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**INSTITUTIONAL DESIGNS FOR JUDICIAL INDEPENDENCE IN
COMPARATIVE LAW**

**THE BOLIVIAN PLURINATIONAL CONSTITUTIONAL COURT AND THE
COLOMBIAN CONSTITUTIONAL COURT**

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INSTITUTIONAL DESIGNS FOR JUDICIAL INDEPENDENCE IN COMPARATIVE LAW

The Bolivian Plurinational Constitutional Court and the Colombian Constitutional Court¹

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1. Introduction

Judicial independence is one of the basic principles of the modern state. The function of administering justice, perhaps the most delicate of the modern state because it involves deciding on freedom, property and sometimes even the lives of individuals, has been given in many places to independent persons who, individually or collectively, intend to solve conflicts in a peaceful way.

Judicial independence also applies to constitutional judges. Constitutional judges should be independent of the other public bodies they control. Must be independent of political interests represented by political parties. They must be independent even of those majorities whose political discretion cannot be imposed arbitrarily but only as far as it is in conformity with the Constitution.

My main purpose in this paper is to compare some institutional designs in the context of constitutional justice to see the different ways in which the principle of judicial independence is materialized in different legal systems. I have chosen to compare the cases of the Bolivian Plurinational Constitutional Court and the Colombian Constitutional Court.

The Colombian Constitutional Court has become a model of prestige in Latin America.² It is well known for the way it has faced political powers to defend the supremacy of the Constitution and fundamental rights.³ It will be very interesting to study some aspects of its institutional design to find either positive or negative impacts on the principle of judicial independence.

The Bolivian case is also very suggestive. The Bolivian Constitution of 2009 is one of the newest in the world. The design of its Plurinational Constitutional Court is very new and very different from the configuration of the Constitutional Court of Colombia and other Latin American countries. Its judges are elected by popular vote, something very unusual from a comparative perspective. But the Bolivian Constitution stipulates that the Court is independent. How can it be? We will study two very different ways of carrying the principle of judicial independence into institutional design.

¹ I am very grateful to Professor Roberto Toniatti for his suggestions to improve my paper. I consider it a preliminary paper on which I hope to continue working in the future.

² See Bonilla, D., 2013. *Constitutionalism of the Global South*. Cambridge: Cambridge University Press.

³ For a very complete explanation of the main achievements of the Colombian Constitutional Court at an early stage, see Cepeda-Espinosa, M. J., 2004. *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, Wash. U. Glob. Stud. L. Rev., 529, <http://digitalcommons.law.wustl.edu/globalstudies/vol3/iss4/2>.

2. Judicial independence

Judicial independence is a well-studied concept in constitutional law, legal theory and political philosophy.⁴ Some have understood by this principle some kind of autonomy that judges should have to resolve their cases in an objective manner, basing their decisions on the law and not on external pressures. These pressures may come from different sources:

“First, political autonomy from other branches is essential, especially in the quest for horizontal accountability. This is crucial to ensure that judges’ decisions are not influenced by short-term political considerations in matters concerning the constitutionality of legislation and acts of authority and in checking the legality of acts of public power. Second, insularity from the conflicting parties is necessary to achieve neutrality in the judges’ decisions. Bribery is an outright form of influence on judges, but more subtle forms, such as cultural or social bonds, can also impair the detachment of the judge from the parties. Third, a more subtle form of insularity is independence from particular ideologies. This is much harder to identify or check. Finally, it is also desirable that judges be isolated from populist or plebiscitary pressures, especially in a time of mass media and increasing public scrutiny of judicial practices”.⁵

Some authors, especially in the Anglo context, use the word “independence” to refer to both the principles of independence and impartiality.⁶ Both principles are closely related. But impartiality has more to do with the judge's objectivity in his relations with the parties. While impartiality means no preferences for either side, the principle of independence points to the judge's autonomy from institutional pressures that do not necessarily come from the subjects involved in the case.⁷

Here I will only focus on the principle of judicial independence. But this principle, aside from impartiality, still has multiple dimensions. There are many institutional designs that may enhance or damage it. Besides institutional designs, there are political and sociological phenomena that shape the form, more or less independently, in which judges decide.

In this paper I can't study these sociological phenomena nor all the institutional designs that have to do with the principle of independence. Instead I can only concentrate on comparing some of the most important features.

There is some consensus among the authors around the fact that the place of a Court in the state structure, the system of appointment of its judges, the requirements and

⁴ See Clark, T.S., 2010. *The limits of judicial independence*. Cambridge: Cambridge University Press; Domingo, P., 1999. *Judicial Independence and Judicial Reform in Latin America*. In A. Schedler, L. Diamond & M. F. Plattner (eds.). *Power and Accountability in New Democracies*, Lynne Rienner Publishers; Rosenberg, G.N., 1992. *Judicial Independence and the Reality of Political Power*. The Review of Politics, 54(03).

