

## CONSTITUTIONAL FEDERALISM IN LATIN AMERICA

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### INTRODUCTION

Four Latin American countries have adopted federal state structures. The current constitutions of Venezuela, México, Brazil, and Argentina have organized their respective polities as federal states.<sup>1</sup> However, theoretical debate on federalism has problemized the “federal” nature of States in which constitutionalism, and the rule of law, have not developed strong roots.<sup>2</sup> For example, is the mere use of the term “federal” in the constitutions of Venezuela, México, Brazil, and Argentina enough to make these countries “true” federations? Or does federalism depend on specific qualities and characteristics that must be present in order to qualify these countries as “federal” States?

The historical experience of Latin America proves that constitutional labels can misguide our senses. Constitutions might expressly define themselves as “democratic” or protectors of the “rule of law,” but these labels may be obscuring the real existence of authoritarian governments, as well as situations of uncontrolled instances of political power.

Whether Venezuela, México, Brazil, and Argentina qualify as “federal” States or not, depends on how federalism is defined. Yet, anyone who has studied federalism will recognize that there is not a single and undisputed definition of this concept.<sup>3</sup> This article will not tackle the task of creating a new definition for federalism.<sup>4</sup> Rather, central elements which are essential

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1. Each of these countries utilizes the term “federal” to describe the type of state organization each has established. See CONST. VENEZ. art. 1 (1961); CONST. ARG. art. 1; C.F. art. 1 (Braz. Constitution); CONST. VENEZ. art. 4 (1999); CONST. MEX. art. 40.

2. See, e.g., FEDERALISM AND FEDERATION IN WESTERN EUROPE (Michael Burgess ed. 1986) (discussion on the relationship between constitutional government and the federal system).

3. For a thorough discussion concerning the difficulties in defining “federalism” and “federation” see PRESTON KING, FEDERALISM AND FEDERATION (1982).

4. One can find many definitions of “federalism” in literature. For example, K. C. Wheare defines federalism as a system of government in which the federal and regional gov-

characteristics present explicitly or implicitly in most definitions of federalism will be considered, and employed as a basis of a comparative study. The aim of this comparative study will be to identify common grounds and trends, as well as contrasts in the federal systems of Latin America.

The formal approach referred to above (which is the one that will be followed in this article) is only part of the discussion that will follow on federalism in Latin America. In addition, the issue of whether a country's constitution is respected and complied with is clearly relevant in the analysis of this subject matter. Nevertheless, this article will not discuss whether Venezuela, México, Brazil, and Argentina comply with their constitutions (including the constitutional federal arrangement). Suffice it to say that each of these four countries have complex systems of constitutional justice, with different kinds of remedies and procedures to protect constitutional norms, in spite of which some specialists insist that constitutionalism in Latin America has failed.<sup>5</sup>

If Venezuela, México, Brazil, and Argentina do not comply with their constitutions, then federalism is non-existent, and as such, this article should not be written. On the contrary, it would be a lie to unequivocally state that each of these countries always complies with their constitutions and that their mechanisms to protect constitutional norms are absolutely efficacious.

Yet if constitutionalism is considered as existing on a spectrum that admits diverse degrees of compliance with a constitution, or different degrees of constitutional efficacy, Venezuela, México, Brazil, and Argentina could still be considered "federal" states. A point must also exist on this spectrum which would determine when a government should not be considered a constitutional government.<sup>6</sup> As such, tying the notion of federalism to that of a constitutional government, there must also be a point on the spectrum that does not make a polity a federation. But above all, it is important to note that different versions of constitutional government and federalism can exist.

Putting these important theoretical considerations aside, this article will formally discuss, analyze, and review the formal allocation of legislative powers in general, and the allocation of tax powers in particular, as they

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ements are both coordinate and independent. *See generally* K.C. WHEARE, *FEDERAL GOVERNMENT* (4th ed. 1963). Preston King defines a federation "as an institutional arrangement, taking the form of a sovereign state, and distinguished from other such states solely by the fact that its central government incorporates regional units into its decision procedure on some constitutionally entrenched basis." KING, *supra* note 3, at 77. More recently and applied to the discussion about federalism in Latin America, Keith Rossen defined federalism as "a form of government in which sovereign powers are constitutionally divided between a central government and geographically defined, semi-autonomous levels of government." Keith Rossen, *Federalism in the Americas in Comparative Perspective*, 26 *INTERAM. L. REV.* 1, 5 (1994).

