

Environmental Courts and Tribunals in Brazil and Bolivia: a comparative analysis between institutional systems of environmental protection

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Abstract: This paper aims to analyse the different layers and dynamics of the specialized institutions that act on behalf of constitutional environmental protection in Brazil and Bolivia. In the first part, the evolution of environmental protection and the growing concern of the international community with the topic will be addressed, as well as the notion of Environmental Courts and Tribunals (ECT's). The second and third parts present the institutional system and the legal framework for environmental protection in Brazil, and finally in Bolivia, highlighting the main instruments that are in place for the constitutional objectives of a balanced and preserved environment, highlighting the differences in the structuring of this protection in both nations.

Keywords: Constitutionalism. Comparative law. Environmental protection. Specialized institutions.

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1. Introduction

Environmental issues, as consequences of human activities, have been the subject of increasing concern from constitutional law and legal institutions. In recent decades, several countries in the world have implemented Environmental Courts and Tribunals (ECT's) to prevent and resolve environmental litigations, such as the Bolivian *Agroambiental* Tribunal. On the other hand, countries like Brazil have structured the environmental protection system through the specialization of institutions, such as the *Ministério Público*.

Analysing how legal systems deal with environmental issues around the world, countries present different models of protection, with the Judiciary having an increased role through its direct judicial enforcement. In this context, this research aims to carry out a comparative analysis

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between Brazil and Bolivia on their institutional systems of environmental protection, with special regards to the notion of ECT's.

To answer the problem exposed, the method of deductive approach and bibliographic research procedure are adopted. In addition, the theory of legal formants for legal comparison is also used, considering that comparative law methodologies can provide important contributions to the current debates on environmental constitutionalism by highlighting some aspects that are substantially neglected by other approaches, such as transnational environmental law or global environmental constitutionalism, notably the use of taxonomies, the historical perspective, the relationship between environmental "visions" and legal traditions.

Rodolfo Sacco's theory of legal formants is a method that focuses on the variety of elements, explicit or implicit, that shape or constitute a given legal system, such as culture and ideology that form the conviction of the interpreter, for, in Sacco's words, "Whatever influences interpretation is a source of law". Based on this, this research focuses on the constitutional, legislative, and jurisprudential formants of the Brazilian and Bolivian systems, with the objective of verifying the specificities of the institutional systems of environmental protection in each country, which involves not only the institutions listed in the constitutional and legal text, but also the concrete performance and structuring of the courts.

2. Environmental Constitutionalism and Environmental Courts and Tribunals (ECTS)

In global terms, the growth of environmental concern occurred in the last decades of the last century and can be observed especially in international movements and agreements. Environmental values entered the debate in June 1972, when the UN held the First World Conference on Man and the Environment in Stockholm.

Many factors have since influenced the growth of environmental concerns in the international order. According to D. Amirante, it is possible to point out the emergence of the issue as consequence of tragic environmental disasters such as Chernobyl in 1986, the 1992 Rio de Janeiro conference, the creation of Agenda 21 and the wave of political-institutional renewal that followed the fall of the Berlin Wall (which led to the creation of several independent states in Eastern Europe)².

According to D. Amirante, the constitutionalization of environmental law occurred in a disorderly and tumultuous manner because it involved four problems: (1) the difficulty for the law to keep up with the emergency nature of environmental problems that have historically been faced almost always after damaging or even catastrophic events connected to the fact that (2) each problem seems to generate the elaboration of a norm in search of a solution, so that legislative inflation is generated to the point of existing norms that, in many cases, contradict each other. Furthermore, (3) the innumerable regulations are usually essentially technical in nature, i.e., it is

² D. Amirante. *L'ambiente «preso sul serio»*. Il percorso accidentato del costituzionalismo ambientale. *Diritto pubblico comparato ed europeo*, n° Speciale (2019): 1-32.

erroneously believed that environmental issues can be objectively solved, since they are totally dependent on scientific determinations. Legally, this rationality leads to a heterodetermination of environmental norms³. Finally, (4) the denial of the "social dimension" of environmental law, when in fact, "the environment, in fact, cannot be considered as an external element to socio-political dynamics, but instead is closely interconnected to the basic choices of our societies and thus assumes a primordial constitutional significance"⁴.

From then on, a global expansion of environmental constitutionalism has been observed, which according to L. Kotzé would be a mode of environmental governance that seeks to improve environmental protection by raising it to the status of a constitutional norm and would represent the confluence of constitutional law, international law, human rights, and environmental law, since it would include transnational elements that go beyond national spheres, impacting the regional and international spheres and vice-versa⁵.

With the arrival of the new millennium, this environmental concern seems to have grown even more to the point of considerably infiltrating constitutions around the world. Constitutions around the world present various degrees of commitment towards environmental provisions and principles. In summary:

As a whole, 79% of the world's Constitutions at least mention environmental issues, with variable degrees of environmental commitment, but an ample majority (62%) is represented by original Environmental Constitutions (thus bearing in principle a strong commitment), while only 17% are Revised Constitutions. This confirms the present consolidation of both a quantitative and qualitative environmental constitutionalism. [...] From a geographical point of view, today Africa is the continent with a higher percentage of EC, with 75% of the States, followed by Asia with 64%, Europe with 60%, while both the Americas and Oceania consist of only 43% Environmental Constitutions (with the substantial difference that the Americas have 34% REC and only 23% SEC, while Oceania has 57% Silent Environmental Constitutions). The highest rate of Environmental Constitutions in Africa may be partially explained by the political conditions of the continent, where constitutional regimes change more rapidly than in the other parts of the world, indirectly favoring environmental updates⁶.

