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# Comparative Latin American Constitutionalism

edited by  
Silvia Bagni  
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# Chapter 4

## Unitary State and Federal State in Latin America: Two Evolving Categories

GIORGIA PAVANI\*

SUMMARY: 1. Introduction. – 2. The Latin American area in comparative law studies. – 3. Centrifugal trends in the unitary states. – 4. Centripetal trends in federal states. – 5. Decentralization in Latin America and the crisis of traditional taxonomies.

### 1. INTRODUCTION

Decentralization processes and trends in federalism have been addressed in great depth within the contemporary literature, although there is no uniformity of opinion on the concept of federalism: there is no overarching thesis (Gamper 2005), nor a magic formula to define it (Rosenn 1988), as it is a concept that varies over time and in space.

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\* Associate Professor of Comparative Public Law at the University of Bologna. This chapter is based on the results of some researches on the decentralization in Latin American countries already published in G. Pavani, *Tendencias centrifugas y centrípetas de la descentralización en América Latina*, in *Federalismi.it*, 6 March 2019; G. Pavani, *El gobierno local. De los antiguos modelos europeos al nuevo paradigma latinoamericano*, Santiago de Chile, 2019.

Many different disciplinary approaches have been adopted to study this phenomenon from a sociological, institutional/constitutional and political perspective; these range from considering federalism as a process, following an empirical-dynamic perspective (Friedrich 1968), to the idea of federalism as a pact (Elazar 1987).

The same consideration applies to the nuanced federal state category: the characteristics of the legal systems are such that “each decentralized State is decentralized in its own way” (Vandelli 2016).

Despite the crisis in theoretical categories, decentralization processes have been increasing due to a centrifugal tendency to distribute power and an apparent “revitalization of the federal idea” since the end of the Cold War (Burgess 2012).

In the face of this worldwide trend towards decentralization – in all its subtleties – the Latin American area may be considered an “experimental laboratory” of great value in studies relating to forms of state.

Both the earlier experiences as federal states and the new decentralization processes characterizing a part of the Andean area represent an excellent example of combined centrifugal and centripetal trends that may be studied in the broader context of the circulation of decentralization models. The transformations in the territorial organization of power occurring in many Latin American countries have implications for form of state transformation processes (intercultural: Bagni 2017) and the vertical and horizontal distribution of power (presidentialism and federalism seen as two sides of the same manifestation of power). Comparative analysis is used to study the evolution of decentralization in the various countries of the area through the determinant elements (the historical and constitutional framework), the principles that guide territorial organization, territorial levels, the distribution of competences, the elected nature of territorial bodies; the scope of the principle of territorial autonomy, centrifugal trends – towards decentralization – or centripetal trends – towards the centralization of power –, identifying the tools used by the central state to strengthen the federal or unitary nature of the state.

## 2. THE LATIN AMERICAN AREA IN COMPARATIVE LAW STUDIES

In the geographic area that stretches from Río Bravo, in the north, to Cape Horn at the tip of Patagonia, otherwise known as *América Latina* or *Latinoamérica*, there are countries that share some common traits, each pre-

-serving its own identity. Most of these traits were acquired during the colonial period and in the decades following independence; they have been consolidated over time, becoming “traditional elements of cohesion”, to which “novel” ones were added (Carpizo 2005).

The legal-political tradition – the foundations of which can be found in the common heritage of Spanish and Portuguese legal systems – was subsequently influenced by countries such as France and the United States, to which the literature has often assigned too much importance with respect to the Spanish and Portuguese roots (at least in the case of some longstanding public law institutions).

It is well known that ever since the territories were assigned to Spain and Portugal in 1493, the law in Latin American countries has been influenced by foreign laws extraneous to the area. These trends are reflected in the legal systemology: the influence of the French Civil Code was such that Latin American countries were placed in the category of *civil law*, at least in everything relating to private law (David-Jauffret-Spinosi, 2010), at the same time contributing to their relegation to “the margins” (Somma 2015). The United States played an important role, initially in the acquisition of constitutional law institutions and models (such as the presidential form of government and a federal organization) and subsequently outside the sphere of public law.