5. *See, eg.*, Keith Rossen, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 *INTERAMER. L. REV.* (1990).

6. I am aware of the theoretical difficulty of finding the position of such a "point" on a spectrum. This kind of approach would force an answer to the question of how much inefficiency is necessary in order to be able to state that a constitutional government is non-existent.

have been established in the constitutions of Venezuela, México, Brazil, and Argentina. Finally, in order to make a global evaluation on the experience of federalism in Latin America, this article will identify the differences and common characteristics that are present in each country mentioned.

## I. VENEZUELA

### A. *The Allocation of Legislative Powers*

Under the Constitution of 1961 (1961 Constitution), Venezuela's division of legislative powers rested on articles 17 and 18. Article 17 defined a series of explicit powers given to the states, and established a residual clause in favor of the states that defined their area of power as being formed by "[w]hatever is not in conformity with the Constitution, within national or municipal power."<sup>8</sup> Article 18 established specific prohibitions for the states, particularly with regards to the creation of a domestic market free of barriers. For example, states could not create customhouses, taxes on imports, taxes on exports, or transit taxes on foreign or domestic goods.<sup>9</sup> Additionally, states could not tax consumer goods before they entered into circulation within their territory, nor could they prohibit the consumption of goods produced outside their territory. States were also not permitted to levy taxes on livestock or on their products or by-products.<sup>10</sup> In sum, the constitutional formula for the allocation of powers was based in principle on: 1) a small list of explicit powers to the states; 2) a residual clause that gave each state jurisdiction of all remaining powers that the constitution did not make national or municipal; and 3) a prohibitions-to-the-states clause.

The new Constitution of Venezuela, adopted in 1999 (1999 Constitution),<sup>11</sup> follows in general terms the same method for the allocation of legislative powers described above, including 1) a small list of explicit and exclusive powers to the states;<sup>12</sup> and 2) a residual clause that gives states jurisdiction over powers that the constitution does not make national or municipal.<sup>13</sup> However, unlike the 1961 Constitution, a prohibitions-to-the-states clause does not exist. As such, the question now remains under the 1999 Constitution, whether the states may exercise the power that under the 1961 Constitution they could not.

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7. This law review article was written before the adoption of the 1999 Constitution of Venezuela. To the extent possible, observations concerning Venezuela's new Constitution relating to federalism have been included.

8. CONST. VENEZ. art. 17 (1961).

9. *See id.* art 18.

10. *See id.*

11. Venezuela adopted a new constitution on December 15, 1999. *See* CONST. VENEZ. (1999).

12. *See id.* art. 164.

13. *See id.* art. 164.11

In spite of the absence of a prohibitions-to-the-states clause in the 1999 Constitution, states may not exercise the powers that were prohibited by article 18 of the 1961 Constitution. Article 18 of the 1961 Constitution prohibited the states from creating a series of taxes, including customs taxes, import taxes, export taxes, transit taxes on foreign or domestic goods, taxes on consumer goods, and taxes on livestock.<sup>14</sup> On the other hand, article 156.12 of the 1999 Constitution reserves to the federal government all the taxes, excises and revenues not attributed to the states or municipalities by the constitution and other enactments. Therefore, since the taxes formerly listed on article 18 of the 1961 Constitution have not been attributed to the states (nor to the municipalities), they are reserved to the federal government and the states cannot create them.<sup>15</sup>

The scope of the power of both the state and municipal governments under the old and new constitutions is defined by the powers assigned to the state and municipal levels of government. The scope of the powers of both the state and municipal governments is rather limited, this because article 136 of the 1961 Constitution and article 156 of the 1999 Constitution make an exhaustive allocation of power in favor of the federal government, leaving little, if any room for the other two levels of government.