³ Which, according to Amirante, means that: "In the legal field, the process of regulatory heterodetermination in environmental matters raises serious doubts in relation to both the legislative and judicial functions. On the one hand, the legislature allows itself to be dispossessed of its function by technicians, turning out to be a mere executor of choices that, under the cloak of objectivity, instead conceal opposing interests, motivations, and pressures as in any other area of social becoming. On the other, the judge often finds himself having to reconstruct a posteriori, attempting to harmonize them, conflicting norms and thus artificially seeking an ordinal unity that does not exist in legislative reality. (D. Amirante, *op. cit.*, 2019, p. 08, translation by the author),"

⁴ D. Amirante, *op. cit.*, 2019, p. 08, translated by the author.

⁵ L. J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene*. 2016, p. 146.

⁶ See D. Amirante. Environmental Constitutionalism Through the Lens of Comparative Law. New Perspectives for the Anthropocene, p. 152. In: D. Amirante; S. Bagni.

Roderic O’Gorman points out that environmental constitutionalism was adopted globally in circumstances inserted both in critical and peaceful scenarios of change, noting varying degrees of international influence towards this paradigm shift. However, it is pointed out that the mere adoption of such provisions may not guarantee that it will be applied in a satisfactory manner, albeit representing a worthy goal towards the necessity of environmental constitutionalism⁷.

In this scenario, it is necessary to highlight the role of specialized institutions in the protection of the environment, as a possible way to improve environmental protection, even in nations that do not formally and constitutionally recognize a broad protection of the environment.

As Domenico Amirante states, there’s at least 3 existing models that attempt to define the competences towards this institutionalized environmental protection with judicial enforcement⁸: “I) models that transfer environmental issues to general jurisdictions; II) models that structure an internal specialization of the Judiciary, relocating courts and judges dedicated to the theme; and III) models that officially create innovative ECT’s in their system”⁹. It is important to emphasize that the three models are not self-excluding and can coexist within the same legal system.

The direct judicial enforcement of environmental protection is especially relevant within Latin America, as the phenomenon defined as “judicialization of politics”¹⁰ is very predominant in multiple scopes. This would include a broader definition, not only of judicial review of policies and jurisprudential improvement, but an increased presence of judicial action and rulings on a country’s political and social life, in which the traditional notion that the courts would merely interpret and enforce the legislation no longer applies. Instead, these institutions are actively resolving a myriad of issues that are usually and traditionally dealt within the political sphere¹¹.

Environmental Constitutionalism in the Anthropocene. Values, Principles and Actions. London: Routledge, 2022.

⁷ See the study concerning the context of many of these constitutional changes in: R. O’Gorman. *Environmental Constitutionalism: A Comparative Study*, *Transnational Environmental Law* 6, n° 3 (novembro de 2017): 435–62, <https://doi.org/10.1017/S2047102517000231>

⁸ Although there are models that have effective environmental protection without direct judicial enforcement, the scope of this research will be limited to the analysis of the institutions that will act primarily through the courts.

⁹ D. Amirante. *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*. 29 *Pace Env’tl. L. Rev.* 441 (2012), p. 446.

¹⁰ Luís Roberto Barroso claims this “judicialization” occurs when politically relevant issues commonly have their final say in the Judiciary, which represents a transfer of power and a drastic change of the traditional practices of law within many civil law systems. See L. R. Barroso. *Judicialização, ativismo judicial e legitimidade democrática*. *Suffragium - Revista do Tribunal Regional Eleitoral do Ceará*, Fortaleza, v. 5, n. 8, p. 11-22, jan./dez. 2009.

¹¹ R. Sieder; L. Schjolden; A. Angell. *The Judicialization of Politics in Latin America*. New York: Palgrave Macmillan, 2005.

Inexorably, this includes the search for environmental protection policies and enforcement through this “judicialization”.

This phenomenon is also referred as “judicial activism”. According to Lael K. Weiss, this sort of activism is predominant in regions like Southeast Asia and Latin America, where this form of litigation is supported by a less traditional and more lax procedural approach and expanded access to justice. This strategy, however, presents some obvious limitations, as it is a model that is unlikely to “gain much traction in jurisdictions that do not share these unique features”¹².

However, the judicative approach does present some benefits and could be significant to the institutional consolidation and maturity in those regions. José Rubens Morato Leite and Maria Demaria Venâncio point out that courts and judges play an important role in this “greening” judicial enforcement process since: “they are responsible for properly applying legal norms and principles to particular cases, through a fair, unbiased and technically-based decision-making process”¹³, aiding the decision and policy-making towards the prevention, mitigation and reparation of environmental damages.

George and Catherine Pring point out that the existence of Environmental Courts and Tribunals (ECT’s) is not necessarily linked exclusively to direct judicial enforcement but may include administrative governmental agencies that will act to protect the environment, or specialized commissions that will have debates and draft public policies for this theme¹⁴.

In this sense, the authors provide 12 “building blocks” that are considered fundamental for the functioning of these institutions, subject to the specific particularities of each case. This expanded dynamic allows them to study and identify ECTs in nations that adopt common law and civil law legal systems¹⁵. It is interesting to note that the authors cite Brazil’s federal prosecutors as an example for the 12th building block, which concerns “enforcement tools and remedies”. As will be treated below, the Brazilian Public Prosecutor’s Office plays an active role in defending the protection of the environment, working with other public agencies and the collectivity.

