constitutional justice model to be pursued. Although imperfect in its implementation, Bolivia's "egalitarian" legal pluralism has given substance to the plurinational paradigm, raising the Court's functions far beyond the mere administration of justice. In fact, the Plurinational Constitutional Court plays a fundamental role in linking the legal systems recognized by the Bolivian state and is the main device for promoting indigenous autonomy and jurisdiction. The recognition of indigenous justice made by Ecuador through art. 171 const. is certainly less significant and, as far as is reported here, does not give any active role to the Ecuadorian Constitutional Court.

Finally, it must be noted that the there is a more widespread control of conventionality in Bolivian constitutional case law than in Ecuador, which places this function in the hands of the Constitutional Court. This discretionary profile probably derives from the different hierarchical status and acceptance of the conventional system adopted by these two states, although both adopt the provisions most favourable to individual rights, regardless of their national or international origin.

In conclusion, the research pointed out the wealth of instruments available to the two Courts and the forms of access to constitutional justice. Ecuador, and to an even greater extent Bolivia, can therefore be easily included in the most advanced version of the pantocratic model.

REFERENCES

Aguirre Castro P.A.
El control de convencionalidad y sus desafíos en Ecuador, in *Revista IIDH*, 64, 2016.

Attard Bellido M.E.
La Justiciabilidad de los DESC en el Constitucionalismo de la Justicia e Igualdad asumido por el Modelo Constitucional del Estado Plurinacional de Bolivia, in *Lex social: revista de los derechos sociales*, 1, 2012.

Bagni S., Nicolini M.
Giustizia costituzionale comparata, Padova, 2021.

Baldin S.
La tradizione giuridica contro-egemonica in Ecuador e Bolivia, in *Boletín Mexicano de Derecho Comparado*, 143, 2015.

Baldin S.
Classifications and fuzzy logic: a comparative law perspective, in S. Bagni, G.A. Figueroa Mejía, G. Pavani (coords), *La ciencia del derecho constitucional comparado. Estudios en Homenaje a Lucio Pegoraro*, I, Ciudad de México, 2017.

Baldin S.
Il buen vivir *nel costituzionalismo andino. Profili comparativi*, Torino, 2019.

Barona Martínez N., Tescaroli Espinosa A.
La gradación de instrumentos internacionales, el pacta sunt servanda *y* pro homine *como herramientas para la inclusión de normas de soft law en el bloque de constitucionalidad ecuatoriano*, in *USFQ Law Review*, 1, 2018.

Buono E.
Pluralismo jurídico igualitario: il mandato costituzionale "inascoltato" nel modello boliviano di cooperazione inter-giurisdizionale, in *DPCE Online*, 4, 2018.

Cappelletti C.
Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato, Milano, 1972.

Ferrer Mac-Gregor E.
Control de convencionalidad (sede interna), in E. Ferrer Mac-Gregor, F. Martínez Ramírez, G.A. Figueroa Mejía (coords), *Diccionario de Derecho Procesal Constitucional y Convencional*, tomo I, México, 2020.

Grijalva Jiménez A.
Constitucionalismo en Ecuador, Quito, 2012.

Kelsen H.
La giustizia costituzionale, a cura di C. Geraci, Milano, 1981.

Mastromarino A.
Separazione linguistica o comunitarismo giurisdizionale? Ragionando di reflective judiciary in Belgio, in C.A. d'Alessandro, C. Marchese (a cura di), Ius dicere *in a globalized world. A comparative overview*, Roma, 2018.

Pegoraro L.
Sistemi di giustizia costituzionale, Torino, 2019.

Rivera Santiváñez J.A.
El control de constitucionalidad en Bolivia, in *Anuario Iberoamericano de Justicia Constitucional*, 3, 1999.

de Sousa Santos B.
Casi di diritto emancipatorio, in *Democrazia e Diritto*, 2, 2004.

Villacís Londoño H.
El control de convencionalidad y su aplicación en Ecuador, in *Revista San Gregorio*, 26, 2018.