The municipal government powers in Venezuela were defined by article 30 of the 1961 Constitution:

[i]t is within the municipal sphere of power, the government and administration of the interests peculiar to the municipality itself, particularly in relation to its property and revenues and to the matters of concern to local life, such as urban development, supplies, traffic, culture, health, social welfare, popular credit institutions, tourism and municipal police.<sup>16</sup>

For its part, article 178 of the 1999 Constitution has extended to some degree the amount of matters that fall within the powers of the municipalities.<sup>17</sup> Nevertheless, the bulk of the legislative powers in Venezuela still remain in the hands of the federal government.

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14. See CONST. VENEZ. art. 18 (1961).

15. A doubt would arise concerning the only item foreseen in article 18 of the 1961 Constitution which does not refer to a tax. According to article 18, the states were not allowed to "prohibit the consumption of goods produced outside their territory." *Id.*

16. *Id.* art. 30.

17. Including urban zoning, parks, gardens, public squares, and public shows. This in addition to commercial advertising and publicity in the municipality, protection of the environment, potable water, electricity, the use and disposition of waste waters, cemeteries, and justice of peace. And, social services including the protection of children, adolescents, and the elderly. See CONST. VENEZ. art. 178 (1999). In this context, "justice of the peace" refers to the lower level courts of the Venezuelan system of courts. These courts have jurisdiction over small claims, both criminal and civil. Traditionally, in Venezuela, the jurisdictional function has been performed by federal courts only. However, the 1999 Constitution defines "justice of the peace" as one that falls within the sphere of powers of the municipalities. See *id.* art. 178.7.

The extent to which article 136 of the 1961 Constitution centralized power in favor of the federation, can be better understood by comparing it to the system of allocation of powers which exists in the United States. Apart from the powers that the United States allocates to its federal system (preservation of peace, monetary system, circulation of foreign currencies, and organization of the military),<sup>18</sup> the powers that article 136.24 of the 1961 Constitution permitted to be regulated by federal law included legislation regulating guarantees conferred by the Constitution, an civil, commercial, criminal, penitentiary and procedural legislation.<sup>19</sup> This in addition to legislation on elections, expropriation by reason of public or social utility, and labor.<sup>20</sup>

Article 156 of the 1999 Constitution also adds a series of new matters that fall under the exclusive sphere of the federal government's legislative power, such as legislation on "private international law" (conflict of laws), on indigenous peoples and their territories, on the organization and functions of the organs of the "National Public Power," and other national institutions of the state. It must be pointed out that contrary to the formulation of article 136 of the 1961 Constitution, the power to pass legislation on tourism no longer appears in the 1999 Constitution.<sup>21</sup>

Moreover, article 136.23 of the 1961 Constitution defined federal powers as those related to "the administration of justice and the creation, organization and powers of the courts, and the Public Ministry."<sup>22</sup> Similarly, article 156.31 of the 1999 Constitution reserves to the federation the power to legislate on everything related to the organization and administration of national justice and to the Public Ministry. In practical terms, this means that in Venezuela there are no "state courts" nor "state (local) prosecutors," leaving only federal ones.<sup>23</sup>

As if the latter was not enough, article 136.25 of the 1961 Constitution established an open clause that allowed for the absorption of almost any matter under federal authority. According to this clause, "[a]ny other matter which the present Constitution assigns to the National Power or which pertains to it by its nature or kind" was within the power of the National Power.<sup>24</sup> This clause remains in the 1999 Constitution in the same terms.<sup>25</sup> The *Exposición de Motivos* of the 1961 Constitution identified this formulation as the implicit powers clause.<sup>26</sup> Notably, differences exist when compar-

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18. See U.S. CONST. art. I § 8.

19. See CONST. VENEZ. art. 136.24

20. See *id.*

21. See *id.* art. 136; CONST. VENEZ. art. 156 (1999).

22. CONST. VENEZ. art. 136.23 (1961).

23. See CONST. VENEZ. art. 156.31 (1999).

24. CONST. VENEZ. art. 136.25 (1961).

25. See CONST. VENEZ. art. 156 (1999).

26. See Carlos Ayala Corao, *Naturaleza y Alcance de la Descentralización Estatal, in LEYES PARA LA DESCENTRALIZACIÓN POLITICA DE LA FEDERACIÓN 94* (1990).

ing Venezuela's implicit powers clause with that of the United States and Mexican Constitutions.