Given the foundations and the definition of these Environmental Courts and Tribunals, the authors claim that:

ECTs include judicial courts, administrative tribunals, and other dispute-resolution forums. Three types of environmental courts were identified by the study: free-standing courts, green chambers within a general court, and designated green judges on a general court. Three types

¹² L. K. Weis. *Environmental Constitutionalism: Aspiration or Transformation?*. International Journal of Constitutional Law (2018), vol 16 no 3, 836-870, Aug. 2017. Available at SSRN: <https://ssrn.com/abstract=3439884>

¹³ J. R. Morato Leite; M. D. Venancio. *Environmental Protection in Brazil’s High Court: safeguarding the environment through a rule of law for nature*. Sequência, Florianópolis, n. 77, p. 29-50, Dec. 2017. <https://doi.org/10.5007/2177-7055.2017v38n77p29>.

¹⁴ G. Pring; C. Pring. *Greening justice, creating and improving environmental courts and tribunals*. The Access Initiative. 2009. Available at: <https://www.law.du.edu/documents/ect-study/greening-justice-book.pdf>

¹⁵ *Ibid.*, p. 38.

of environmental tribunals were identified: independent tribunals (completely separate from another agency or ministry), quasi-independent ones (under another agency's supervision but not the agency whose decisions they review), and "captive" tribunals (within the control of the agency whose decisions they review). Other ECT types can include special commissions, ADR programs, ombudsman, and human rights bodies.¹⁶

The creation of ECTs has grown exponentially over the years, and these institutions have become a viable way for governments around the world to improve their access to justice and provide adequate responses to the resolution of environmental conflicts¹⁷. These can happen in many ways, with the common ground apparently being the enforcement of international commitments signed before important international organizations such as the UN¹⁸.

3. Environmental protection in Brazil: the role of the public ministry and the highest courts

Next, an overview is presented of how the Brazilian legal system approaches environmental protection from the constitutional, legislative, and jurisprudential formants. To this end, initially the environmental provisions of the Federal Constitution of 1988 are presented, following the institutional structuring from the constitutionalizing process of environmental protection in Brazil, especially focusing on the attributions of the Federal Public Prosecutor's Office, the administrative branches of environmental inspection, and the role of direct judicial enforcement.

3.1 Brazilian environmental constitutionalism and the institutionalization of environmental protection

The Brazilian constitutional text of 1988 is a major landmark of Latin American environmental constitutionalism¹⁹ and continues, even today, to be very current in terms of environmental protection. It harnessed social mobilization and appeal of NGOs at the time of its drafting, with renewed democratic values that were shaping the Constitutional Assembly at the time²⁰. Besides its article 225, which specifically regulates the matter, the document also has other provisions that somehow address environmental issues, in addition to recognizing the supra-legal status of human rights

¹⁶ *Ibid*, p. 21

¹⁷ *Ibid*, p. 91.

¹⁸ In this sense, Michele Carducci argues that environmental litigation could be a viable way of enforcement. See: M. Carducci. *La ricerca dei caratteri differenziali della "giustizia climatica"*. DPCE Online, [S.l.], v. 43, n. 2, July 2020. ISSN 2037-6677. Available at: <http://www.dpceonline.it/index.php/dpceonline/article/view/965>

¹⁹ It is worth mentioning that when the text was published in 1988 the document became known as the "green constitution" due to the unprecedented attention given to environmental issues at the constitutional level in the country.

²⁰ R. O' Gorman, *op. cit.*, p. 458

treaties, which include international treaties aimed at environmental protection, as pointed out by Valério Mazzuoli²¹.

In item LXXIII, of Article 5, it is established as the right of any citizen, in case of damage to the environment, the possibility of filing a class action suit before the courts. In the chapter that regulates the general principles of economic activity, articles 170 and 174 list the protection of the environment as a guiding principle of the economic order. Article 186 establishes the protection of natural resources and the preservation of the environment as requirements for fulfilling the social function of property²².

It is, however, in its article 225 where the most praised and original provisions specifically address the protection of the "environment" in the Brazilian Constitution of 1988, stating that "everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to a healthy quality of life, and it is the duty of the government and the community to defend and preserve it for present and future generations".

Articles 23 and 24 list the division of environmental competencies among the entities of the Brazilian federation, which will be shared on three levels of the Union (Federal Government), Member States, the Federal District, and municipalities. As José Rubens Morato Leite and Maria Demaria Venancio point out, the 1988 Brazilian Constitution: "(1) grants an enforceable fundamental right to an ecologically balanced environment, (2) establishes environmental protection as a binding state right and duty, (3) provides a conceptual framework for public policies and (4) assumes strong and distinct judicial protection of the environment"²³.

The 1988 Constitution sought to expand local autonomies, decentralizing part of the federal government's power. The framework of competencies delimited constitutionally is defined by the doctrine as a cooperative federalism, unfolding in two main scopes of action: a) administrative competencies and b) legislative competencies²⁴.

According to Edis Milaré, the administrative competence to protect the environment, natural resources, fauna and flora, the nation's heritage (historical, cultural, artistic, tourist and landscape), as well as pollution control, is a common competence shared among all the federal entities. Regarding the competence to legislate on the matter, this will be concurrent and supplementary among the entities, where the Union will establish general rules²⁵. In summary, the Union will legislate on matters of national interest, the States on regional matters, and the municipalities on local interests²⁶. It also has an infra-constitutional framework that will provide

²¹ V. O. Mazzuoli. Trattati internazionali in materia di ambiente nell'ordinamento giuridico brasiliano. In: *Rivista Giuridica dell'Ambiente*, n° 1 (2017), p. 141-158.

²² Brasile. *Constituição da República Federativa do Brasil de 1988*. 5 out. 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm.