Foreign influences can be seen in the part of the Constitutions dedicated to territorial organization and the choice of the type of state. In this case, it is impossible to identify a single “element of cohesion” or a single foreign influence, because the area is clearly bipolar and has historically seen the emergence of two different types of territorial organization: the unitary state and the federal state. The largest states in size and population looked to the US federal model, whereas most developed instead under the unitary state paradigm and adopted the French-Napoleonic organization model, which was enabled by the “three hundred years of centralized colonial domination” (Véliz 1984).

Although until recently the two “sub-areas” were internally quite homogeneous, the decentralization process now affecting – in different ways – some states of the Andean area mar the homogeneity of the sub-area of unitary states. Many are undergoing a process of “transformation or reorganization” of the unitary state that is impossible to describe following the rigid 19<sup>th</sup> and 20<sup>th</sup> century criteria and the classic taxonomies (based on legal criteria alone) revolving around the distinction between unitary state and compound state (Pavani-Estupiñán Achury 2016).



In particular, the constituent processes of Ecuador and Bolivia were based on a project of a plural society, and the new Constitutions, approved in 2008 and 2009 respectively, show how this is a principle that shall have to guide all political processes, including that of decentralization (see D'Andrea, chap. 5 this volume).

This push towards decentralization confirms that centrifugal and centripetal trends have overlapped in Latin America: just as centralism has marked not only unitary states, so federalism has marked not only federal states. Many countries that adopted the unitary form of state had experienced federalism, even for short periods: the Federal Republic of Central America, after Mexico's independence in 1821; Simón Bolívar's 1826 proclamation regarding Colombia, Peru and Bolivia; Chile's very brief experience that began with the implementation of the Federal Law of July 14, 1826 and ended on August 12, 1827; the small federal interregnum in Colombia, promoted by the Constitutional Charters of 1858 and 1863 (Morelli 1991).

At the same time, the centralist structure implanted by Spain in America through the municipalities, *cabildos*, *intendencias* and *diputaciones provinciales* is such that in countries like Argentina and Mexico the adopted federal model "is not merely a copy of the North American model" (Fernández Segado 2002) but has some distinctive features suggestive of centralist federalism and neo-federalism (§ 4).

The history of each country and the centrifugal and centripetal trends that have characterized the Latin American area in recent times make it difficult to ascribe individual countries to one class or another. In studying the transformations of the unitary state model, we can group some states (Colombia, Ecuador, Bolivia, Peru, Chile, Paraguay and Uruguay) on the basis of their origin. These states confirm the unitary model in their constitutional texts (with initial bureaucratic-administrative decentralization). Nevertheless, some are undergoing decentralization processes and present certain special or unique characteristics which lend themselves well to studying the evolution of the traditional form of unitary state. States may be classed differently according to the aims of the analysis: if reference were made to centrifugal forces, Uruguay and Paraguay could almost be excluded; if centripetal forces were also considered, the class of unitary states would include Venezuela, which is formally classified as a federal state. If the focus were solely on the constant unitary trait, one could exclude countries such as Bolivia and Ecuador, which are in theory moving away from the unitary model through a very distinctive decentralization process.

Depending on the degree of similarity to the Napoleonic model, it is possible to formulate an initial classification, stating that different variants of the unitary state have developed in Latin America (§ 3), and assert that the unitary state is not a monolith, as: “it could be stated that, while each decentralized State is decentralized in its own way, the unitary States, instead, are all unitary in the same way. This belief – widespread – is now disproved [...]” (Vandelli 2016).

The selection of federal states is less complicated than that of unitary states. From the start, the leading scholarship considered Argentina, Brazil, Mexico, and Venezuela as the four federal countries of Latin America.

As clarified earlier, this does not mean that there have been no other federal experiences in the history of that part of the American continent, but that the territorial organization of these countries has looked to the federal state model from the start and continues to do so, albeit with “centralist intervals” often due to military governments. Nor does it mean that Latin American states are assigned to one class or the other in accordance with self-definitions in their respective Constitutions, since the wording embodies the political-cultural commitments emerging from the constituent assemblies and is at times seemingly conflicting.