⁵ Domingo, P., 1999. *Judicial Independence and Judicial Reform in Latin America*. In A. Schedler, L. Diamond & M. F. Plattner (eds.). *Power and Accountability in New Democracies*, Lynne Rienner Publishers, p. 153-154.

⁶ See Breyer, S., 1996. *La independencia judicial en los Estados Unidos*. Saint Louis University Journal, 40, p. 1157.

⁷ To see this difference, see Aguiló, J., 1997. *Independencia e imparcialidad de los jueces y argumentación jurídica*, Isonomía, 6, p. 71-83.

prohibitions to enter and remain in office, and the term of office, are all crucial in this matter.⁸ These are institutional designs that contribute in varying degrees to ensure the principle of judicial independence. We will compare them taking into account the respective institutional designs of the Bolivian Plurinational Constitutional Court and the Colombian Constitutional Court.

3. The Bolivian Plurinational Constitutional Court

Bolivia is a South American country known for its ethnic diversity. It is the Latin American country with the highest percentage of indigenous population.⁹ There are 36 indigenous nations, as well as the mestizo population, integrated in the same country.

Until relatively recently, Bolivia had a constitutional system that failed to recognize this cultural diversity. Bolivia, in all its republican history, has had 20 Constitutions (1825, 1826, 1831, 1834, 1839, 1843, 1851, 1861, 1868, 1871, 1878, 1880, 1938, 1945, 1947, 1961, 1967, 1994, 2004 and 2009). Only 20 years ago, the 1994 Constitution recognized the multiethnic and multicultural character of the Bolivian republic. For decades, in the nineteenth century, the indigenous population was enslaved. And in the twentieth century their constitutional rights were recognized too late.¹⁰

A very strong movement in favor of the recognition of pluralism in all its forms prompted the Constitution of 2009. Representatives of all the indigenous nations participated in its elaboration and the final text was endorsed by popular vote. The result was a quite progressive Constitution whose transversal idea is the recognition of the plurinationality of the Bolivian state.

Article 1 of the Constitution declares that

“Bolivia is constituted as a Unitary Social State of Plurinational Communitarian Law that is free, independent, sovereign, democratic, intercultural, decentralized and with autonomies. Bolivia is founded on plurality and on political, economic, juridical, cultural and linguistic pluralism in the integration process of the country”.¹¹

The establishment of the Plurinational Constitutional Court is one of the most important facts that emerged from this constitutional process. As its name implies, this Court’s main feature is plurinationality. From this perspective, it has special characteristics that distinguish it from other Constitutional Courts in Latin America and in the world. But its most peculiar feature has to do with the system of appointment of its members, which must be elected by popular vote. And not only the members of this Court are chosen in this way. Popular elections in Bolivia are also provided for other high Courts – such as the Supreme Court of Justice and the Agro-environmental Court – as well as for the Council of the Judiciary (this is the body in charge of disciplining judges and

⁸ See Rios, J., 2010. *Instituciones para la justicia constitucional en América Latina*. In G. Helmke and J. Rios (comp.). *Tribunales constitucionales en América Latina*. México: Suprema Corte de Justicia de la Nación.

⁹ See <http://www.ilo.org/indigenous/Activitiesbyregion/LatinAmerica/Bolivia/lang--es/index.htm>.

¹⁰ See Rivera, J. A., 2008. *La evolución político-institucional en Bolivia entre 1975 a 2005*, Estudios Constitucionales, 6(2), p. 173-210.

¹¹ I worked with the following translation of the Bolivian Constitution: <http://es.scribd.com/doc/73770823/Bolivia-2009-Official-Translation>. It has been also very useful to consult the following webpage, which has a fully commented version of the Bolivian Constitution: <http://www.econstitucional.com>.

lawyers). Bolivia had a Constitutional Court since before this Constitution (since 1994), but its members were appointed by the Legislature. Generally, members of Constitutional Courts in the world are selected by another public authority or by several, but not by citizens in elections.

What does it mean the Constitutional Court having this *plurinational* connotation? From a legal standpoint, pluralism implies that within the same constitutional and legal order, usually one of a state, different systems of law coexist.¹² In Bolivia these systems are the ordinary and the indigenous. Each resolves the issues within its own competence but the Constitutional Court is the final interpreter of the Constitution.

But neither the plurinational character of the Constitutional Court nor the election of its members indicates that Bolivia, in its constitutional and legal system, has rejected the principle of judicial independence. This principle has been maintained and is explicit in various provisions of the Constitution. Article 178 of the Constitution provides:

“The power to impart justice emanates from the Bolivian people and is based on the principles of independence, impartiality, juridical security, publicity, probity, promptness, being free of charge, legal pluralism, being inter-cultural, equity, service to society, citizen participation, social harmony and respect for rights”.