²³ J. R. Morato Leite; M. D. Venancio, *op. cit.*, p. 37

²⁴ E. F. Bim; T. Farias. *Competência ambiental legislativa e administrativa*. Revista de informação legislativa: RIL, v. 52, n. 208, p. 203-245, out./dez. 2015. Available at: https://www12.senado.leg.br/ril/edicoes/52/208/ril_v52_n208_p203

²⁵ *Ibidem*

²⁶ E. Milaré, *op. cit.*, p. 192-193.

for the sustainable management of natural resources and environmental protection of specific areas²⁷.

This section of the paper will focus on the institutional actions in favor of environmental protection, but it should be noted that the collectivity has equal importance in the enforcement of its constitutional objectives, being able to access mechanisms of popular and civic participation to aid the formation of environmental public policies²⁸.

The institutional functions of the Public Prosecutor's Office are presented in article 127, establishing it as an "essential institution for the jurisdictional function of the State, responsible for the defense of the legal order, the democratic system, and the social and individual inalienable interests"²⁹. The expanded competences, along with the autonomy and independence granted to the prosecutors has greatly expanded the scope of action of this institution. However, it must be acknowledged that this also played a significant role on the expansion of the phenomenon of "judicialization of politics"³⁰.

This is the case not only with environmental provisions, as the Brazilian Constitution is very ample on its social, economic, political, and environmental values and provisions, most of which the responsibility lies predominantly with political branches and not the Judiciary³¹. With the new constitutional *ethos*, the public prosecutors were granted enough powers to oversee the fulfillment and enforcement of all these rights, which done mainly through judicial litigation.

The Public Prosecutor's Office (MP) has its actions guided by the constitutional objectives of 1988, which established many environmental provisions within different scopes, further adding to the importance of the MP's protection of this category of constitutional duties. In this context, the institution must act in accordance with the duties that aim at justice and environmental protection for the present and future generations (intra and intergenerational justice), as well as human respect for other species and ecosystems (interspecies justice).³²

In works of great environmental impact, the Public Prosecutor's Office monitors compliance with environmental licensing, issues recommendations, acts in conjunction with environmental inspection

²⁷ I. W. Sarlet; T. Fensterseifer. *Direito Constitucional Ambiental: Constituição, Direitos Fundamentais e Proteção do Ambiente*. São Paulo: Revista dos Tribunais, 2012, 2 ed., p. 164.

²⁸ Cfr. E. Milaré. *Direito do Ambiente: a gestão ambiental em foco* (doutrina, jurisprudência, glossário). São Paulo: Revista dos Tribunais, 2009, 6 ed., p. 193-202.

²⁹ The Brazilian Public Prosecutor's Office does not belong to any of the Three Branches (Executive, Legislative, Judiciary), being a separate career autonomous and independent from the judiciary. It is divided between the State Public Prosecutor's Office and the Federal Public Prosecutor's Office, which, in turn, will include the Federal Public Prosecutor's Office.

³⁰ See R. B. Arantes, Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil, p. 248, in: R. Sieder; L. Schjolden; A. Angell. *The Judicialization of Politics in Latin America*. New York: Palgrave Macmillan, 2005.305 pp.

³¹ L. K. Weis, *op. cit.*, p. 858

³² I. W. Sarlet; T. Fensterseifer, *op. cit.*, p. 158-159.

agencies and institutions³³, acts to protect the interests of indigenous peoples and, when necessary, acts to repress environmental crimes. In summary, the role of the Public Prosecutor's Office acts as one of the "main bodies responsible for implementing the rule of environmental law, must ensure the constant respect and implementation of environmental principles in State and institutional practices".³⁴

It is important to emphasize that within the structure of the Public Prosecutor's Office (at state and federal levels) there are specialized offices for environmental issues, guaranteed to professionals who show interest and vocation to act exclusively in this area. Furthermore, at the federal level of the institution, there is an umbrella organization dedicated to reviewing and coordinating the actions of the agency, supervising the fulfillment of the institutional duties of its members, streamlining guidelines, and even reviewing the actions of concrete cases, which can be reviewed and reopened if the activity of the MP was considered insufficient or negligent³⁵.

It is worth noting that part of the Public Prosecutor's Office activities is carried out in the extrajudicial sphere, increasing the resolution of environmental controversies that would possibly end up in the courts.

In relation to Brazil's Judiciary, it has been internally structured to adjudicate environmental proceedings, providing some offices with exclusive dedications that vary according to regional circumstances. There are examples of state and federal judges who deal especially with environmental matters, but generally this competence is shared with other proceedings (civil, criminal and/or administrative).

3.2 Environmental protection and the Brazilian Judiciary

Despite being a country that adopts the civil law legal tradition, the Brazilian Judiciary is frequently called upon to act in the strengthening of environmental legislation, with the resolution of conflicts and the standardization of jurisprudence for concrete cases³⁶. The reach of decisions in this area has much greater weight in the courts at the top of the Judiciary, notably the Federal Supreme Court (STF) and the Superior Court of Justice (STJ).

The Supreme Federal Court is the institution at the top of the hierarchy of the Brazilian judicial system, with 11 judges (referred also as Justices). According to the 1988 Constitution, the Supreme Court acts as the "guardian of the Constitution", in addition to its extensive list of causes of original jurisdictional competences. Thus, it not only acts as a constitutional

³³ Among these are the Chico Mendes Institute for Biodiversity Conservation (ICMBio), the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) and the environmental police forces. Also noteworthy are the councils that deliberate on environmental public policies, such as the National Council on the Environment (CONAMA).

³⁴ Brasile. Conselho Nacional do Ministério Público. *A atuação do Ministério Público na defesa do meio ambiente: abordagem prática e resolutive*. Brasília: CNMP, 2021, p. 8.