Latin American countries provide a good example of this semantic conflict. Many of them define the unitary form of state while providing for forms of decentralization: Bolivia (*a unitary/plurinational communitarian state; unitary/decentralized and with autonomy*: art. 1, Cost. 2009); Ecuador (*an independent/unitary/intercultural, plurinational State, organized in the form of a republic and governed in a decentralized manner*: art. 1, Cost. 2008).

Reference to the federal structure is found in today’s Constitutions and in many of the earlier ones also. The classic denomination of federalism – ‘United States’ – was adopted by Brazil until 1967, by Venezuela until 1953 and by Mexico, the only country that has maintained it to date. The Brazilian constitution of 1967 called the country Brazil only, but the 1969 amendment added the adjective federal, whereas Venezuela was called the Republic of Venezuela without any other adjective, which some authors consider suggestive of a centralized form of government (Alexander 1965).

In the current Constitutions the term federal state is found in the Preamble and in art. 4 of the 1999 constitution of the Bolivarian Republic of Venezuela (*federal and decentralized*), art. 1 of the 1994 constitution of Argentina (*The Argentine Nation adopts the federal republican representative form of government. [...]*), and art. 1 of the constitution of the Federative Republic of Brazil (*formed by the indissoluble union of the states and munic-*

*ipalities and of the Federal District [...]*). The political constitution of the United Mexican States declares that the Mexican nation is one and indivisible, while the federal pact is found subsequently, under point A III.

### 3. CENTRIFUGAL TRENDS IN THE UNITARY STATES

Having completed the processes of decolonization, most Latin American states adopted the unitary form of state, which in its Napoleonic phase is characterized by: the homogeneity and uniformity of the municipal organization; the creation of a municipality for each urban area; the elected local administrations; the division of functions assigned to the territorial institutions, distinguishing between “own” functions and “delegated” state functions; the establishment of the department or of an intermediate level of government to allow control by the state; the establishment in that level of government of a prefect, mayor, governor or representative of the state in the territories.

The essential features of this model have been assimilated by states in different ways, depending on their decolonization processes and the construction of nation-states, and have been transformed, adapted or incorporated into Spanish institutions already present in the American area. This is why the French influence alone cannot explain Latin America’s trend towards centralization: “no doubt the three hundred years of centralist, unitary and hierarchical colonial domination have produced a unique form of territorial organization” (Pavani-Estupiñán Achury 2016).

In any case, the centralist character was undermined by the diversity and heterogeneous geography of America: “in the central Andes, a relatively homogeneous type of territorial organization predominated, reflecting and reinforcing the control that the colonial state had over the population”; in the Caribbean, heterogeneity prevailed both in the forms of territorial regulation and in the question of territorial control (Herrera 1999).

As was the case during the initial implementation of the unitary model (neither peaceful nor uniform), even at this time of transformation of territorial organization, it is difficult to argue that many Latin American states are abandoning the unitary model and shifting towards the model of a regional or even federal state, as defined in the literature, because “the context, the mixing, the hybridization of institutions have in recent decades taken on a fresh dimension that is specific to these territories, their people and their needs” (Pavani-Estupiñán Achury 2016).

An initial attempt to classify Latin American unitary states in the light of current transformations and adopting an approach based on similarities (or differences) with respect to the essential characteristics of the Napoleonic model leads to the following considerations. It can be stated that different variants of unitary states have emerged in Latin America: some with almost no political decentralization (e.g., Uruguay and Paraguay), others with processes somewhere between *déconcentration* and *décentralisation* (e.g., Chile, Colombia, Peru), and yet others more decentralized, with even a certain degree of asymmetric territorial autonomy (e.g., Bolivia and Ecuador).

The constitutional reforms and constituent processes of recent decades have brought novelty and represent a new stage in the development of modern constitutionalism. The reiteration of the unitary model stands out among the novel elements, along with the principles that govern the decentralized states and their expressions of ancestral autonomy, as they are recalled in the Bolivian Constitution: *suma qamaña* (*vivir bien*), *ñandereko* (*vida armoniosa*), *teko kavi* (*vida buena*), *ivi maraei* (*tierra sin mal*) e *qhapaj ñan* (*camino o vida noble*), principles that should inspire the entire territorial organization (Baldin 2019).

