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Comparative Latin American Constitutionalism

edited by
Silvia Bagni
Serena Baldin

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Introduction

SILVIA BAGNI* AND SERENA BALDIN**

This book emerged out of a shared realisation. The editors, Silvia Bagni and Serena Baldin, found that while a vast legal literature on constitutionalism in Latin America exists in Europe, no single volume has provided an overview of the main institutional models of constitutional law in the region. Some institutions have received extensive consideration within comparative law (one thinks of the concept of *amparo* [protection] in constitutional justice studies, for example, or more recently the Andean notion of *sumak kawsay/buen vivir* [good living]). There is also an extensive, if fragmented, literature on human and constitutional rights. In our view, however, no general synthesis of the region's legal models in terms of their origin, circulation and hybridisation previously existed. So, we have decided to present these models according to the traditional divisions of constitutional law¹: legal systems

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¹ The categories of constitutional law change in legal doctrine from country to country. A literal translation could present problems of functional correspondence. However, as an editorial choice was necessary, we have decided to use the English translation of the Italian categories, referring the reader, where needed, to the methodological premises of each chapter.

and forms of state; territorial organization; forms of government; constitutional justice. Despite the limited nature of the cases selected for each topic, this volume seeks to address the above gaps.

Because of the scientific rigour of its content and the methodological approach adopted, we hope this volume will be of interest both to fellow comparatists and, more in general, to all scholars who devote their studies to Latin American political and legal issues. On the other hand, we have adopted a streamlined format and chose to avoid cumbersome footnotes, including instead a final basic bibliography for each chapter. We hope this makes the volume a suitable complement to the traditional textbooks used by university students in courses on Comparative Public and Constitutional Law, but also on non-legal subjects.

This volume focuses on classic public law issues to gain insight into recent constitutional innovations. Moreover, it is the result of a basic and precise methodological choice. In fact, we decided to go beyond the limits of simply studying foreign law to fully embrace a comparative approach. An obvious result is that we observe Latin American legal facts – that is, forms and types of state, presidentialism and constitutional justice – not merely as national events. Rather, we see them as institutions that need to be contextualised in a broader way. That is, we need to consider the relationships between two or more systems in order to identify trends.

It is not by chance that the first chapter by Lucio Pegoraro, entitled “Comparisons with (and within) Latin America. A Critical Introduction”, focuses on comparative methodology, highlighting what unites and divides countries in the region. One question Pegoraro seeks to answer is whether Latin America as a whole represents a model. He also asks if some of the institutional choices made there might be exportable elsewhere, for example, plurinationalism resulting from the integration of indigenous cultures at the constitutional level.

The contributions in the section entitled “Legal Systems and Forms of State” are in perfect continuity with the above. In “*Latinoamérica: Law, System and Tradition of a Patria Grande*”, Sabrina Lanni traces how the Latin American legal system took shape, beginning with the Romanisation of indigenous peoples’ law. In focusing on Latin America, the author asserts that we can, indeed, talk about the law of a “*Patria Grande*” (‘Great Homeland’). That is, one can understand and interpret the social multiplicities and different identities the region represents as a homeland. Above all, there have been interesting innovations in recent decades in the region, especially at the constitutional level. Silvia Bagni illustrates this in

her chapter on “Forms of State in Latin America”. Applying this analytical category to the legal systems in the region may entail using traditional classification schemes based on Eurocentric or North American criteria. However, by moving away from this approach, Bagni enriches the classification of forms of state with new models such as the “Caring state”. She also specifies other categories such as the anti-communist autocracy or the “Cuban-style” socialist state.

Even in terms of the territorial organization of the state, the region’s profile reflects new developments that call established doctrine into question. It also urges paying more attention to systematisation and in-depth diachronic studies which can be useful in revealing the historical roots of decentralisation as well as current developments. The authors of the two contributions included in the “Territorial Organization” section take up such challenges. In “Unitary State and Federal State in Latin America: Two Evolving Categories”, Giorgia Pavani concretely highlights the interactive and sometimes chaotic phenomena shaping the relationships that exist among various levels of government. In this context, forms of decentralisation can set off centrifugal tendencies in unitary states while centripetal dynamics, vice versa, may occur in federal ones. In “Decentralisation, Pluralism, Indigenous Communities and Popular Power in Latin America between Unitary States and Federal States”, Amilcare D’Andrea reflects on innovative forms of organisation linked to popular power, decentralisation and pluralism in local and/or indigenous communities’ issues which are presenting legal scholars with more numerous and frequent contradictions.

The “Forms of Government” section provides readers interested in Latin American political issues with food for thought that may open up of new lines of research. In his chapter on “The Other Side of Latin American Presidentialism: Costa Rica and Uruguay”, Edmondo Mostacci begins by considering the historical reasons which led to the spread of presidential forms of government in Latin America. He then focuses on the constitutional rules defining the relations between the legislative and executive branches. A close analysis of constitutional provisions helps clarify the reasons why Costa Rica and, albeit with some additional vicissitudes, Uruguay, represent counter examples when compared to other, generally less happy, presidential experiences in Latin America. In the chapter entitled “The Presidential Form of Government in Argentina and Chile”, Francesco Duranti first analyses the established relationships between the President and Parliament in the two countries. He then highlights the unsuccessful attempts which have been made to mitigate the excessive dominance of their heads of state.

He also considers the management of states of emergency. The latter issue, while a topical subject given the current pandemic, has long been a common event in Latin America.

The concluding section looks at “Constitutional Justice”. The first contribution by Serena Baldin and Enrico Buono considers “The Pantocratic Model of Constitutional Justice in Ecuador and Bolivia”. This chapter highlights the main similarities and differences between the Constitutional Courts in each country in terms of their functions and guarantees of judicial independence. In a broader perspective, this research also brings into focus the characteristics of the so-called pantocratic model of constitutional justice in which public authority activity is comprehensively subject to some type of constitutional control. The last chapter by Anna Ciammariconi concerns “Constitutional Justice in Argentina and Brazil”. Here, the author diachronically and synchronically analyses the main features of the two countries or systems in terms of how their Supreme Courts are configured. Despite drawing similar inspiration from the American model, and thus having widespread judicial review, the two countries have developed differently in relation to this original ideal.

In conclusion, the hope is that this volume will stimulate further research on Latin America, and also on other systems and institutions within this region. This will serve to enrich the scholars’ knowledge of the legal specificities of the sub-continent, which needs to be understood as more than just a peripheral appendage of the Western world. As comparative scholars ourselves, we hope this volume will inspire our students to begin to cultivate freedom of thought alongside good reasoning and empathy. This will help them go beyond the pre-set boundaries and limited perceptions that are sometimes part of our cultural baggage and the environment that reinforces it. For this reason, the title of this book recalls a famous educational journey. It is the one that led *Comandante* Che Guevara to discover the soul of a continent and his own revolutionary one, as he aspired to achieve that sense of *fraternidad* that we should each cultivate towards all our fellow human beings.