³⁵ Brasile. Ministério Público Federal. Atuação temática. CCR4. Enunciados. Available at: <http://www.mpf.mp.br/atuacao-tematica/ccr4/enunciados-1/enunciados-tutela-coletiva>

³⁶ J. R. Morato Leite; M. D. Venancio, *op. cit.*, p. 34.

court in the control of constitutionality, but in practice is called upon to judge a myriad of appeals in civil, criminal, and administrative cases. By the logic of the present system, virtually any judicial controversy can eventually reach the Supreme Court³⁷.

The Supreme Court, despite being praised for its resolution of constitutional disputes, does not have a renowned recognition for its decisions strengthening environmental protection in the current design. This is not to say that the court does not have the tools to adequately address them when called upon to do so, but in practice, the response may be untimely and less than expected, especially in a scenario of drastic changes and dismantling of environmental protection policies³⁸. In the past the Supreme Court has been too cautious in the judicial resolution of constitutional competencies between federal entities, especially in questions of environmental impact using products in conflicting quantities and legislation³⁹.

Nevertheless, the Court recently handed down very important decisions regarding environmental protection arising from international agreements and treaties. In ADPF 708, the Court reaffirmed the principle of the prohibition of retrogression related to environmental protection, invoking the respect for international commitments signed by Brazil. The lawsuit was filed because of the federal government's failure to manage the "Climate Fund", which raises and uses resources to support and finance projects aimed at mitigating climate change. In the trial, most of the Court followed the vote of the reporting Justice to recognize the supra-legal status of treaties on environmental issues, equating them to the same status as human rights treaties, which are enforceable as constitutional norms⁴⁰.

As for the Superior Court of Justice, also defined as the "court of citizenship", it has 33 magistrates who work for the conformity and uniformity of infra-constitutional legislation and has a list of original competencies and decisions in appeals. As José Rubens Morato Leite and

³⁷ It is for no other reason that its members categorically state that no other supreme court in the world hears as many cases as the Brazilian one. See: Conjur. *Nenhuma suprema corte no mundo julga mais que o STF, diz Toffoli*. 20 Feb. 2020. Available at: <https://www.conjur.com.br/2020-fev-20/nenhuma-corte-mundo-julga-stf-toffoli>

³⁸ This is a prime example of how the "judicialization of politics" might come into play in the Brazilian scenario. A data survey shows that in a two-year period, the Bolsonaro government issued: 1,229 infralegal acts, 37 acts of rule revision, 58 acts of rule relaxation, 54 acts of deregulation, and many others, many linked to the environmental area. See: A. Frazão. *O meio ambiente "nas mãos" do STF*. Mais do que a última palavra, os julgamentos do próximo dia 30 podem ser a última oportunidade. Jota. Constituição, empresa e mercado. 23 Mar. 2022. Available at: https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/meio-ambiente-nas-maos-do-stf-23032022#_ftn5.

³⁹ See for instance the case studies from the period of 1988-2012 made by Caroline Medeiros Rocha, in: C. M. Rocha. *O STF e o meio ambiente: a tutela do meio ambiente em sede de controle concentrado de constitucionalidade*. 2013. Universidade de São Paulo, São Paulo, 2013. Available at: <http://www.teses.usp.br/teses/disponiveis/2/2134/tde-05122013-154012/pt-br.php>.

⁴⁰ Brasile. Supremo Tribunal Federal. *STF proíbe contingenciamento dos recursos do Fundo Clima*. 04 July 2022. Available at: <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=489997&ori=1>

Maria Demaria Venâncio point out, the court has been successful in judging leading cases that have strengthened the application of environmental legislation, basing the jurisdictional on ecological principles and sustainable development. This was the case of "*State Public Prosecutor's Office of Minas Gerais v Pedro Paulo Pereira*" where the principle used was called *in dubio pro natura*⁴¹.

It is important to note that some of these cases were taken to the Superior Court of Justice at the request of the Public Prosecutor's Office for the purpose of unifying jurisprudence. The case "*Brasilit v State Public Prosecutor's Office of Rio de Janeiro*" also stands out within this framework, where the STJ established the understanding that environmental laws must meet their social and ecological purposes, reinforcing the principle *in dubio pro natura*⁴².

The Brazilian Judiciary is called upon to resolve environmental conflicts and present interpretive guidelines for the resolution of other cases. Within the highest courts and the Judiciary's control bodies, there's a growing movement pleading towards the creation of specialized environmental courts and the institution of environmental policies with ecological guidelines⁴³. According to the definition of 3 models of ECT's defined by Domenico Amirante, Brazil has the following two models: I) models that transfer environmental issues to general jurisdictions; II) models that structure an internal specialization of the Judiciary, relocating courts and judges dedicated to the theme⁴⁴.

The specialization of courts in specific matters provides not only a faster jurisdictional response (resulting from the delimited and not generalized competence), but also a more consistent and adequate response with the necessary expertise in the area of action. From this dedicated and specialized performance there is a reduction of the work of the other common jurisdictions, helping the purposes of standardizing or, at least, making consistent the judicial decisions on the specialized matter.

Unfortunately many of the issues that could be resolved within the political and administrative spheres do end up in the Judiciary, contributing to the notion of "judicialization of politics". This specialization could eventually help the conformity of environmental provisions and norms on the long term. Other environmental agencies have significant part of their work done in the extrajudicial sphere, some of it that ends up on the courts represents what couldn't be resolved without judication.

The specialization of these institutions does add credence for their legitimacy and competence, as environmental issues pose inherent tensions on the state's actions and policy making. There's a constant pressure between the use and preservation of natural resources, generating wealth and social welfare, recognizing fundamental rights and social values⁴⁵.

⁴¹ J. R. Morato Leite; M. D. Venancio, *op. cit.*, p. 40.

⁴² J. R. Morato Leite; M. D. Venancio, *op. cit.*, p. 40.

