



## TENSION OVER THE MODEL OF CONTROL OF CONSTITUTIONALITY IN ECUADOR.

CACPATA CALLE WILSON ALFREDO<sup>1</sup>, GIL BETANCOURT ANTONELLA STEFANÍA<sup>2</sup>

Universidad Regional Autónoma de Los Andes Santo Domingo. Ecuador.

E-mail: [us.wilsoncacpata@uniandes.edu.ec](mailto:us.wilsoncacpata@uniandes.edu.ec)

ORCID: <https://orcid.org/0000-0002-0615-2908>

E-mail: [ds.antonellasgb36@uniandes.edu.ec](mailto:ds.antonellasgb36@uniandes.edu.ec)

ORCID: <https://orcid.org/0000-0001-7330-4791>

### **Abstract:**

*The constitutionality control model applicable in each State must be clearly established by the constitutional norm or by the interpretation that the competent body may give. In Ecuador, from 1998 to 2008, a model of mixed control of constitutionality was undoubtedly applied. However, since its current Constitution, in force since October 20, 2008, there have been doubts about its control model, initially going through a concentrated one and trying to change to a mixed model and sometimes with the existence of a limited diffuse one. Given that, the present investigative work seeks to determine a suitable mechanism or way through which the Constitutional Court can issue a ruling with an erga omnes effect, which allows for the certainty of the constitutionality control model that exists in Ecuador. Using methods of the theoretical level of knowledge such as synthetic analytical and empirical such as documentary analysis. Concluding that the action of unconstitutionality is the ideal way that would allow the Constitutional Court to issue a ruling with erga omnes effect, on the model of constitutionality control that exists in Ecuador.*

**Keywords:** *Constitutional control, concentrated control, diffuse control, mixed control, principle of direct application, norm consultation.*

### **INTRODUCTION:**

The control of constitutionality is a mechanism through which the compatibility and coherence of the infraconstitutional legal system with the Constitution is examined, hence according to Roberto Gómez it is constituted as "[...] (2022)necessary to guarantee the supremacy and rigidity of the Constitution, fundamental characteristics of the constitutional State model". (p. 141)

This control can be carried out through several models: (a) concentrated, a power that rests solely with a control organ, characterized by its independence from the other functions of the State and by its specialization in resolving constitutional matters, and can be called according to each country as Constitutional Court or Constitutional Court, its decisions having an erga omnes effect; (b) diffuse, the exercise of control is distributed among several judges/organs of the administration of justice with the power to disapply any normative provision contrary to the Constitution, within a specific case, a decision that has inter partes effect; and, c) mixed, the two models of control coexist within the same system -concentrated and diffuse-, the latter being subject to the subsequent review of the body or court that exercises concentrated control in order to issue a general and mandatory pronouncement.

The Ecuadorian Constitution of 1998 (in force until 2008) incorporated a model of mixed control of constitutionality, since any judge or court had the power to declare a legal precept inapplicable if it considered it contrary to the Constitution or international conventions and subsequently had to submit a report of that before the Constitutional Court, a body that could ratify the constitutionality or declare the unconstitutionality of the provision. infraconstitutional with the character of general and mandatory (Constitución Política de la República del Ecuador, 1998).

However, in Ecuador, since the publication of its current Constitution (October 20, 2008), there has been uncertainty regarding the applicable model of constitutional review. This doubt is based on the principle of direct application of the Constitution, as opposed to the action of consultation of norm. Regarding the principle of direct application, doctrinally it is defined as the obligatory nature of the fulfillment of the rights recognized in the Constitution "[...] directly and immediately applicable,



without the need for infra-constitutional norms to develop them". The Ecuadorian Constitution (hereinafter CRE or Supreme Norm) provides for it in article 426 as follows: (Ochoa, 2021, p. 31) (2019) All persons, authorities and institutions are subject to the Constitution.

Judges, administrative authorities and public servants shall apply directly the constitutional norms and those provided for in international human rights instruments, provided that they are more favourable to those established in the Constitution, even if the parties do not expressly invoke them. The rights enshrined in the Constitution and international human rights instruments shall be immediately implemented and implemented. A lack of law or ignorance of the rules may not be alleged to justify the violation of the rights and guarantees established in the Constitution, to dismiss the action filed in their defense, or to deny the recognition of such rights.