The choice of the decentralized form, in line with the political design defined by the constituent assemblies, is particularly evident in the specific cases of Ecuador and Bolivia, in which political decentralization can be understood as a necessary condition for realizing the project of an intercultural and plurinational state (Gargarella-Courtis, 2009; Salazar Ugarte, 2013).

The role of native communities is one of the most important elements of this decentralization process: it is a key feature contrasting with the paradigm of classical sovereignty of Western-liberal origin, based on a concept of pluralism/multiculturalism, of “assimilation” and not integration. The new wave of constitutionalism, with the recognition in constitutional texts of the rights of indigenous peoples (and their territories) and the affirmation of the “intercultural” state, breaks with this paradigm; it also upsets the traditional categories of state organization, defined according to rules of Western-European derivation governing relations between centre and periphery and between state and citizens.

Despite the paradigm shift, particularly evident in some countries, the French-Napoleonic influence is perceived in the centralized organization of power, albeit with some peculiarities. In some cases, the classic elements of the unitary state mentioned above prevail over the new elements and overshadow the centrifugal trends towards decentralization that the constitutional and/or legislative reforms were intended to bring about.

This is the case of the intermediate level of government, which in several countries continues to be identified with the French model of the department (Colombia and Peru do not complete the constitutional project of forming Regions). Even when Regions are established, as in Chile, the rationale is the *déconcentration* of power rather than *décentralisation*, in part a vestige of the periods of dictatorship that strengthened the power of the central government.

A change can be seen in Bolivia, where there has been a shift from viewing departments as executors of central state policies, to considering them bodies possibly able to define their own policies and manage their own territory. Regions, created in opposition (politically) to the departments, appear less autonomous. In the case of Bolivia, the emblematic feature of French-Napoleonic *déconcentration* has been transformed into an entity more like the Regions of European regional states.

The idea of the municipality as the building block of local government is a remnant of the French-Napoleonic system; governed by a directly elected mayor, it has its own powers and powers delegated by the centre, although there has lately been a tendency to promote associative mechanisms between territorial entities (as evidenced by the *Ley Orgánica de Ordenamiento Territorial colombiana* no. 1454 of 2011).

Even though legislative and constitutional reforms have maintained some of the entities typical of the unitary model, the break from the principle of *uniformité* – an expression of the principle of *égalité*, a precept of the French Revolution and already present in the centrist structure implanted in Latin America by the Spanish crown – marks a change. The defining feature of the unitary state theoretical construct falters in nearly all the states examined, especially in Bolivia and Ecuador, where the principle of unity is not equivalent to the idea of homogeneity characterizing unitary states, at least in the initial version, but to the cohesion required to implement the process of state integration based on autonomy.

A territorial organization based more on asymmetry than on uniformity emerges in these countries. It is not, however, the asymmetric character that has characterized regionalism in some European states, used as a tool to recognize the rights of minorities (linguistic communities or nationalities that existed prior to the formation of nation-states). The asymmetry in Andean states is not due to the division of territory to exclude but determined by the participation of the territories assigned to indigenous/ancestral peoples in a single plurinational state (a state in which all these peoples coexist). That is why the aim was not to build a new state with the characteristics of the ethnic

federal form, but rather a state (self-proclaimed unitary) that embraces all ethnic differences (recognized through a decentralized territorial organization).

#### 4. CENTRIPETAL TRENDS IN FEDERAL STATES

The renewal of the concept of federalism in recent years has enabled emergent federal states to develop in different ways with respect to the models in the literature (USA, Switzerland and, in part, Germany), abandoning the aggregative, symmetrical, egalitarian and homogeneous process of formation (i.e. based on the concept of a nation with a liberal imprint that pursues cultural homogeneity) in favour of new federative processes (based on devolution and founded on different historical-cultural and constitutional paradigms) in which asymmetry becomes the rule. In Latin America, these processes affect the states originally adopting the unitary model – as in the case of Ecuador and Bolivia – more than those adopting the federal model from the start.

In the past, these countries have been identified and classified as “emergent” federations rather than “mature” federations, a distinction based primarily on time, institutional features and adaptability to change (Watts, 2008). Along with other emergent federations, the four Latin American states have been considered “fragile,” because they experienced military rule and dictatorships (Steytler-De Visser 2015). In the most recent comparative studies, these countries continue to be contrasted with the “mature” American model (Palermo-Kössler 2017).