⁴³ Brasile. Superior Tribunal de Justiça. *Resolução do CNJ institui política ambiental no Poder Judiciário*. Available at: <https://www.stj.jus.br/sites/portaltj/Paginas/Comunicacao/Noticias/26112021-Resolucao-do-CNJ-institui-politica-ambiental-no-Poder-Judiciario.aspx>

⁴⁴ D. Amirante, 2012, *op. cit.*, p. 446

⁴⁵ L. K. Weis, *op. cit.*, p. 856.

With the renewed global concern with environmental protection, the role of specialized courts and tribunals is gradually increasing. The feasibility of this implementation deserves special attention, without disregarding the internal and external nuances of a given legal culture. It should be noted that any specialization or creation of ECTs does not necessarily take the resolution of environmental controversies away from the highest courts, especially the constitutional courts. The control of constitutionality will still be fully exercised, as will be seen in the case of Bolivia, this type of action will complement the work of the ECT's.

4. Environmental protection in Bolivia

Next, some specificities of the Bolivian environmental protection system will be presented from the constitutional, legislative, and jurisprudential formants. To this end, the 2008 Constitution and its main innovations on the subject are analyzed, with a complementing overview of the infra-constitutional rules on environmental issues, as well as the structuring and functioning of the institutions that will act on themes that revolve around the Bolivian environmental constitutionalism, especially in regarding the competences of the Bolivian Agro-environmental Court.

4.1 The Environment in Constitutional and Legislative Formants in Bolivia

The Bolivian Constitution of 2009 is one of the major milestones of the "new Andean constitutionalism" or "new Latin American constitutionalism" and has numerous provisions that stand out in terms of environmental protection. The text adopts a decolonial character committed to plurinationality and the rights of indigenous, peasant, and original peoples⁴⁶.

This new Constitutional paradigm was enacted to address the historical and social issues that have been prevalent in Bolivian society and its peoples. Thus, it bases itself on intercultural and equalitarian relations that aim to redefine and reinterpret its model of state, through its "plurinational" lenses. In this sense, although it attempts to maintain its status as a Unitary government (unlike Brazil, which is a federation), it has introduced new dynamics on its institutional and constitutional actions, which has led to its definition of an "*sui generis* unitary state"⁴⁷.

Regarding environmental protection, the Bolivian Constitution defines it "as an essential function of the State the promotion and guarantee of the use of natural resources and the conservation of the environment" (art. 9.6) and lists among its long charter of duties, the rights of indigenous peoples, the right to live in a healthy environment and with adequate use of

⁴⁶ G. Leonel Jr. *El nuevo constitucionalismo latinoamericano un estudio sobre Bolivia*. Brasília, 2015.

⁴⁷ G.Pavani; L. E. Achury. Mutaciones del Estado Unitario en América Latina nuevos rasgos metodológicos para el estudio de los procesos de descentralización. In: G. Pavani [et al.] *Plurinacionalismo y centralismo*. Bogotá: Universidad Libre, Università di Bologna, 2017,

ecosystems (art. 30). In the same vein, section I of Chapter Five (Social and Economic Rights) is dedicated to the "Right to the Environment" recognizing that its people have a "right to a healthy, protected, and balanced environment" (art. 33) and that any individual may exercise this right through "appropriate legal actions" (art. 34), amplifying the access to justice.

The document also mentions as an educational objective the conservation and protection of the environment, biodiversity, and territories for "*vivir bien*" (art. 88) and lists as duties of Bolivians: to protect and defend natural resources and an environment suitable for the development of living beings (art. 108)⁴⁸.

In regards of the constitutional mechanisms for environmental protection, there is the popular action (art. 135) that can be filed against an action or omission by the authorities or by an individual or collectivity that violates or threatens collective rights and interests related (among other hypotheses) to the environment. Any person (individual or collectivity) may file a popular action, but the Public Prosecutor's Office⁴⁹ and the *Defensor del Pueblo*⁵⁰ must do so when they are aware of the facts that have occurred.

Although the Bolivian Constitution of 2009 did not expressly recognize rights to nature as Ecuador did in 2008, elements of the Andean worldview have been enshrined in the Constitution of Bolivia, which has led to the regulation of the protection of these rights at the infra-constitutional level through laws 071/2010 and 300/2012.

Law 071/2010 defines "*Madre Tierra*" as "the dynamic living system that consists of the indivisible community of all life systems and living beings, interrelated, interdependent, and complementary, sharing a common destiny" and determines the following rights: to life, diversity of life, water, clean air, balance, restoration, and to live free from contamination⁵¹. The Bolivian State recognizes the duties that must attend to the principles of generational and intergenerational justice, as well as the guarantee of regeneration of "*Madre Tierra*" within the limitations of nature's regenerative capacity and the reversal of damage caused by human action⁵².

The Law 300/2012, "*ley marco de la Madre Tierra y desarrollo integral para vivir bien*", regards the guidelines and principles that guide the protection of the rights of *Madre Tierra* and establishes the objectives and institutional framework of integral development that should guide state

⁴⁸ Bolivia is a Unitary and Decentralized State and the division of competencies in environmental matters defined in articles 297 to 305 of the Bolivian Constitution were regulated by articles 88 to 100 of the Framework Law of Autonomies and Decentralization. Cf. Bolivia. *Ley marco de autonomías y descentralización "Andrés Babiñez"*. Ley n. 31 de 2010.

⁴⁹ The attributions of the Public Ministry are listed in articles 225 to 228 of the Bolivian constitutional text.

⁵⁰ This is the head of the Office of the "*Defensoria del Pueblo*", whose duties are set out in articles 218 to 224 of the Bolivian Constitution.

