Chapter 1
Comparison with (and within) Latin America. A Critical Introduction

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SUMMARY: 1. Comparisons. – 2. Comparing Latin America. – 3. A colonialist legal historiography versus "de-colonial" theories. – 4. The "unitary" comparative categories of Latin America. – 5. Comparisons in Latin America. – 6. Conclusions: Latin America as a family, a form of state and a model.

1. Comparisons

The existence of an element of *comparability* is a pre-condition to making comparisons. Given that, a comparison in a juridical context generally aims to observe similarities and differences between parts of or entire legal systems. This approach, then, can be applied in terms of law as well as in other sciences, such as political science.

Macro-comparisons are normally distinguished from micro-comparisons. Macro-comparisons aim at grouping homologous laws/systems into

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classes distinguished by similarities within groups and differences between them. On the other hand, micro-comparisons have the same aim, but focus on a particular segment of the systems being compared (for example, a particular source of law, a constitutional justice institution, a contract governed by private law, a state body and the like).

When making comparisons, micro-approaches normally evolve out of macro-comparative studies which have already clarified the most determinative elements, which then bind different systems together and allow them to be grouped into the same class. Macro-studies also consider the elements that divide systems in terms of their prevailing structural and functional differences (for example, with respect to ideology, economics, social factors and the like or perceptions of law and its various components). Macro-comparisons result in groupings of legal families or "legal systems" (prevalent among civil law scholars), forms of state (prevalent among public law scholars), or "legal traditions" (used by both). A micro-comparison is usually conditioned by the class to which the compared element belongs or within which it may make more sense (often) to place it.

Before doing a macro-comparison, one must precisely identify – as far as possible – the object to be comparatively studied. Another problem concerns the way to approach a study or choice of method. To consider Latin America as an object of study, it is necessary to consider a) what the term "Latin America" means and b) how we can expand our knowledge of it. The first question involves agreeing on the meaning of the term and stipulating it in a way that it can subsequently be used. The second question concerns how to approach a topic. An approach can be inductive or deductive, historical or strictly juridical. It can also centre on constitutional or civil institutions and the like. Above all, it may be based on a Western view of the law, or, on the contrary, turn things around and (try to) adopt the analytic perspective of indigenous peoples (or at least take their perspective into consideration).

2. Comparing Latin America

Many words imply membership and mask ideologies. We should state upfront that "Latin America" is a word linked to colonisation. As such, it effectively erases what existed before the colonial conquest from the historical lexicon. Like the term "New World", it implies the existence of an older and hitherto unique world, a true and important one, one which dominates the seas and lands as well as language.

However, it is also true that words should be used for what they mean according to current usage. After more than five centuries of colonisation, a term like "Latin America", although worthy of critical consideration, has been consolidated. It is a term everyone, more or less, similarly understands (barring the exceptions noted below). Its meaning is accepted despite the fact that many on the other side of the ocean are aware of alternative native formulations which have been almost erased over time. It is also true that the "Westernisation" of the Latin American continent has become consolidated as well over time. In the wake of the genocide of the region's indigenous peoples, colonial law became standardised and aligned with the conquerors' models. Only in recent decades has there been a palingenesis, or effort to rewrite history, adapting it (at least partly) to dormant indigenous traditions.

Still, there is no single criterion or universally accepted conventional way of defining the term "Latin America". Some authors consider it as that part of the Western Hemisphere that extends to the south of the United States, where the official languages are Spanish, French and Portuguese. Others consider Latin America a cultural and geographic region comprised of eighteen Spanish-speaking countries plus Brazil, or generally that part of the Americas colonised by Spain and Portugal. Many authors see the term "Latin America" as having the same meaning as the term "Iberoamerica". The prefix in the latter refers, of course, to the Iberian Peninsula, an area which includes Spain and Portugal (as well as Andorra and Gibraltar, a part of the UK where English is the official language) (see Lanni in this volume, chapter 2, § 5).

It is useful to ask whether the term "Latin America" is used the same way in a legal context as it is in Geography or whether other sciences offer distinct alternative contributions or options to this end. The extent to which geographic and juridical-cultural delimitations of the region vary are quite evident in some instances. For example, Latin America is sometimes identified as comprised of Central America (except Belize) and part of the Caribbean and South America (except Suriname). This definition overlooks the fact that Mexico geographically belongs to North America, along with Canada and the United States, and that the Caribbean is not only "Latin". In fact, the adjective "Latin" is borrowed from the cultural constructs of disciplines other than strictly Geography (Baldin 2019).