These circumstances have produced and continue to produce differences with respect to the United States model. In Latin-American federal states “the political system does not always succeed in configuring federalism as a brake on central power, according to Hamilton’s well-known assertion: both because of the clauses that in fact limit peripheral powers and because of the non-uniform democratic praxis, due to the fact that states of emergency and the concentration of power have in the past been imposed on the democratic parentheses” (Pegoraro-Rinella 2018). “Latin American hyper-presidentialism” with its traditional concentration of power in the federal government and, internally, in the President, as well as the almost total absence of true fiscal federalism, has granted very little autonomy to the territorial entities (Fernández Segado 2002).

All these social, cultural, political and legal circumstances have had an impact on the development of federalism in Latin America, preventing or seriously hindering its consolidation.

This difference may be explained by the different approach to federalism adopted in legislation, doctrine and jurisprudence, the main legal formants (Sacco 1991), i.e., the different sets of rules and propositions that help generate the legal order of a group within the system and that, in this case, appear somewhat “misaligned”.

From the comparative law perspective, the analysis of legal formants suggests that the four Latin American countries are not merely a different way of implementing the US model.

According to the constitutional (normative) formant, “the four countries follow the so-called North American system: everything that is not expressly granted to the federation are powers reserved to the federative entities” (Carpizo 1973). It is the mechanism of dual federalism that has characterized the early federal phase of many states and, in the area under study, of Argentina and Mexico in particular, at least in theory. Despite the clarity of the rule reported in various constitutional texts, in practice the legislative and administrative development of the Latin American federal states has been different.

Right from the start of federal experiences, there has been a trend towards the centralization of power in the hands of the Federation, in particular the federal Executive, far removed from the theory of dual federalism. This has been particularly true in Venezuela, the constitutional design of which weakens the legislative power, preventing it from exercising control over the executive power (articles 156 and 164 of the Constitution).

Except for Venezuela, the Constitutions of the other states define the essential features of the federal state identified in academic writings.

However, legislative development and interpretation of the constitution have moved some states away from these minimum requirements, leading to a misalignment between law in books and law in action, particularly in some areas subject to legislative reform (as in the case of health in Venezuela and of tax co-participation in Argentina and Mexico). This trend towards the centralization of power and this “centralizing culture” have been favoured by the doctrine of the courts. Often the Constitutional Courts charged with settling disputes between the federation and the member states have ruled in favour of the federation, through what has been dubbed “centrist jurisprudence” (and this happens even when the Court is not formally the arbitrator, as in Brazil).

The literature, after studying the historical evolution and the different functioning of the two previous legal formants, has adopted a set of models to describe the evolution of federalism in the Latin American area. It

has used the category of centralized federalism to describe the phenomenon of concentration of power in the Federation. In the case of Venezuela, the terms “authoritarian centralism”, then “democratic centralism” and, lastly, “neofederalism” (López Aranguren 1987) have been used to describe the situation in which member states have only the powers granted by the federal legislature.

As for centralized federalism, it should be noted that this category does not identify the generalized process of “centralization” affecting practically all existing federal systems worldwide. This is not the phenomenon to which scholarship refers when it uses the model of centralized federalism to describe Latin American cases: “on the contrary, it seeks to define a different federalism in which state, provincial or regional and local powers are totally dependent on decisions of national scope adopted by the central power” (Fernández Segado 2002). In addition to the dominant scholarship that shares the view of centralized federalism, some scholars have considered certain features of constitutional and legislative reforms as typical of cooperative federalism, the evolution of federalism in which powers and functions are shared between the two levels of government (federal and state).

In this context, we wish to point out the evocative power of federalism models in the literature and their different application in the (self-defined) Latin American federal states through the analysis of legal formants, highlighting the marked dissociation of constitutional text, legislative evolution validated by the legal interpretation of federal courts and by doctrinal theories.

This methodological approach has revealed that the federal state in Latin America has not only diverged from the US model but also developed differently in the four countries, each of which has followed its own “growth curve”.