⁵¹ Bolivia. *Ley de Derechos de la Madre Tierra*. Ley 071. 2010.

⁵² A. E. Vargas Lima. El derecho al medio ambiente en la Nueva Constitución Política del Estado Plurinacional de Bolivia. In: *Anuario de derecho constitucional latinoamericano*, año XVIII, Bogotá, 2012, p. 257.

action in pursuit of *vivir bien*⁵³. The concept of “*vivir bien*” aims to be more than a traditional social-welfare state, as it historically has never been fulfilled adequately in Latin America⁵⁴.

The text then establishes the competence and obligation of the administrative and jurisdictional authorities for the protection of the rights of *Madre Tierra* (Mother Earth) (art. 34). According to that norm, the duty of administrative protection imposes that all levels of the Plurinational Bolivian State elaborate specific norms and technical-administrative sanctioning instances for acts or omissions in relation to the protection of the rights of nature (art. 35). The duty of jurisdictional protection, in turn, determines that the rights of Mother Earth are protected and defended before the ordinary, agro-environmental, and indigenous-originating-campesino jurisdictions (art. 36).⁵⁵

Still in terms of legislative formant, Bolivia has enacted various infraconstitutional laws on waste management (Ley 755/2015), water (Ley 1906), sustainable fishing and aquaculture (Ley 938/2017), mining (Ley 535/2014), hydrocarbons (Ley 3058/2005), protected areas (Supreme Decree 24781/2010), environment law (Ley 1333/1992) forest law (Ley 1700/1996), wildlife, national parks, hunting and fishing (Decreto-ley 12301), non-timber organic products and non-timber agricultural and forestry production (Ley 3525/2006) and the Regional Agreement on access to information, public participation and access to justice in environmental matters in Latin America and the Caribbean⁵⁶.

It is noticeable that Bolivia contains a complex legal structure, with a constitution that expanded a long list of fundamental rights and provisions aiming to express the social values of their communities. Many of these could be considered directive principles belonging in a “*contrajudicative model*” as put forth by Lael K. Weis, as they aim to entrench state obligations towards the fulfilment of these constitutional rights, which would derive primarily from the political-sphere, and not from the Judiciary⁵⁷. However, the Bolivian system made a conscious choice to expand its access to justice, taking into consideration its plurinationality, which translates into the justiciability of many of its rights. In attempt to consolidate this new dynamic, the Bolivian Constitution created new and original institutions to deal with these matters.

⁵³ A. E. Vargas Lima. El derecho al medio ambiente en la Nueva Constitución Política del Estado Plurinacional de Bolivia. In: *Anuario de derecho constitucional latinoamericano*, año XVIII, Bogotá, 2012,

⁵⁴ See D. R. Martínez; P. R. Viciano. Crisis del estado social en Europa y dificultades para la generación del constitucionalismo social en América Latina. In: R. M. Dalmau; R. V. Pastor; C. Storini. *Nuevo constitucionalismo latinoamericano*. garantías de los derechos, pluralismo jurídico y derechos de la naturaleza. *Lex*, 2021, 29-42, p. 07.

⁵⁵ Bolivia. *Ley marco de la Madre Tierra y desarrollo integral para vivir bien*. Ley 300. 2012.

⁵⁶ Cf. UNITED NATIONS. CEPAL. *Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe*. Santiago, 2018. Available at: <https://www.tribunalagroambiental.bo/wp-content/uploads/2020/12/acuerdo-de-escazu.pdf>

⁵⁷ L. K. Weis, *op. cit.*, p. 858

4.2 The Environment and the Bolivian Agro-Environmental Tribunal

According to the Bolivian constitutional text, the jurisdictional function is unique, but exercised through three distinct jurisdictions: a) ordinary jurisdiction; b) jurisdiction of the indigenous, original and campesino peoples; and c) agro-environmental jurisdiction (art. 179)⁵⁸. The analysis of the jurisprudential formant in this research focuses on the attributions and performance of the agri-environmental court, since it is a specialized body that can be framed within the concept of ECT's.

The Agro-Environmental Court is the highest specialized court in the agri-environmental jurisdiction whose members are elected by universal suffrage, serve a six-year term, and must be specialized in the agri-environmental area and have competently, ethically, and honestly exercised the agrarian judiciary, a free profession, or a university chair in the area for eight years (article 188)⁵⁹.

The material competencies of the Agro-environmental Tribunal are listed in art. 189 of the Bolivian Constitution of 2009 (and art. 152 of Law 025/2010) and include, among others: (a) judicial actions on acts that threaten fauna, flora, water and the environment; (b) judicial actions on practices that endanger the ecological system and the conservation of species or animals; (c) resolution of cases of cassation and nullity in agrarian, forest, environmental, water resources, rights of use and exploitation of renewable natural resources, water, forestry and biodiversity; d) to hear and resolve in a single instance the contentious administrative proceedings resulting from contracts, negotiations, authorizations, concessions, distribution and redistribution of rights of use of renewable natural resources, and other administrative acts and resolutions; e) to organize the *juzgados ambientales*⁶⁰.