However, the rather large, semantic, sometimes very imprecise container we call "Latin America" at least allows us to differentiate the region from that part of America colonised by the British and the Dutch. However, there are some internal faults. The first and immediately evident one concerns the

distinction between Hispanic America and Lusophone America (Brazil). As just mentioned, the former French colonies are, moreover, commonly not integrated as well.

Some research emphasises the peculiarities of Central America and/or the Caribbean compared to the remaining countries in the "container". However, Lusophone America, part of Central America and the Caribbean presumably still share some common factors with the rest of Latin America. Alternatively, other features seem to suggest sub-partitions do exist. In the case of the Caribbean, in particular, some elements common only to the islands may prevail over other compelling factors, e.g., distinct periods of colonisation and the affirmation of different legal cultures in the countries conquered by England, France, Holland and Spain, respectively.

The terminology we have mentioned so far is that of Western legal (and other) historiography. To this end, definitional problems arise if one takes an "internal" perspective, as is pointed out by those who make indigenous claims and reject colonial connotations and the cancellation of the region's pre-Columbian cultural heritage. These perspectives are summed up in the Kuna expression *Abya Yala*, which means "land in bloom", "land in its full maturity" or "the mature land" as opposed to the term "New World" and "America" as used after the Spanish conquest. The Kuna notion of *Abya Yala* may mainly refer to their ancestral lands, located in present-day Panama and Colombia. However, some think that it also alludes to the entire southern area of the known continent. Clearly, use of the term *Abya Yala* has ideological connotations and implications which presuppose support for indigenous peoples' rights (López Hernández 2004).

3. A colonialist legal historiography versus "de-colonial" theories

Given the region's history of conquest and assimilation, the legal literature has yet to specifically elaborate or clarify a Latin American family, form of state or tradition linked to the laws developed in the region. None of the main proposed classifications of legal families, an area of study that falls under the much vaster topic of civil law, see Latin American as comprising a "family". Civil law scholars have sometimes noted the peculiar elements and original adaptations of the European codified model in the region and have undertaken extensive general classifications to this end (e.g., Losano 2000). Like Lanni (in this volume), some even come to think of Latin America as a "legal system". Other

classifications (Mattei 1997) have found that it is precisely the Latin American subcontinent which provides important explanatory elements regarding the family concept in political law (which combines law and politics).

In turn, constitutional doctrine considers only European history when writing about "constitutional cycles" rather than addressing the colonies as receptors (which existed in Latin America and much elsewhere in the world). A state form that specifically characterises, or has characterised, Latin America is hardly ever mentioned, not even in the context of specific time periods or partial geographic areas (barring the exception we will consider shortly below). Despite claims to the contrary, there has been an overall refusal to consider Latin American pluralism and the *mestizaje* (hybrid) nature of its traditions, which distinguish it from other geographic-cultural-juridical areas. Instead, there has been a preference for measuring its systems or orders in relation to Western values.

Above all, neo-constitutionalism has inflicted a *coup de grace* on any claims of identity and developing non-imperialistic historiographies of Latin America. This tendency imposes itself on most doctrine in Latin America. In turn, this has tended to block any element of originality for the sake of taking an uncritical, anti-historical view of rights and dignity, which are seen as being (unique) globally unifying elements. However, this official view has also been vigorously opposed, especially since the very end of the last century. A "de-colonial" interpretation of Latin America has been nurtured by claims of identity and the recovery of juridical and cultural traditions previously dormant for centuries. These traditions have been reawakened in recent decades at the social and political level and have translated into the development of "*nuevo constitucionalismo*" (new constitutionalism).

As written up by Garay Montañez (2020), for example, this perspective derives from taking a critical view of the power imposed by Western epistemology. It further notes the exclusion of indigenous peoples' philosophies and the views of the region's contemporary multi-ethnic populations, shaped by conquest and colonisation processes. From this perspective, one has to either abandon or, alternatively, integrate a constitutional theory based on categories such as sovereignty, constituent power, state, the individual, equality, freedom, democracy and constitutions. However, these concepts also all derive from European experiences marked by "an anthropocentrism based on an exclusionary protagonist: the European man or male, who is Christian, adult, white, heterosexual, educated and property-owing". His "humanity" is based on dominating and undervaluing others as well as expelling them from the social contract. This protag-

onist, as Garay Montañez further states, becomes consolidated in the colonial context with the elaboration of a constitutional theory based on the colonial settler. The settler, in turn, perceives himself as a superior human being and the owner of political, economic and epistemic power. He is the author and subject of this kind of constitutional theory.

"De-colonial" thought has generated critical debate aimed at (re)founding a type of constitutionalism which is properly Latin American and, above all, may integrate indigenous values. At the same time, it does not deny Western contributions which have proved capable of humanising modern society.