Both the United States and Mexican Constitutions define implicit powers in a similar, yet not identical manner. The Constitution of the United States indicates that Congress has the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."<sup>27</sup> On the other hand, the Mexican Constitution states that Congress has the power to pass all the statutes that are necessary for making effective its own explicit powers and the explicit powers of the other branches of government of the Union.<sup>28</sup> In both the United States and Mexican Constitutions, implicit powers are a function of explicit ones. Implicit powers can only be "discovered" by reference to explicit powers.

The Venezuelan Constitution does not link implicit powers with explicit ones. Rather, implicit powers are a function of the nature and kind of implicit powers in question. The determination on whether a matter pertains by its nature or kind to the National Power, corresponds solely to the Venezuelan National Congress.<sup>29</sup> This element further supports the argument that Venezuela does not have a federal system.

The 1961 Constitution allowed the existence of concurrent powers between the federation and the states. Yet, the actual centralization of power by the federal government made concurrent powers irrelevant. As a matter of fact, it was not until the late 1980s when a process of decentralization gained momentum, that the notion of concurrent powers was revived and reinvigorated. The way in which this process took place can only be understood by analyzing the "decentralization clause" established in article 137 of the 1961 Constitution.<sup>30</sup>

Article 137 of the 1961 Constitution states that "Congress, by a vote of two thirds of the members of each Chamber, may assign to the states or municipalities particular matters within the national power, in order to promote administrative decentralization."<sup>31</sup> The process of decentralization envi-

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27. U.S. CONST. art. VIII.

28. See CONST. MEX. art. 73.

29. See Allan Brewer-Carias, *Bases Legislativas para la Descentralización Política de la Federación Centralizada*, in LEYES PARA LA DESCENTRALIZACIÓN POLÍTICA DE LA FEDERACIÓN 17 (1990).

30. See CONST. VENEZ. art. 137 (1961).

31. *Id.* It is important to note that the terms of the "decentralization clause" also imply that Congress alone can modify the constitutional allocation of powers, disregarding the procedure for amending the constitution established in title X, which allows the participation of Legislative Assemblies of the states. See *id.* This of course, is another element to take into consideration in the debate about the federal nature of the Venezuelan state. The "decentralization clause" is also foreseen by article 157 of the 1999 Constitution. See CONST. VENEZ. art. 157 (1999). The transfer of powers may occur with a majority vote of the members of the National Assembly, and not by a vote of two thirds of the members of each house of Congress, as it was required under the 1961 Constitution. See *id.*

sioned by the 1961 Constitution started to take shape in the late 1980s. In this context, a group of jurists commissioned to prepare studies in support of decentralization considered the possibility of identifying a list of powers that were allocated not to the federal government nor to the local or municipal levels of government, but in general to “the State,” that is to the Venezuelan State as a whole. In this way, every power allocated by the Constitution to the State could be considered a power that was concurrently shared by the federal, the state, and municipal governments.<sup>32</sup>

Examples of this allocation of powers to the “state” can be found in articles 72, 73, and 77 of the 1961 Constitution.

The State shall protect associations, corporate bodies, societies and communities that have as their purpose the better fulfillment of the aims of human beings . . . . The State shall protect the family as the fundamental nucleus of society . . . . The State shall strive to improve the living conditions of the rural population.<sup>33</sup>

The studies of these jurists were the basis for the later drafting of the Organic Law for Decentralization, Delimitation and Transfer of Powers of the Public Power (Law for Decentralization) which was approved by the Venezuelan Congress on December 20, 1989, and entered into force on January 1, 1990.<sup>34</sup> The Law for Decentralization did not only transfer a series of powers of the federal government to the states, but it also identified the concurrent powers provided for under the 1961 Constitution.<sup>35</sup> Additionally, the Law for Decentralization predicted the “progressive transfer” of the listed powers from the federation to the states.