This new dynamic has resulted in some jurisdictional conflicts between the agro-environmental jurisdiction, the ordinary jurisdiction

⁵⁸ Bolivia, *op. cit.*, 2009

⁵⁹ Law 025/010 establishes that the Agri-Environmental Court is composed of seven magistrates or magistrates and is divided into two rooms of three ministers each, so that the president of the court does not belong to either room. The procedure for electing members of the court is regulated by Law 025/010, as are the election and functions of the president of the court, the attributions of its offices. See more in: Bolivia. *Ley 025 de 24 de junio de 2010. Ley del órgano judicial.*

⁶⁰ Bolivia, *op. cit.*, 2009. With the 2009 Constitution, the agrarian courts became *juzgados agroambientales*, and there are currently 63 distributed throughout the nine departments of the country. Besides dealing with conflicts over rural property rights and everything related to agricultural production, they must also deal with conflicts over the use and exploitation of renewable natural resources, water, forests, and biodiversity, to safeguard and prevent liability for the contamination of water, air, soil, or damage caused to the environment, biodiversity, public health, or cultural heritage. The procedure applied to the agro-environmental *juzgados* is prevalently oral and simplified, being an agile and dynamic process that does not admit double instance. After the judge's decision, parties who feel aggrieved can appeal to the agro-environmental court as a closing court or to the constitutional justice system through a constitutional protection action. Bolivia. *Tribunal agroambiental. Tribunal agrário nacional en la historia del sistema judicial en Bolivia. Juzgados agroambientales.* 2022. Available at: <https://www.tribunalagroambiental.bo/index.php/historia/>

and/or the peasant originary jurisdiction⁶¹. This is an evidently complex system, and clarification of conflicts of this nature is the responsibility of the Plurinational Constitutional Court, the country's Supreme Court ⁶², it is certain that this jurisdiction will also act in favor of Bolivian environmental protection since its function of protecting fundamental rights and guarantees is directly linked to the right to a healthy and ecologically balanced environment⁶³.

The *ethos* of the Plurinational Bolivian State brings new elements of its own to the exercise of justice, prioritizing popular participation, interculturality, and social function. The specialized jurisdictions, by stipulating the election of their magistrates through universal suffrage, allow local leaders and authorities to act directly in the resolution of conflicts. The intention is to bring the provision of judicial protection closer to democratic representation within the context of legal pluralism, respecting the cultural values and norms proper to the communities⁶⁴.

In this scenario, it is possible to conclude that Bolivia, with its Plurinational Constitution of 2009, has succeeded in creating innovative ECTs, ensuring specialized environmental protection in the new jurisdictional organization chart. The choice of magistrates will take into consideration the recognition of the specialization and the constitutional objectives foreseen, and can be classified in model III, within the division proposed by Domenico Amirante: "III) models that officially create innovative ECT's in their system"⁶⁵.

5. Conclusion

The Brazilian environmental protection system, considering the specificities of its constitutional-environmental model, including the shared responsibilities among different federative actors, has sought to institutionalize a direct judicial enforcement through general jurisdictions, having also granted enough autonomy for an internal specialization of its institutions towards a more focused environmental judication. This occurs mainly through the Judiciary, but the Brazilian enforcement agencies (especially the Public Prosecution) also act extrajudicially in the prevention and mitigation of possible environmental damages.

In turn, the Bolivian system created innovative and original specialized institutions to deal with environmental issues, which will occur within general jurisdictions, and within collegiate bodies with exclusive competence in environmental matters. Apparently, the direct judicial enforcement of environmental protection present distinct dynamics in both countries. Bolivia has emphasized local and community autonomies in favour of environmental activism, despite having an unitary state. The institutional

⁶¹ G. Leonel Jr. *El nuevo constitucionalismo latinoamericano un estudio sobre Bolivia*. Brasília, 2015, p. 208.

⁶² R. A. Chambi Mayta. *Jurisdicción Indígena y Colonialidad Jurídica en la Bolivia Plurinacional: Desafíos de la Autodeterminación Indígena*. Foz do Iguaçu, 2021, p. 72

⁶³ A. E. Vargas Lima, *op. cit.*, p. 265.

⁶⁴ G. Leonel Jr., *op. cit.*, p. 207-209.

⁶⁵ D. Amirante, 2012, *op. cit.*, p. 446

response seems to come predominantly from popular participation, which will shape even the composition of its specialized institutions, as some of their members are elected by universal suffrage.

In Brazil, the Public Prosecutor's office seems to be at the forefront of the enforcement of environmental provisions, even in the provocation of jurisdictional responses, being complemented by popular participation. Other public agencies also work with public prosecutors, having different roles in the preservation of nature and biodiversity. Brazil also doesn't elect its institutional members in the Public Prosecutors or the Judiciary, most enter by merit through public competition, with a small percentage stemming from direct political nominations.

Both the Brazilian and Bolivian constitutions emphasize the importance of institutional work and popular participation for the protection of the environment, counting on an extensive and robust legal framework towards its effectiveness. Nonetheless its expansion on fundamental, social, and political rights, both nations give incentives for an ample access of justice, consequently expanding the role of the Judiciary against state actions (or lack thereof). This has resulted in a phenomenon known as "judicialization of politics" or "judicial activism" that is very predominant in nations of Latin America.

It is interesting to note the importance of the indigenous and peasant movements in the Bolivian context, especially in the recognition of these peoples in the protection and preservation of the environment, and their cosmivision regarding *Madre Tierra* and *vivir bien*. The respect for the traditional and indigenous people's interconnectivity with nature is an aspect that deserves more attention in Brazil since these peoples play important roles in environmental activism, especially regarding the preservation of biomas.

In summary, the specialized institutions (ECT's) of both countries, although at different junctures, have crucial roles in the fulfilment of constitutional objectives towards a holistic environmental protection and the recognition of the importance of nature and its preservation. Of equal importance are their actions against measures of the state or omissions stemming from the political sphere.

The countries analysed recognize and implement, in their own way, the principle of an ecologically balanced environment for the present and future generations, an objective which is also aimed by the international efforts to mitigate climate change. Although the direct judicial enforcement of environmental constitutionalism does present its limitations (and could indeed be criticized as being ineffective or untimely) it nonetheless aids in the growth of institutional maturity and entrenchment of these social values.