On this basis, both Latin American and European doctrines have become reflections and revisions of classic Eurocentric schemes. Interest has centred on seeing systems in dialogue with each other and which introduce, or at least try to introduce, a synthesis between Western and indigenous law by constitutional, legislative and/or jurisprudential means. The methodological obstacles posed by a rigorous legal method based on European law have been thus overcome. Even among comparative constitutional scholars, there is increased interest in how this synthesis of Western and indigenous law is shaping some specific systems which then turn it into new constitutions, constitutional revisions, legislation and jurisprudence. The comparative potential of interculturalism in overcoming multiculturalism is noteworthy. Indeed, new state forms are being identified as emerging from such experiences (for example, the Caring state discussed by Bagni in chapter 3 of this volume).

4. The "unitary" comparative categories of Latin America

Studying Latin America as a unitary object within legal-comparative research implies that something compelling and important binds the region's different systems together – above and beyond its common geographic setting. These are what Constantinesco (1996) would call determining elements.

Geography does contribute to having shared institutions, sources, rights and the like. These elements are all relevant when identifying the nature of legal systems and circulate more easily among geographically connected regions. However, this is not always a given. Should one study Israel along with Syria, Jordan or Iraq solely because they are in the same geographic region? Or should one consider Australia and New Zealand in legal studies focusing on the East because they are not part of the European continent and far from United States? Furthermore, research on America south of the US

traditionally leaves out Belize and Suriname since their respective political links to the UK and Holland have prevailed over their geographic location.

If you want to look for unifying or exclusive elements (presuming they exist at all), and estimate the important ones for distinguishing systems, it may be better to rely on traditions, culture(s), legal mentality, history, ideas about power and its legitimation and the like, as well as the way these factors translate into positive law institutions. Identifying such elements may serve two purposes. It can be used to a) deny a unitary class exists, or instead b) make micro-comparisons on differences within a unitary class.

The traditional narrative on Latin American law, barring the "de-colonial" contributions mentioned above, presents us with a varied picture. At the same time, it is also marked by some constants.

In terms of private law, codification has evolved from a single strain, with common characteristics emerging throughout the region. However, these common sources have been critically received and not simply duplicated in the region, often resulting in differences from state to state (especially between Brazil and Haiti and other countries). The region's peculiarities in terms of public law and constitutional doctrine have been marked by both the legacies of the constitution of Cádiz and Bolivarianism, with their particular ideas about political representation, and the widespread adoption of presidential forms of government. More recently, there have also been more or less marked movements towards parliamentarism. The same can be seen in the system of constitutional guarantees, with special reference to the ideas of *amparo*, *mandado de segurança* (writ of *mandamus*), popular action and other similar institutions. More in general, and from an historical point of view, the same approach concerns *caudillismo* (the excessive personalisation of leadership), the personalisation of politics, populism and the role of parties.

Factors common to public and private law include considering how sources are perceived and their relationship to political categories. Such factors may suggest placing Latin America within a macro-system framework in transition from "the rule of political law" to "the rule of professional law". Concurrently, other common factors to be accounted for include: the role of judges and the justice system, especially in terms of constitutional justice; marginalisation; the more recent partial recognition of customary and indigenous law (the return of the "rule of traditional law"); doctrine and its relationship with dynamic formants; and the harmonisation of law, with particular reference to the role of the Inter-American Court of Human Rights.

Beyond the law in a strict sense, Latin America presents an economic – as well as political – system that has been largely levelled by the Washington

consensus (apart from the case of Cuba) while there has been some limited emancipation in recent decades (e.g., the case of Venezuela). Still, all this does not tell us anything about Latin America as a family or form of state of itself or as distinct from a more comprehensive category. Depending upon the perspective, Latin America, like many other orders and systems, can be seen as belonging to the Western tradition and the families of civil or political law. As a form of state, no one currently doubts that Latin American countries belong to the category of liberal democracies (this was not so in the past when emergency powers were constantly and almost ubiquitously used on the continent).

Bernd Marquardt (2016) denies that Latin American is unique with regard to some of the elements mentioned above. For example, *caudillismo* may be found in Europe and other regions as well as in Latin America. Above all, he rejects the idea that Latin America represents something "less" than Europe or a mere (and bad) receiver of institutions forged on the old continent. He discounts this as a view stemming from the influence and preconceptions of European and North American doctrine. Moreover, he notes one can identify some characteristics in Latin America that might serve to further underline the "crypto-typical" elements commonly found there. With regard to the doctrinal formant, he particularly remarks that "in terms of social psychology, there is relatively low self-esteem, which could be called *victimhood*...".