Article 3 of Act No. 27 of 2010 (the Constitutional Court Act) lists 13 principles that should guide constitutional justice in Bolivia. Among these 13 principles is the principle of judicial independence. The Act explicitly says (Art. 11) that the Constitutional Court is separated from the other public authorities of the state and that it is required to resolve cases based on the Constitution and the Act itself.

How is judicial independence reflected in the Court’s institutional design?

First, within the structure of the Bolivian state, the Court is separated from the other public bodies precisely because it controls and it should be independent of them all. The Constitutional Court of Bolivia is not part of the judicial branch or any other, but is an independent body, which even has its own budgetary autonomy (Article 10 of Act 27 of 2010).¹³

The question that remains is how a body elected by the people can be independent from the will of the people?

According to Article 197 of the Constitution,

“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”.

Article 198 stipulates

“The Judges of the Plurinational Constitutional Court shall be elected by universal suffrage, pursuant to the procedure, mechanism and formalities used for the election of the members of the Supreme Court of Judges” (sic).

This regulation can be found in Article 182 of the Constitution and, more in detail, in Articles 16 to 20 of the Constitutional Court Act. The constitutional provision (Article 182) states that the Plurinational Legislative Assembly (the Bolivian parliament) is the body that must make the selection of candidates. The Assembly must select the

¹² For an understanding of the different dimensions of this principle in the Bolivian constitutional order, see <http://econstitucional.com/menuanalisis.aspx?ID=1>.

¹³ About this component of the independence of the Constitutional Court, see the dissenting opinion to the Decision 0548/2010-R of July 12/2010.

candidates with the votes of two-thirds of its members. Once approved the selection, the Assembly should send the list of the selected candidates to the Electoral Body. This body has the task of organizing the elections of the magistrates.

The Constitutional Court Act specifies this process (Art. 16, 19, 20). The first stage is a public announcement made by the Plurinational Legislative Assembly six months before the end of the term of the judges. Article 19 specifies that any person who meets the constitutional and legal requirements may apply before the Assembly. Social organizations (indigenous and from civil society in general) may also nominate candidates. The list submitted by the Assembly to the Electoral Body should be composed of 28 candidates, half of whom must be women.

The Constitution (Article 182) prohibits political campaigning for the election of judges. Neither the candidates nor anyone on their behalf can do political campaign to promote their choice. Candidates cannot belong to political parties. Political parties can't make political campaign on behalf of candidates. The penalty for those who violate these rules is disqualification. Article 182 of the Constitution only authorizes the Electoral Body to report on "the merits of the candidates".

Magistrates must be elected by simple majority. Elections should be organized, according to the Constitutional Court's Act, 30 days before the end of the current judges' period. About the election, Article 20 of the Act states that it will be made in a single national constituency. Those who obtain the seven highest votes will be elected permanent judges. The following seven will be appointed substitute judges.

As mentioned above, in the Bolivian constitutional order two legal systems coexist, the ordinary system and the indigenous system (Article 1 and 179 of the Constitution). This explains the provision of Article 197 of the Constitution, according to which in the Constitutional Court there must be a representation of both legal systems.

Initially, it was proposed in the Constitutional Assembly that the representation of both systems would be equal.¹⁴ However, the Assembly finally decided that both systems should be represented, but did not say in what proportion. The Constitutional Court Act answered this question. Under Article 13, the Court must have at least two judges from the indigenous system.

The requirements to be elected magistrate are written in the Constitution (Art. 199) and in the Constitutional Court Act. Article 17 of the Act brings a long list of requirements with many more than in other legal systems. There are 10 requirements: 1) to be a Bolivian citizen, 2) to have a minimum age of 35 years, 3) for men, having complied with military service, 4) not to have been convicted of a crime, 5) not to be in a situation of prohibition, ineligibility or incompatibility, 6) to be registered in the electoral roll, 7) to speak two official languages of the country, 8) to be a lawyer, 9) to have done graduate studies in public law or have an experience of 8 years in this area, and 10) not to have been sanctioned with dismissal by the Council of the Judiciary. This Article also states that in the process of selection of candidates having been an original authority in a system of justice will be considered as a positive aspect. That is, having been a judge in the ordinary system or an indigenous authority in the indigenous judicial system. This is not a requirement but a favorable aspect in the selection process.

¹⁴ About this issue in the Constitutional Assembly, see <http://www.econstitucional.com/menuanalisis.aspx?ID=197>.

Apart from these requirements, the Bolivian legal system provides a complex regime of prohibitions to enter and remain in office. These are, as we shall see, ineligibilities, incompatibilities and prohibitions.