In other words, during the many years in which centralization has been rampant, most concurrent powers had been “occupied” by the federal government. As the moment of decentralization arrived, the Law for Decentralization “uncovered” concurrent powers that until then had remained “dormant” (as it were), and established the mechanism for their progressive transfer to the states, through “[a]greements for the transfer of services.”<sup>36</sup> However, in practice, the transfer was rather slow, due in part to the fact that the states did not have either the administrative or financial capacity to assume new responsibilities.

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32. See Brewer-Carias, *supra* note 29, at 21.

33. CONST. VENEZ. arts. 72, 73, 77 (1961).

34. See *Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público* (1989) [hereinafter *Ley Orgánica*].

35. See *id.* art. 4. Article 4 of the Law for Decentralization refined the list of concurrent powers that had been identified by the pioneering group of jurists mentioned above, and ended up with a list that includes powers in areas such as planning, protection of the family and of minors, the improvement of living conditions for rural populations, the protection of indigenous communities, education, culture, sports, training of workers, agricultural, industrial, and commercial promotion. See *id.*

36. *Id.* art. 6.

For its part, the 1999 Constitution refers explicitly to “concurrent powers” in article 165, in the following terms: “[t]he matters that are the object of concurrent powers shall be regulated by acts of bases [*leyes de bases*] passed by the National Power, and by development-acts of the States. This legislation shall be oriented by the principles of interdependence, coordination, cooperation, responsibility and subsidiarity.”<sup>37</sup> At the moment, it is difficult to surmise the exact meaning of this article, except for the general idea that the 1999 Constitution allows the existence of concurrent powers. Moreover, although article 165 states that concurrent powers in Venezuela exist, they are supposed to function according to the basic criteria established by the federal legislative power, through the so-called *leyes de bases*. Therefore, this is an additional element that strengthens the position of the central government within Venezuela’s federal system.

### B. *The Constitutional Allocation of Tax Power*

Under the 1961 Constitution, the basic principle for the allocation of tax powers was derived from an application of the residual clause of article 17.7, which gave the states the power to establish those taxes the Constitution did not assign to the national or municipal spheres of power.<sup>38</sup> However, the final part of article 136.8 of the 1999 Constitution established a residual clause in favor of the federation in the area of taxation, which states that the national government has the power to create “[a]ll other taxes, excises, and revenues not attributed to the States or municipalities which the law may create with a national character.”<sup>39</sup>

In addition, the scope of the tax power of the states was limited by article 18 of the 1961 Constitution, which established a series of taxes that the states could not create including import and export taxes, and taxes on live-stock.<sup>40</sup> Moreover, articles 31 and 34 defined, respectively, the few taxes that corresponded to the municipalities including taxes on urban real property,<sup>41</sup> and the limitations to the tax power of municipalities.

This formulation meant that the cornerstone of the whole tax system was with the scope of taxes allocated to the federal government, which leads directly to the consideration of article 136.8 of the 1961 Constitution.<sup>42</sup> Arti-

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37. CONST. VENEZ. art. 165 (1999).

38. See CONST. VENEZ. art. 17.7 (1961).

39. CONST. VENEZ. art. 136.8 (1999).

40. See CONST. VENEZ. art. 18 (1961).

41. See *id.* arts. 31, 34. It must be noted that although article 31.6 of the 1961 Constitution stated that municipalities could create “[a]ny other special taxes, excises and contributions that they impose according to the law,” meant that the federal government could transfer to the municipalities the power to impose certain taxes. *Id.* art. 31.6; see Romero-Muci, Humberto, *Aspectos Tributarios en la Ley Orgánica de Descentralización, Delimitación y Transferencia de Competencias del Poder Público*, in LEYES PARA LA DESCENTRALIZACIÓN POLITICA DE LA FEDERACIÓN 217-19 (1990).