Indeed, legal doctrine in the region shows a strong propensity to borrow from Europe and the United States, often uncritically imitating their schemes. This has meant renouncing any emphasis on the continent's important, original, historical peculiarities forged over time (for example, in terms of representation theories, social rights, the concept of *amparo* and the like). Given the region's immense culture, it is entirely capable of highlighting such aspects (and should continue to do so given the propositions of *nuevo constitucionalismo*). Doing this would have repercussions on the jurisprudential formant (and in part on the legislative one). These have rested on ideas and solutions imported from European courts (and from European and US doctrine), without bothering too much about the different contexts of insertion. The colonial soul has thus continued to survive over the centuries.

Certainly, however, "low self-esteem" cannot be a sufficient criterion to designate a class while, as a juridical-cultural category, Latin America is worthy of separate analysis. One factor to be possibly considered is the region's *mestizaje* nature, or the pluralism of its cultures, peoples, languages, different and distinct colonial influences, developments and even ethnicities. Bolivia

has put plurinationality at the centre of its constitution and it is precisely this idea which could represent the true *Grundnorm* (basic law) for the whole of Latin America. It might take the place of the notions of individual freedom, human rights and human dignity, which are capable of representing only a Western, European, colonial or post-colonial component.

It is true that other regions of the world, such as India or Southern Africa, also express similar *Grundnormen*. However, what makes Latin America different (apart from many other things) is its centuries-old mixture of distinct elements (which have continued up to the present despite the overwhelming predominance of Western-related culture). The region has had a history marked by expressing its own political and cultural strains and, fundamentally and above all, a "physical" mixture of diverse elements not found in the aforementioned parts of the world.

On a more strictly juridical level, and despite the exceptions routinely noted in the social sciences, Latin American law has its own characteristics. Of course, the Western archetype remains strongly at its base in terms of codified law, servile imitations of US public law and an adherence to the law of rights and globalisation. Yet, the region's diverse soul and sensitivity to pluralism has also managed to introduce adaptive and novel elements. These may not always occur simultaneously, but they do entail common structures and functions. In short, Latin America can be safely analysed as an entire class, or at least as a sub-class, of a legal family and, perhaps much more cautiously, a form of state.

5. Comparisons within Latin America

In the context of a "*tertium comparationis*" represented by a juridical-cultural area, useful comparison can be made only if a researcher already has a primordial knowledge of the system as a whole. They must also be aware of the differences and particularities which exist and characterise each order or institution in order to be able to choose what to diachronically and synchronically compare. As Alessandro Somma (2019) writes, "You finally end up almost naturally finding points of divergence, rather than reasons for convergence, when you combine studying a legal system with evaluating its place in time and space".

Each system in Latin America presents its own peculiarities, whether it is in terms of decentralisation, forms of government, constitutional justice, sources of law, state organisation, constitutional revision, transitional justice

or constitutional guarantees (especially individual constitutional complaint, a pillar of Latin American constitutionalism). This is the case despite the widespread imitation of European and US legal models which are perhaps only partly adaptable to the Latin American situation.

For example, in the area of federalism, the US system has been imitated in terms of the division of competencies, ways of resolving conflicts between centre and the periphery, the supremacy clause and even federal district autonomy (on which Mexico back-tracked a few years ago). However, regional factors, rather than normative differences relative to the ideal model, have prevented achieving results equal to the US. These regional factors include a series of pre- or meta-legal features linked to institutional culture, economic inequalities, forms for organising power which significantly deviate from the US model and the unifying role of political parties, which up until now have shown little turnover. However, this does not preclude studying the differences between Mexico, Argentina and Brazil, not to mention Venezuela, which has gradually abandoned a federal state type, retaining it in name only. There are also differences which are felt, for example, in terms of periphery dynamics, the role of municipalities (which is emphasised in Brazil), the presence or absence of indigenous communities and territories and so-called fiscal federalism and the like (see Pavani and D'Andrea in this volume, chapters 4 and 5).

Forms of government in the region are generally classified as presidential, with the sole exception of countries not affected by Iberian colonisation. But, even in this case, the imported US model has been correctively adjusted over a long initial phase in order to bolster executive power. More recently, elements of "parliamentarisation" have been introduced. In this context, the study of forms of government makes it possible to highlight the differences between various legal systems and outline some resulting sub-classifications. There have been sporadic departures from a presidential model (e.g., Uruguay has had a directorial model during some historical periods). In some instances, the "Government", as an institutional body, has been established as distinctly independent from the President. No-confidence issues linked to individual ministers or leaders and the strengthening of parliamentary versus presidentially controlled institutions have also arisen (e.g., as evident in the establishing of double mandates, legislation by decree or the use of emergency measures and the like as discussed by Mostacci and Duranti in this volume, chapters 6 and 7).