The ineligibilities are established in Article 238 of the Constitution and in Article 18 of the Constitutional Court Act. Under the Constitution, shall not be elected:

- “1. Those who have been or are directors of enterprises or corporations that have contracts or agreements with the State and who have not resigned at least three months before the day of the election.
2. Those who have been directors of foreign international enterprises that have contracts or agreements with the State and have not resigned at least three years prior to the date of the election.
3. Those who hold elected positions, or who hold positions by designation or appointment, who have not resigned from them at least three months prior to the date of the election, with the exception of the President or Vice President.
4. The members of the Armed Forces and the Bolivian Police in active service who have not resigned at least three months prior to the date of the election.
5. The ministers of any religious cult who have not resigned at least three months prior to the date of the election”.

Article 18 of Act 27 of 2010 also states that cannot be elected as judges of the Constitutional Court individuals who are members of a political party at the time of nomination. Or those who have been part of the management of a company that went bankrupt for fraudulent reasons. Or those who have favored persons found guilty of crimes against the unity of the state or persons who participated in dictatorships.

Incompatibilities are not to enter the office of judge (as ineligibilities are), but to stay in it. These are prohibited conducts for anyone who is a member of the Constitutional Court. According to Article 239 of the Constitution, the following are general incompatibilities:

- “1. The acquisition or leasing of public assets on behalf of the public servant or third persons.
2. The signing of administrative contracts with or obtaining any other kind of personal benefit from the State.
3. Professional service as employees, representatives, advisors, managers of entities, companies or enterprises that have a contractual relationship with the State”.

Act 27 of 2010 (Art. 21) establishes three other special incompatibilities. The Act says that a judge of the Constitutional Court cannot, while in office, act as a lawyer, work in the public or private sector (even without salary) or as university professor.

Article 236 of the Bolivian Constitution describes the general regime of prohibitions for public employees. The judges of the Constitutional Court are public employees; therefore this provision is applicable to them. Consequently, they can only hold one public office. They cannot act when they have a conflict of interest. The third general prohibition is contracting with the public administration. And the fourth is to appoint close relatives.

The elected judges should have a six years term, with no possibility of re-election (Art. 183 and 200 of the Constitution). This term is one year longer than that of other public

officials in Bolivia, including the President, Vice President, congressmen, senators, governors and mayors.

It is important to clarify that the prohibition on re-election in Bolivia refers only to re-election for the next term (Art. 14 of the Constitutional Court Act). A person may be re-elected judge of the Constitutional Court if a term has passed since he left office.

Another important feature of the Bolivian constitutional system is that the judges of the Constitutional Court can be recalled. The judges may lose their office if so is decided by the citizens at the polls. This design is unique in the world for the case of a Constitutional Court.

Article 240 of the Constitution regulates the mechanism:

“The mandate of anyone who occupies an elected position, with the exception of those of the Judicial Organ, may be revoked, in accordance with the law”.

Remember the Constitutional Court is not part of the judiciary. So citizens in fact may remove judges from office. The recall has to be promoted by a citizens’ initiative, in particular by the 15% of the entitled voters in the respective constituency. Since the constituency to elect judges is national, then the recall should be promoted by the 15% of all entitled voters in Bolivia.

4. The Colombian Constitutional Court

Colombia's Constitutional Court was established in 1991 with the adoption of a new Constitution. The 1991 Constitution introduced important changes in the Colombian political and legal system. First, in the model of state, which went from being an “*Estado de Derecho*” to be an “*Estado Social de Derecho*”.¹⁵ Also in the model of democracy: Colombia changed from a representative democracy to participatory democracy. The charter of rights was also expanded to include social and collective rights. The new Constitution established mechanisms such as the “*acción de tutela*” and new bodies such as the Constitutional Court to secure constitutional rights.¹⁶ Since then, the Constitutional Court has gained prestige in Latin America for its progressive decisions on issues such as the separation of powers,¹⁷ the guarantee of social rights such as health,¹⁸ the rights of indigenous and Afro-Colombian communities, unions between persons of the same sex, or mechanisms for constitutional reform. The Court has often proved its independence from the Government, the Legislative and even the majority of citizens. How is the constitutional design that has enabled all this?

The principle of judicial independence in Colombia was established in Article 228 of the Constitution. This provision applies to all judges in Colombia. It is a common rule that inspires the judicial system across jurisdictions. According to this Article,

¹⁵ This social clause meant a revolution in the distribution of power between the branches. The Constitutional Court rapidly became the main guarantor of new fundamental and social rights. The Decision in which the Constitutional Court defined the scope of the new clause was T-406/1992.

¹⁶ For an overall view of the major changes brought by the 1991 Constitution, see Quinche, M., 2010. *Derecho constitucional colombiano de la Carta de 1991 y sus reformas*. Bogotá: Doctrina y Ley.

¹⁷ For an assesment of the separation of powers in Colombia, see Kugler, M. & Rosenthal, H., 2005. *Checks and Balances: An Assesment of the Institutional Separation of Political Powers in Colombia*. In A. Alesina (ed.). *Institutional reforms. The case of Colombia*. Cambridge: MIT Press.