Each country has had moments in which federalism developed at a slower pace, particularly during military rule and other times of democratic crisis. Furthermore, in some of the cases examined, it is possible to detect an involution rather than an evolution of the curve (*i.e.*, of federalism, with the extreme case of Venezuela). In terms of verifying the uniformity of growth curves among states, the analysis of legal formants outlined above helps corroborate certain trends, going beyond the specific data (quantity and type of legislative powers distributed between federation and states, etc.) providing useful information for interpreting the curve.

The trend towards centralization seems predominant with respect to the (few) attempts to increase (or fully recognize) the constitutional autonomy of member states and, in some cases, even of municipalities vis-à-vis the Federation.



Although the choice of the federal model is common to all four of the states mentioned, there are differences: Venezuela confirms an involution of the growth curve; Brazil's growth curve is characterized by many "fits and starts" due to the multiple periods of military rule, which halted the implementation of the federal design and affected its development; the curves of Mexico and Argentina would be the most consistent with the federal model and its determinants, but each is characterized by peculiar elements that have strengthened the Federation at the expense of the autonomy of member states (in Mexico the political influence and role of the President, along with numerous constitutional reforms; in Argentina the very limited financial autonomy of the provinces, among other factors).

## 5. DECENTRALIZATION IN LATIN AMERICA AND THE CRISIS OF TRADITIONAL TAXONOMIES

All this leads us to a broader reflection on the categories and the criteria used to define them.

The literature had already reconsidered the initial category of federalism, reasoning in terms of "neofederalism" and "unitary federal States" (Hesse 1962) with reference to Brazil, Argentina, Venezuela and Mexico, and in terms of various forms of decentralization for the other Latin American countries that adopted the initial unitary form of state, even envisaging a form of federalism based on a plurinational criterion (Pegoraro-Rinella, 2018).

As highlighted earlier, it is difficult to assign the various Latin American countries to either the federal state or the unitary state category, because the Latin American area lends itself to a different way of study, depending on the classification criteria adopted. If for some countries the doubts are mitigated by the historical (and constitutional) data and by the fact that many of the minimum requirements indicated in the literature are met (e.g.: Mexico and Argentina, which are closer to the federal state model, whereas Uruguay and Paraguay are very close to the unitary state model), for other countries it is not so simple.

Classic categories also falter in the face of the new Constitutions of Ecuador and Bolivia, which on paper are moving away from the unitary model through a very atypical decentralization process.

It is difficult to place each country in a set category (unitary state/composite state, whether federal or regional), particularly in the case of (initially) unitary states that have established intermediate political-territorial

structures or levels with varying degrees of autonomy. In some cases, these levels of government have proven to be more effective than those represented by the member states of some federal states. In addition, the (initially) federal states all record a general trend towards the centralization of power at both the legislative and the administrative level. The (initial) decentralization of unitary states operated essentially at the administrative level and strengthened the central state at the expense of the territorial entities; in contrast, the decentralization of federal states operated essentially at the political level and allowed for the recognition and autonomy of intermediate territorial entities.

In Latin America both categories have evolved but remained distinct: “the decentralizing trends in the unitary State do not necessarily lead to the development of a federal form. Nor does the centralizing federal State always result in a unitary State.” (Hernández Becerra 1995).

The previously mentioned trend towards centralization in the federal states follows different trajectories from those that characterized the centralism of unitary states, and the centrifugal trends recorded in the unitary states look to forms of autonomy different from those granted to the member states of the federations, focusing on forms of participation that bring citizens ever closer to their territories. The (initially) unitary states have established intermediate political-territorial bodies or levels with more or less marked autonomy (in some cases more effective than that of the member states of some federations).

In Latin America, these phenomena are particularly evident when considering the (lack of) mutual exchange and influence among the various states in the adopted solutions. Ecuador and Bolivia, in regulating their respective decentralization processes, have not looked to (and have not been inspired by) the federal experiences of their neighbouring federal states, but have promoted a new form of state (unitary and decentralized) respecting plurinationalism. These are the reasons why the old, classic bipartite division unitary state/federal cannot apply to the Latin American area, as it does not represent the many peculiarities of contemporary forms of state.

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