Another element regarding the distinct development of the region's peculiar model concerns constitutional justice. Here, similarities and differences can once again be appreciated both statically and dynamically. Their origins, in

terms of constitutional justice, are marked mainly by the widespread importing of systems from the US within which judges can prevent unconstitutional laws. More recently, and following a worldwide trend, there has been a move towards concentrating constitutional justice, even though profound differences between legal orders still exist (see Baldin and Buono, and Ciammariconi in this volume, chapters 8 and 9). There are further examples which might also be added in terms of the institutions noted above.

6. Conclusions: Latin America as a family, a form of state and a model

We have said so far that Latin America, although endowed with its own characteristics compared to other legal systems, is generally not considered a legal family in its own right. Only recently has the hypothesis been put forward that the region as a whole has reflected a "form of anti-communist state" during the post-WWII period. Since the new millennium, some Latin American countries have also reflected the form of a "Caring state" (in common with other regions of the world) (see, for example, Bagni in this volume, chapter 3, especially § 4 and 6). Is it therefore possible to think about a shared notion of the "Latin American model"? The term "model", as commonly used, evokes the idea of classifying and synthesising complexity using logical categories. In other words, it is a term that is ostensibly and closely linked to methodological research problems, including those which exist within comparative legal research. The use of the term "model" is to be understood in the sense of it being a synthetic representation of political-constitutional realities and phenomena. Additionally, a model is seen as a kind of "exemplary form" worthy of imitation.

Tusseau (2009) writes that, "[t]he use of models based on a constitutional justice example allows, on one hand, establishing coherence within each national legal system of constitutional justice. On the other, it also allows ordering different comparative elements in a rational way in order to facilitate the use of data. Rather than having to consider a set of concrete characteristics for each system (e.g., Spanish, Italian or Czech constitutional justice, etc.), it makes it possible to focus rather on the ideas implied by the models (e.g., the European model of constitutional justice). From this perspective, building models involves using simplifications for educational purposes that are linked to the various characteristics of the examined subjects. In doing

this, care should be taken not to underplay or exaggerate these characteristics, which would make the models unable to account for real configurations of positive law."

Tusseau continues on stating that, "Two major ways of conceiving models exist. In the first, models are induced based upon the empirical data they emulate. Alternatively, the second approach asserts that empirical data should not be considered on themselves, but in so far as they let us build preliminary models that bring order to the undifferentiated flow of phenomena. The closeness of a model's constituent elements has nothing automatic or natural about it. Rather, it is all elaborated by the author. Given the same finite set of legal institutions, there is an infinite number of ways to describe them in an equally exact way. This may result in models that vary greatly in their power or are even antagonistic." There are then, positive models – those that are normally referred to because they are considered worthy of importing – but also negative models, such as those offered by the Third *Reich* in Germany.

"Negative" factors, as identified by Marquardt (2016), seem to prevail overall in Latin America alongside others of a particularly cultural nature, and together these may hinder any affirmation of a global model. However, this does not preclude noting the important contributions the region has made to specific sectors of civil and constitutional law and the partial leadership it has offered with respect to different institutions. We only need to think of social rights, which were constitutionalised for the first time in the Mexican constitution of 1917. There are also the concepts of *amparo*, *habeas data* and, at the doctrinal level, the development of the science of *Derecho Procesal Constitucional* (Constitutional Procedural Law). The latter has been encouraged by the research of the great master, Héctor Fix-Zamudio (1993, 2002) in Mexico, and more recently by his disciples and many other scholars on the continent. Today, it is above all necessary to remember the constitutionalism of *buen vivir*. This notion has outlined important paths for harmonising Western values with those of other cultures that are being taken into consideration on the old continent (and North America) today, pushed by hunger and war.

Latin America has been considered for centuries as an example of economic and cultural homogenisation driven by the United States and Europe. Indeed, the region has been studied as such by constitutionalists and philosophers, believing their living room was the whole world. At the same time, Latin America has, on one hand, long been experimenting with original solutions while rediscovering and protecting its ancient roots. On the other, it has produced legal structures sometimes inconsistently aligned

with classic liberal-democratic models linked to conformist doctrines and inattentive to diversity. Because of this, Latin America may represent a model that encourages comparative legal scholars to pay close attention to their underlying theoretical assumptions. At the same time, the region also offers useful elements for considering the exportability of its constitutionalism to Western Europe and the North.

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