¹⁸ See Yamin, A. & Parra-Vera, O., 2009. *How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court*, Plos Medicine, 6(2).

“The administration of justice is a public function. Its decisions are independent. Its proceedings will be public and permanent with the exceptions established by law, and substantive law will prevail in them. Legal limits will be diligently observed and failure to apply them will be sanctioned. The functioning of the judiciary will be decentralized and autonomous”.¹⁹

Judges in Colombia, according to Article 230 of the Constitution, “are only subjected to the *“imperio de la ley”*”. Article 5 of Act 270 of 1996 (*“Ley Estatutaria de la Administración de Justicia”*), which is the statute that regulates all the judicial system, reaffirms the principle of judicial independence. Explicitly it says that no superior authority, administrative or judicial, may impose to a Colombian judge a decision of any kind.

The Colombian Constitutional Court, unlike the Bolivian Plurinational Constitutional Court, is part of the judicial branch and is the supreme authority of the constitutional jurisdiction. It does not enjoy of budgetary autonomy. The entire administration of the budget of the judicial branch is the task of another body, the Supreme Council of the Judiciary.

The Constitution does not say how many judges should integrate the Constitutional Court. It's the Act 270 of 1996, in its article 43, which specifies that there must be nine magistrates. The Senate should elect them from panels of three candidates submitted by the President of the Republic, the Supreme Court and the State Council. The President, the Supreme Court and the State Council have the right to submit three shortlists each. This means that three persons nominated by the President, three by the Supreme Court and three by the Council of State shall fill the nine chairs of the Court. So the three branches of the state are involved in the composition of the Constitutional Court.

The Constitution (art. 239) and Act 270 of 1996 (art. 44) only establish one criterion for the elaboration of these lists and subsequent election of judges: the Court should be composed of specialists in different areas of law. This rule has led the current Constitutional Court to be composed of judges specialized in administrative law (3), constitutional law (2) civil law (2) labor law (1) and criminal law (1).

The requirements to be a magistrate of the Constitutional Court are the same as for a magistrate of the Supreme Court. There are four written requirements in Article 232 of the Constitution:

- “1. To be a Colombian citizen by birth and a citizen in good standing.
2. To be a lawyer.
3. Not to have been condemned by a court sentence to imprisonment, except for political crimes or crimes of strict liability.
4. To have filled, for 10 years, positions in the judicial branch or the Public Ministry, or to have exercised honorably for a like period the profession of lawyer or university professor in the legal disciplines in officially recognized institutions”.

This provision also states that, in order to be appointed as a magistrate, it is not necessary to be part of the judiciary.

Article 240 orders that a person cannot be chosen as a judge of the Constitutional Court if the year before the election he or she had served as a minister or as a judge of the

¹⁹ I worked with the following translation of Colombian Constitution: http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.

Supreme Court or the State Council. Article 245 of the Constitution, which prohibits the Government to appoint to the executive branch those who have been judges of the Court, complements this guarantee of independence. This prohibition also applies for one year from the time the person finished his/her term on the Court.

The Colombian legal order considers three figures that limit access and the exercise of public office. These are the inabilities, incompatibilities, and prohibitions. Inabilities to be a judge are laid down in Article 150 of Act 270 of 1996. They are not specially designed to ensure judicial independence, but rather to safeguard the moral and professional qualifications of the person who aspires to be a judge. In contrast, incompatibilities are designed to guarantee the principle of independence. According to Article 151 of Act 270 of 1996, these are: 1) holding other public office, especially by election or political representation, 2) being a member of the armed forces, 3) being a merchant or a member of governing bodies of companies, 4) acting as a lawyer or as a professional in any other area, 5) being a minister in a religious cult. Finally, the Constitution describes several general prohibitions applicable to all public authorities, while the Act 270 of 1996 incorporated other prohibitions applicable only to judicial officers. The Constitution prohibits to public authorities to appoint close relatives as employees (art. 126). The second constitutional prohibition is to have a contract with public entities (art. 127). Thirdly, judicial employees are forbidden from participating in partisan activities or political controversies. They may only exercise their right to vote (art. 127). The Constitution also prohibits public authorities to simultaneously occupy more than one public employment (art. 128). To ensure the independence from other countries, the Constitution excludes accepting fees or compensation from foreign governments or international organizations without authorization from the Colombian Government (art. 129). As noted above, Article 154 of Act 270 of 1996 added another 18 particular prohibitions (applicable only to judicial officers). Some of them are directly related to the principle of independence. For example, judges cannot deny or delay without justification a procedure to be performed. They cannot give their opinion, even in private, about the issues they will decide. They can't compromise their vote. Nor can congratulate or censure other public authorities for their public decisions.