42. See CONST. VENEZ. art. 136.8 (1961).



cle 136.8 gave the federal government broad powers to establish different kinds of taxes including taxes on income, estates and gifts, imports, fiscal stamps, and on the production and consumption of goods. Additionally, article 136.8 admitted that the law could reserve in whole or in part with the federal government taxes on alcohol, liquors, cigarettes, matches and salt works.<sup>43</sup> Furthermore, the federal government retained power to tax mines and hydrocarbons, and “[a]ll other taxes, excises and revenues not allocated to the States or municipalities which the law may create with a national character.”<sup>44</sup>

It is important to note that the predominant legal doctrine in Venezuela has accepted a systematic interpretation of the residual clause which allows the recognition of the original powers of taxation to the states.<sup>45</sup> That is to say, originally the states were perceived as being competent to create taxes on consumption, because the law did not reserve in whole, or in part, this power to the national power. However, in spite of this interpretation, these residual powers of taxation of the states remained largely unexercised.

The Law for Decentralization transferred to the states three areas of taxation: 1) fiscal stamps; 2) taxes on the exploitation of non-metallic and non-precious minerals, salt works, and oyster pearl beds; and 3) taxes on consumption not allocated to the National Power.<sup>46</sup>

The 1999 Constitution repeats in very similar terms the formula for the allocation of tax powers of the 1961 Constitution. Article 156.12 of the 1999 Constitution lists the taxes that fall under federal jurisdiction: income tax, estates and gifts, capital, production value added tax, hydrocarbons and mines, import and export of goods and services, consumption of liquors, alcohol, cigarettes and other products of tobacco.<sup>47</sup> After comparing the 1961 Constitution with the 1999 Constitution, taxes that have been transferred to the states can be identified, including taxes for registration and fiscal stamps, production, and the value added tax. Notwithstanding this transfer, the 1999 Constitution repeats the residual clause in favor of the federation in the area of taxation.<sup>48</sup>

Finally, to complete the discussion on Venezuela’s “fiscal constitution,” the *Situado Constitucional* will be addressed.<sup>49</sup> This concept encompasses a formula for the distribution of certain amounts of federal public revenues to the states, that was established since the mid-1920s as a sort of compensation for the centralization of public revenues by the federal government. In short, this concept refers to a part of the federal budget that must be distributed among the states, the federal district, and the federal territories in the

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43. *See id.*

44. *Id.*

45. *See id.* art. 17.7; CONST. VENEZ. art. 138.8 (1999).

46. *See Ley Orgánica, supra* note 34, art. 11.

47. *See* CONST. VENEZ. art. 156.12 (1999).

48. *See id.*

49. *See id.* art. 167.4.

following manner: 30% of its total amount in equal parts, and the remaining 70% to be divided in proportion to the population of each of the entities mentioned.<sup>50</sup> For its part, the Law for Decentralization modified this scheme increasing the percentage of the *Situado Constitucional* from the total estimated ordinary revenues.<sup>51</sup>

The 1999 Constitution repeats the centralized scheme in the distribution of the power to tax, and it also confirms the operation of the so-called *Situado Constitucional*. According to article 167.4 of the 1999 Constitution, the *Situado* is an item of the federal budget that amounts to a maximum of 20% of the total ordinary revenues of the national government, that shall be distributed among the states and the Capital District in the same way as article 229 of the 1961 Constitution accomplished.<sup>52</sup>

Federalism as practiced in Venezuela, is the most centralized in Latin America. Not only is legislative activity in most important areas centralized by the federal legislature, but the application of the law is also centralized. Moreover, the peculiar manner in which implicit powers have been understood, has created an additional instrument that can be used by the federal government to expand its powers. Moreover, concurrent powers depend on the "bases" set forth by the National Assembly, and the most important and profitable taxes are in the hands of the federation. Notably, this pattern of centralized federalism was not changed by the recent 1999 Constitution.

## II. MÉXICO

### A. *The Allocation of Legislative Powers*

The principle for the division of powers in México's federal system is found in the residual clause of article 124 of the 1917 Mexican Constitution.<sup>53</sup> Partially inspired by the Tenth Amendment of the United States Constitution, article 124 states that "it shall be understood that the powers not expressly attributed by this Constitution to the federal authorities, are reserved to the states."<sup>54</sup> The similarity between article 124 of the Mexican Constitution and the Tenth Amendment of the United States Constitution is

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50. See CONST. VENEZ. art. 229 (1961). Part of the federal budget that must be distributed among the states, which shall amount to no less than 15% of the total estimated ordinary revenues of the budget. See *id.*

51. See *Ley Orgánica*, *supra* note 34, art. 13. The Law for Decentralization, foresees a "*Situado Municipal*," that is, a percentage of the total revenues of the states that must be allotted to the municipalities. The percentage for 1990 amounted to 10%, but the law established that it would be increased 1% every subsequent year, until a figure of 20% was reached. See *id.* art. 14.