On the other hand, the consultation of norm is a figure incorporated from the Constitution of 2008, which, although it is located within the concentrated model, according to Agustín Grijalva also obeys the constitutional control of (2011) *Posteriori* concrete. In such a way, through this figure:

[...] Although judges may not disapply the precepts that they consider unconstitutional, they are empowered to consult or initiate the question of unconstitutionality, that is, when they can formulate a petition to the body of control of constitutionality, with the purpose of reviewing the regularity of the norm that affects the result or the continuation of the process. (Oyarte, 2019, p. 1079)

Hence, the CRE expressly establishes the consultation of norm in article 428, (2019) In the following sense:

When a judge, *ex officio* or at the request of a party, considers that a legal norm is contrary to the Constitution or to international human rights instruments that establish rights more favourable than those recognized in the Constitution, she shall suspend the processing of the case and refer the file to the Constitutional Court for consultation. that within a period not exceeding forty-five days, it will decide on the constitutionality of the norm.

In view of the above, the dilemma in question has not been clarified, since the Constitutional Court of Ecuador, as the highest interpreter of the Constitution, far from giving certainty to the operators of justice of how to proceed in the face of the existence of an alleged or undoubted constitutional antinomy applicable to a specific case, has left visible only the ideological tensions that exist among its members. preventing them from creating a real binding jurisprudential precedent, generating only isolated criteria since they have been expressions of concurring, saved or minority votes (constitutional doctrine).

In this sense, the objective of this article is to determine an appropriate mechanism or way through which the Constitutional Court can issue a pronouncement with *erga omnes* effect, which allows to have the certainty of the model of control of constitutionality that exists in Ecuador, thus avoiding that the judgments issued by such constitutional body are reduced to diffuse non-binding doctrinal criteria, exposed sporadically in isolated votes, which generate legal uncertainty in this treated issue.

#### METHODS:

The modality of the research was qualitative, so this approach allowed to incorporate various theoretical foundations related to the models of normative constitutional control.

Regarding the types of research, documentary information was used in order to compile relevant information obtained from books, scientific journals, jurisprudence, websites, etc.

At the same time, due to its scope, it was descriptive, due to the analysis that was carried out regarding the model of control of constitutionality applicable in Ecuador and figures such as the principle of direct application and the consultation of norm.

Regarding the methods of the theoretical level of knowledge, the synthetic analytical was used, which allowed to decompose the various models of control of constitutionality and to refer to their qualities.

Regarding the methods of the empirical level of knowledge, documentary analysis was used to compile and incorporate the information contained in the official website of the CCE on the

judgments related to the identification of the model of control of constitutionality applicable in Ecuador.

### RESULTS:

It will highlight several judgments issued by the Constitutional Court, from 2008 considering several stages in relation to the denominations and renewals it has had:

Board 1. Model of control of constitutionality applicable to Ecuador according to judgments of the Constitutional Court of Ecuador.

*Source: Constitutional Court of Ecuador.*

*Prepared by: The authors.*

CONSTITUTIONAL COURT INTEGRATIONS	SENTENCES	VOTE			CONSTITUTIONALITY CONTROL MODEL
		Majority	Bran	Concurrent	
Transition period (Sep. 2008 - 05 Nov. 2012).	055-10-SEP-CC. (2010)	5 votes			Concentrated Control (p. 22).
				Nina Pacari	Concentrated Control (p. 2).
First formally integrated Constitutional Court (6 Nov. 2012 - Nov. 2015).	001-13-SCN-CC. (2013)	8 votes			Concentrated Control (p. 4).
Constitutional Court partially renewed (Nov. 2015 - Aug. 22, 2018).	184-18-SEP-CC. (2018)	5 votes.			Mixed Control (p. 67).
			Francisco Butiñá		Concentrated Control (p. 2).
Constitutional Court fully renewed (Feb. 2019 - Feb. 2022).	11-18-CN/19 (2019)	4 votes			Mixed control (para. 290).
	1116-13-EP/20. (2020)	3 votes			Mixed Control (paras. 28 and 29).
				Avila, Grijalva, Lozada and Salazar.	Mixed Control (paras. 17 and 19).
				Hernan Salgado	Concentrated Control (paras. 19 and 20).
	1644-14-EP/21. (2021)	6 votes			Mixed control (para. 41).
				Hernan Salgado	Concentrated Control (paras. 3 and 4).



### DISCUSSION:

Regarding the results obtained, it is evident that with the entry into force of the 2008 Constitution, there was confusion on the part of the judges about the model of control of constitutionality that should be applied, since they had been exercising a diffuse/mixed control as provided for in the 1998 Constitution.