The term of judges of the Colombian Constitutional Court is 8 years, with no possibility of re-election (art. 233 of the Constitution).

5. Comparison: Institutional Designs for Judicial Independence in Colombia and Bolivia

The institutional designs that we have studied prove that there are different ways of understanding and implementing the principle of judicial independence. However, some of them may bring more risks than the others. There are in Bolivia and in Colombia some fragile designs that might affect judicial independence and that could be improved to realize this principle in a better way. But both countries have also original arrangements that may fit well with their political and social reality and not necessarily damage their judges' independence.

First thing to say is that judicial independence is a fundamental principle in both constitutional orders. Both countries widely accept the basic idea that judges, including the members of their Constitutional Courts, must decide without being exposed to external pressures. This includes independence from the other branches of government, independence from political parties and, moreover, independence from democratic

majorities. Bolivia and Colombia have incorporated this high standard in their Constitutions and laws as a starting point for the design of all their judicial structures. Differences arise when it comes to the institutional domain. The location of these Constitutional Courts in the state structure is quite different. The Constitutional Court of Colombia is part of the judiciary; the Constitutional Court of Bolivia is not part of this or of any other branch. This distinction does not necessarily play against the Colombian case. From the fact that the Constitutional Court belongs to the judiciary we should not conclude that it is not independent from the other high Courts and judges. It is. Organically it is part of the branch, but it is also, within this branch, the head of a jurisdiction, the constitutional jurisdiction. No public authority, nor from the judiciary or from any other branch, ranks above the Constitutional Court in this matter. This is so true that the interpretation of the Constitution given by the Constitutional Court prevails over any other interpretation coming from another high Court. So independence in Colombia is absolute, as in the Bolivian case.

The budgetary autonomy is also an important issue. The Bolivian Court has this autonomy, while the Colombian Court does not. A recent judicial reform in Colombia tried to change this situation. The proposal was that the administration of the judiciary involved the Presidents of the three high Courts, including the Constitutional Court, for the three Courts to have a say in the allocation of public resources. This reform failed. Therefore, the resources of the whole judicial branch continue to be managed by another body, the Supreme Council of the Judiciary.

By far the most radical difference between the two systems has to do with the election of judges. As we saw, in Colombia members of the Court are elected by the Senate, while in Bolivia they are elected by the people. This is a huge difference. What is the impact of these designs on the realization of the principle of judicial independence?

It is true that the popular election of judges is not an entirely unknown practice in a comparative perspective. In other countries such as the U.S. and Switzerland some of them, perhaps many of them like in the U.S., are also elected by popular vote. In Latin America it is also common that some judges are elected in this way. Usually these are peace judges, whose main function is to settle in Equity small claims that can be resolved through conciliation (for example those affecting neighborly relations).²⁰ This is the case of Colombia, Venezuela and Peru.²¹

The particularity in the Bolivian case is that all their high Courts are elected by popular vote. This condition itself is indeed very strange from a comparative perspective. In Latin America, Bolivia is the only country with this design. Other countries have tried something similar and failed. The most recent case is that of Argentina. Its President, Cristina Fernandez de Kirchner, promoted a reform of the judicial system involving the popular election of some judges. The Supreme Court declared this reform unconstitutional precisely because it affected the principles of separation of powers and judicial independence.²²

Let us first see further relevant differences between the two systems. As noted, public bodies that propose candidates are also quite different. In Colombia the submission of shortlists is a duty of the President, the Supreme Court and the State Council, each one of them having the power to submit three candidates to fill the chair. In contrast, in

²⁰ About peace judges, see Colombian Act 497 of 1999.

²¹ See <http://www.econstitucional.com/menuanalisis.aspx?ID=182>.

²² Supreme Court of Justice, Rizo Case, June 18 of 2013.

Bolivia the authority that nominates candidates is the Legislature, which sends the Electoral Authority a list with 28 candidates. In Bolivia the selection process is open in the sense that anyone can propose his or her name to the Legislative Assembly to be selected. In Colombia the process of selection of candidates, whether the President or the Supreme Court or the State Council makes it, is more closed. These authorities are completely free to integrate their lists: in other words they are not legally required to receive applications.

But there are also deep similarities between the two legal orders. Both involve the Legislature; and in both, Legislatures are very powerful. In Colombia the Senate is the authority responsible for the election of judges. In Bolivia, the Legislature nominates candidates. By limiting the number of candidates to 28, its power is huge. We must remember that, of these 28, 14 shall be elected as permanent or alternate judges. In other words, the election of judges of the Plurinational Constitutional Court of Bolivia is made by the people, but very limited by the previous election that has already been done by the Legislature.

This brings us to another important similarity. In Colombia and Bolivia, the Constitutional Court is independent of the bodies that nominate and elect their members. The judges of the Colombian Constitutional Court are not linked in any manner to the Senate or to the body that has made the nomination (the President, the Supreme Court or the State Council). They are completely independent from these bodies. The Constitutional Court has stated that the principle of independence excludes any pressure, insinuation, recommendation, requirement, decision or advice from other public bodies. In the Court's own words, "el hecho de que alguna otra rama del poder público participe en la designación de algunos funcionarios judiciales -como es el caso del Senado y del presidente de la República en la elección de los magistrados de la Corte Constitucional- o que colabore en el buen funcionamiento de la administración de justicia -mediante el concurso económico, logístico o material- no significa, ni puede significar, que se le otorgue facultad para someter la voluntad y la libre autonomía del juez para adoptar sus decisiones" (C-037/96).

But is the Bolivian Constitutional Court independent from the citizens who elect their members?

The Bolivian Constitution, in Article 196, assigns three major functions to the Plurinational Constitutional Court: 1) to ensure the supremacy of the Constitution, 2) to make the "*control de constitucionalidad*" (judicial review), and 3) to enforce constitutional rights. As we can see, these three functions imply a subordination of the Court **only** to the Constitution. The Court is independent of the will of the people and other state bodies. It is not within its duties to represent the will of citizens, even though citizens elect members of the Court. As we said before, the popular election of the magistrates is not a result of a traditional political process. There is no participation of political parties or electoral programs with promises to citizens. In fact, the Constitution prohibits candidates belonging to political organizations.²³ There are no campaigns in the media. Instead, the process is led by a state authority as solely responsible for reporting on the merits of the candidates. It is not a spontaneous, but a state-directed political process.

The Bolivian Constitution (art. 197) states that:

²³ For political organization in Bolivia we must understand: political parties, associations of citizens or indigenous organizations.

“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”.

What might this “representation” mean? Does it mean that judges somehow represent the will of these systems or its members? The judges of the Constitutional Court must follow the orders of the judicial authorities of these systems? Judges coming from the indigenous system, for example, must obey the orders of the indigenous judicial authorities? The answer is no. Representation here is a descriptive or reflective representation;²⁴ it is not a representation of any will. Both systems are *reflected* in the composition of the Court (in this way we can say they are *represented*), but they do not bind the judges in any way.

The institutional design that, in fact, may harm the Court’s independence is the recall election. We said before that judges of the Bolivian Constitutional Court might be removed from office by popular vote. While in Colombia there is also this figure, the people can remove only governors and mayors. Never a judge may lose his or her position because people want it so. This must be for judges staying away from popular pressures, which are often very intense. Such an institutional design like Bolivia’s can be extremely dangerous because it exposes constitutional justice to occasional, changing moods in public opinion.

The Bolivian legal system is more demanding than the Colombian one in limiting access to the Constitutional Court through different requirements. This is a paradox of the Bolivian system: it allows the popular election of judges, but it rather restricts access to these public offices. In other systems (such as the Colombian) it is the opposite: popular election is not allowed, but access is quite easier.

In both countries, in order to be a judge of the Constitutional Court, a person must be a citizen and a lawyer. But in Bolivia candidates should also have postgraduate studies in public law. Additionally, they must meet military requirements and know two official languages. Some of these requirements are even more demanding than those that must be met by the members of the Supreme Court. To be elected in this Court, a person needs to be 30 years old and need not prove graduate studies. The age requirement for the case of the Constitutional Court is the highest of the entire Constitution. A person must be 35 years old to be elected as a member. The high levels of demand in both countries can be explained by the necessity to avoid corruption and clientelism, which are very common in this kind of procedures in Latin America. Without any requirements, anyone can be nominated and elected as a member of the Constitutional Court only because he or she is a well-connected person within the circles of power. High requirements, at least to some extent, may limit discretion in the selection process and thus contribute to the adequacy and independence of those selected.

The whole system of prohibitions is very similar in both countries. Bolivian and Colombian magistrates are prohibited from holding another position in the public and private sectors. In both countries, they are also prohibited from contracting with the state. This ensures that judges occupy all their time on the bench, instead of treating interests of other public bodies to further them. Independence from political parties is guaranteed by the provision that, both in Bolivia and Colombia, prohibits judges to be part of these organizations. Nor can they be military or ministers of religion.

²⁴ About descriptive representation, see Pitkin, H. (1972). *The concept of representation*. University of California Press.

Nevertheless, these systems have their peculiarities that have more to do with ideological and political than legal issues. For example, in Bolivia anyone who has directed foreign companies that have contracted with the state may not be elected as a judge for a period of three years. Neither can be elected as judges those who have favored dictatorships.