The CCE, in 2013, issued a response with a degree of security through the mandatory jurisprudential precedent that expressly determined the existence of a concentrated control of constitutionality, thus having the judges, considering that a norm is contrary to the constitution, the obligation to "Suspend the case and send in consultation to the Constitutional Court the file of the process that contains the normative provision allegedly contrary to the Constitution". (Sentencia No. 001-13-SCN-CC., 2013)

Based on this, the principle of direct application is differentiated, which must be used in the absence of infraconstitutional normative development, while the consultation of norm must be activated in the presence of a contradiction between the infraconstitutional norm with some constitutional provision (constitutional antinomy), whether there is doubt or even certainty.

Subsequently, through the judgment 11-18-CN/19 Confusion/tension was generated on the model of control of constitutionality because in paragraph 290 of the majority vote it determined that "[...] The judge does have the competence to carry out control of constitutionality and conventionality, like any other public authority within the scope of its competences [...]", thus trying to implement a new model of control of constitutionality (diffuse/mixed). However, what is expressed in this paragraph cannot be considered a change of jurisprudential precedent, since to move away from the precedent issued in 2013 it should do so expressly, reasoned and with the assent vote of at least 7 of its members, according to article 2 numeral 3 and 160 second paragraph. (Sentencia No. 11-18-CN/19, 2019)(Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, 2018)

From the decisions issued by the members of the Court, in which this issue has been addressed, several possibilities can be established:

1. The existence of a concentrated control of constitutionality, expressed as such in the concurring vote issued by the then president of the Constitutional Court, Hernán Salgado Pesantes:(Sentencia No. 1116-13-EP/20, 2020)

19. Accordingly, already in the field of constitutional review, operators of justice that consider that a norm is contrary to the Constitution, are obliged to confine their conduct to what is established in the Constitution for that specific purpose; that is, they will have to suspend the processing of the case and consult the Constitutional Court, in accordance with article 428 of the Constitution.

20. In conclusion, the principle of direct application, as its name suggests, takes place in the absence of secondary regulation; but not in the case of contradiction, in which scenario it is necessary to observe what is related to the control of constitutionality that, in the Ecuadorian case, as was expressed in the preceding section, is characterized by being a concentrated system.

2. The existence of diffuse/mixed control of constitutionality, according to the majority vote (6) in the judgment 1644-14-EP/21 (2021):

[...] In short, in order to guarantee legal certainty in the resolution of cases brought to their attention, justice operators are obliged to apply the CRE directly, even more so in those cases in which there is a regulatory vacuum, since otherwise the administered would be left without the effective protection of their rights and the character of "fully justiciable" that all constitutional rights have would be denied.

3. The existence of diffuse/mixed control applicable only if the infra-constitutional rule is to be examined in contrast to a constitutional rule:

[...] When there is a constitutional rule applicable to the case, by supremacy that rule must be applied, even when this implies disapplying the norm of legal rank that contradicts the constitutional norm.



20. Otherwise, to apply the law over the Constitution in the face of such a clear rule would be to openly violate constitutional supremacy. (Sentencia No. 1116-13-EP/20, 2020)

Clarifying this point, all judges would be allowed a limited model of diffuse control, given that if the antinomy occurs between an infraconstitutional norm and a constitutional principle, Ecuadorian doctrinaires such as Camilo Pinos, have argued that that should be subject to norm consultation, this by the extensive interpretation that requires the application of a principle. (2022)

In view of the foregoing, the Constitutional Court, in order to resolve this tension over the model of constitutional review, could issue a ruling with erga omnes effect in the knowledge of several actions such as: a) the filing of an action for interpretation; b) at the time of issuing a judgment in a judicial guarantee, of direct knowledge or selected by the faculty of review; or, c) by the activation of a norm query action.

However, this has its limitations, either by the restricted locus standi in the case of the action of interpretation - article 155 - or by the existence and selection of the appropriate case to be able to pronounce on the model of control of constitutionality in the cases of letters b) and c) described above. Therefore, it is considered that there is another way, with an open active legitimation, that allows every citizen to present it: the action of unconstitutionality, through which: (Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, 2018)

The Constitutional Court of Ecuador is competent to hear and resolve public actions of unconstitutionality on the merits against normative acts of a general nature issued by organs and authorities of the State, in accordance with numeral 2, article 436 of the Constitution of the Republic of Ecuador (CRE), in accordance with articles 74 to 98 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (LOGJCC). (Sentencia No. 36-19-IN/21, 2021)

Through this power, it exercises the abstract review of unconstitutionality, carrying out a compatibility examination to determine whether the infraconstitutional norm accused of unconstitutional, is compatible or not with the supreme norm, the effect of the decision has the character of erga omnes.