One problem is that both legal systems do not prevent the phenomenon commonly known in Colombia as “*puerta giratoria*”. This means that a person can easily move from the Government or other state body to be elected judge of the Constitutional Court. Conversely, a person who has just completed his or her term as a judge may move on to work for the Government. In Bolivia the latter is possible. As to the former, it is only required that the person has resigned from the Executive three months before his or her election as a judge. In Colombia this term is for one year. This is normal given that judges come from lists submitted by the President and by two other high Courts. The rule seeks to prevent people passing from one organ to another affecting judicial independence. And also, for a year, the Government cannot appoint former judges in public office. But after a year, a person who has been a member of the Constitutional Court can aspire to other public office (e.g. can be elected to Congress or as President). In Colombia this has generated much criticism. Some people think that there are those who take advantage of the judiciary to make politics with their judicial decisions. As the work-experience requirement (10 years) is not very demanding, there are young magistrates who complete their term and then run for Congress or even the Presidency. For some, this trend affects judicial independence. So much so, that in the last attempt to reform the justice system, which failed, one of the proposals was to reform the Constitution so that judges had more experience, and so they were disqualified from holding public elective office after being judges.

The term of office for Colombian judges is 8 years, while in Bolivia is 6. In Colombia reelection of magistrates is not permitted. In Bolivia immediate reelection is prohibited, but reelection is allowed with an intermediate term.

In both cases, these terms are longer than those of other public authorities. In Bolivia nearly all are 5-year terms. And in Colombia almost all are 4-year. Having longer judicial rather than executive terms in office is favorable from the point of view of judicial independence. Nevertheless, in recent years, several Latin American countries have amended their Constitutions to allow presidential reelection. In Colombia, for example, the Constitution was amended in 2006 to permit reelection. In 2010 it was proposed to reform it again to allow a third term, but the Constitutional Court, as an example of independence from the Government who wanted to be reelected, prevented it (C-141/2010). In Bolivia Evo Morales has been President for 8 years, and probably he will be elected for another term in 2015-2020. Many have criticized the independence of Constitutional Courts in countries where the President of the Republic may be in office as long as the judges or up to twice, as in the case of Bolivia. The accumulation of power in the President is a very common phenomenon in Latin America that threatens the independence of the Courts. Recently in Colombia a constitutional amendment was intended to extend to 12 years the period of the judges. This reform, as we have said, failed.

6. Conclusion

The principle of judicial independence has reached in the last two centuries an almost universal dimension. Many nations, including Bolivia and Colombia, have proclaimed it in their Constitutions and have included it in their laws. It is very difficult, if not impossible, to describe the activity of a Court without making reference to the principle of judicial independence.

The more recent Constitutional Courts have been designed with this principle in mind. But what the Bolivian and the Colombian case have proved is that judicial independence supports multiple designs. Their Constitutional Courts are very different in how their members are elected. But there are also many similarities between the two legal orders. The importance of the role of the Legislative is one of them. In both countries, the Legislative intervenes in the appointment of judges, but just by the opposite way: in Colombia the Senate elects the magistrates, while in Bolivia the Legislative Assembly has the function of limiting to 28 the universe of potential candidates. Also in both countries there are several requirements and prohibitions to enter and remain in office. As we saw, imposing such restrictions is very common in Latin America to limit the discretion of nominators and prevent cases of clientelism and corruption.

It is very important to see how these institutional designs work together, rather than evaluate them separately. The appointment system, for example, is related to the requirements, or to the term of office. It is true that in Bolivia judges are elected by the people, while in Colombia they are not. But it is also true that in Colombia the eligibility requirements for the position are more flexible than in Bolivia. Moreover, every design is complex. Popular election of judges in Bolivia is not so simple. “Elections” here are really different from the elections to which we are familiar. Election is not, *per se*, opposed to independence. All depends on the type of election and other related institutional designs. The Bolivian legal order has attempted to counteract the possible adverse effects of the election with other institutional designs to ensure judicial independence. Preselection of candidates by the Legislative Assembly or the prohibition of political campaign are some examples.

But not all specific designs are suitable to ensure the independence of judges. Both in Bolivia and in Colombia there are some fragile designs that could facilitate inappropriate pressures, and that, precisely, have been avoided in other legal systems in order to preserve judicial independence. In Bolivia, for example, judges of the Constitutional Court may be removed from office by decision of the majority of their voters. In Colombia this is not possible because it is to be avoided that judges are subject to these majorities. But in Colombia, the Court has no budgetary autonomy. In Bolivia, the Constitutional Court does have it, and this has strengthened the Court’s against other branches and Government agencies.

There are also shared concerns. The presidential reelection and the “*puerta giratoria*” are some examples studied in this paper. Presidential reelection, with increasing concentration of power in the President of the Republic, is a serious threat to the independence of judges and, in general, to the system of checks and balances. Substantial changes in the design of the Executive branch should stimulate reflection about how to adjust the other branches. In Colombia, these discussions have already begun; and in the country some reforms have already been tried, but they have failed. Probably in the next few years, both Bolivia and Colombia will have to review aspects of their Courts’ institutional design to ensure judicial independence.

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