For this action to proceed, an infra-constitutional norm must be found that allows this issue to be addressed directly. For the authors of this research, that legal provision is found in the Organic Code of the Judicial Function (COFJ): (2019)

Art. Article 129.- Generic powers and duties of judges.- In addition to the duties of any judicial servant, judges, as appropriate, have the following generic powers and duties:

1. Apply the constitutional norm and that of international human rights instruments over the legal precepts contrary to it.

This expressly provides for the power of ordinary judges to directly apply the constitutional norm, over and above legal precepts contrary to it. That is, the power to carry out a review of constitutionality, thus implicitly establishing a model of mixed control of constitutionality. However, this legal norm would be colliding with the constitutional provision of Article 428 of the CRE, which provides for the obligation to consult the Court in the event of doubt or certainty of a constitutional antinomy. Therefore, presenting this action against article 129 numeral 1 of the COFJ will give the Constitutional Court the opportunity to pronounce itself with the character of general and obligatory resolving this tension and legal insecurity that exists on the model of control of constitutionality that governs in Ecuador, allowing justice operators to have certainty in their actions.

#### CONCLUSIONS:

The control of constitutionality consists of a tool or mechanism that allows to examine the compatibility and coherence of the infraconstitutional normative provisions with the Constitution, this control can be carried out primarily obeying three different models: concentrated, diffuse and mixed.

So far the Constitutional Court has not been able to issue a mandatory jurisprudential precedent that provides certainty and legal certainty on the model of control of constitutionality that exists in Ecuador, generating uncertainty in justice operators about how they should proceed in the presence of a constitutional antinomy.



Through this article, it was determined that the action of unconstitutionality is the ideal way that would allow the Constitutional Court to issue a pronouncement with erga omnes effect, on the model of control of constitutionality that exists in Ecuador.

#### REFERENCES:

- [1] *Organic Code of the Judicial Function. (June 26, 2019). Official Register Supplement 544 of 09-mar.-2009. Quito, Ecuador: Corporacion de Estudios y Publicaciones.*
- [2] *Constitution of the Republic of Ecuador. Constituent. (2019). Official Register 449. Montecristi: Official Register 449.*
- [3] *Political Constitution of the Republic of Ecuador. (11 August 1998). Official Register 1. Sangolquí, Ecuador.*
- [4] Gomez, R. (2022). *El control constitucional en el Ecuador. Una aproximación teórica y filosófica. Law Review Forum, 122-144. Retrieved from National Autonomous University of Mexico: <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2894/10.pdf>*
- [5] Grijalva, A. (2011). *Constitutionalism in Ecuador. Quito: Centro de Estudios y Difusión del Derecho Constitucional.*
- [6] *Organic Law on Jurisdictional Guarantees and Constitutional Control. (2018). Official Register Supplement 52 of 22-Oct.-2009. Ecuador: Corporacion de Estudios y Publicaciones.*
- [7] Ochoa, E. (2021). *The direct application of the Constitution. Retrieved from the Repository of the Catholic University of Santiago de Guayaquil: <http://201.159.223.180/bitstream/3317/17715/1/T-UCSG-POS-MDC-242.pdf>*
- [8] Oyarte, R. (2019). *Constitutional law. Quito: Corporation of Studies and Publications.*
- [9] Pinos, C. (October 20, 2022). *VI International Congress of Constitutional Law.*
- [10] *Decision No. 055-10-SEP-CC, 0213-10-EP (Constitutional Court of Ecuador, November 18, 2010).*
- [11] *Decision No. 001-13-SCN-CC., 0535-12-CN (Constitutional Court of Ecuador, February 6, 2013).*
- [12] *Decision No. 184-18-SEP-CC., 1692-12-EP (Constitutional Court of Ecuador May 29, 2018).*
- [13] *Decision No. 11-18-CN/19, 11-18-CN (Constitutional Court of Ecuador June 12, 2019).*
- [14] *Decision No. 1116-13-EP/20, 1116-13-EP (Constitutional Court of Ecuador November 18, 2020).*
- [15] *Decision No. 36-19-IN/21, 36-19-IN (Constitutional Court of Ecuador September 22, 2021).*
- [16] *Decision No. 1644-14-EP/21, 1644-14-EP (Constitutional Court of Ecuador June 02, 2021).*