52. See CONST. VENEZ. art. 164.4 (1999); CONST. VENEZ. art. 229 (1961). The 1961 Constitution allocated 30% of its total amount in equal parts, and 70% in proportion to their respective populations. See CONST. VENEZ. art. 229 (1961).

53. See CONST. MEX. art. 124.

54. *Id.*

readily apparent,<sup>55</sup> however, the clauses are not identical and therefore their meaning and impact upon the allocation of powers is diverse.

One of the differences is the use that article 124 of the Mexican Constitution makes of the adverb “expressly.” Interestingly, the use of the word “expressly” was a controversial issue in the debates that led to the adoption of the Tenth Amendment. Section two of the Articles of Confederation stated that “each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.”<sup>56</sup> Eventually, the Tenth Amendment did not include the word “expressly.” As such, it was understood that the federal government could exercise powers that were not expressly allocated to it by the constitution.<sup>57</sup>

The antecedent of article 124 of the Mexican Constitution is article 117 of the Mexican Constitution of 1857. The Mexican constituent assembly of 1856-1857 borrowed part of the United States’ Tenth Amendment formulation, but decided to include the adverb “expressly.” It was not a casual circumstance, but a manifestation of intent. The intention was to create a more rigid system of division of power between the federation and the states, in such a way as to make it perfectly possible to distinguish which limited set of powers belonged to the former, and which to the latter.<sup>58</sup>

Another difference between article 124 of the Mexican Constitution and the Tenth Amendment of the United States Constitution lies in the reference that the Tenth Amendment makes of “prohibitions to the States.” Article 124 of the Mexican Constitution does not make this reference, but a systematic interpretation of the Mexican Constitution allows room for an identical reading of article 124. The Mexican Constitution itself establishes a series of prohibitions to the states. Some of these prohibitions have an absolute character, and are defined by article 117.<sup>59</sup> The absolute prohibitions do not permit in any way that these powers be exercised by the states.<sup>60</sup> Others prohibitions are relative, which means that they could eventually be exercised by the states, but only with the authorization of the federal Congress. These are listed in article 118.<sup>61</sup>

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55. The Tenth Amendment of the United States Constitution states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people.” U.S. CONST. amend. X.

56. Articles of Confederation, § 2.

57. See JORGE CARPISO, ESTUDIOS CONSTITUCIONALES (2d ed. 1983).

58. See CONST. MEX. art. 117 (1857); U.S. CONST. amend. X.

59. See CONST. MEX. art. 117.

60. For example, they cannot enter into a treaty with a foreign government; they have no currency power; they cannot impose levies upon the transit of persons or merchandises through their territory; nor can they borrow money from foreign governments or institutions, amongst many others. See *id.*

61. See CONST. MEX. art. 118. For example, states cannot, without the authorization of Congress, impose export and import taxes, or have a permanent army or a war fleet. For its part, it must be mentioned that article 115 foresees a sphere of powers that belong to the municipalities. Municipalities have the power to pass rulings related to the public services that

Therefore, by identifying the quantity and quality of the powers expressly allocated to the federation, we can determine what the balance of power is between the federation and the states. Most of the powers allocated to the federal government are listed in article 73 of the Mexican Constitution.<sup>62</sup> This enumeration includes matters such as labor legislation, legislation on federal crimes, oil, mining, commercial matters, electric and nuclear power, and financial services.<sup>63</sup>

Notably, in contrast with Argentina, Brazil, and Venezuela, article 73 of the Mexican Constitution does not delegate to the federal Congress the exclusive power to issue civil and criminal legislation.<sup>64</sup> Nor, does the federal legislature have complete power to pass procedural legislation, as is the case in Venezuela. In México, the states have the residual power to draft their own civil, criminal, and procedure codes. In addition, the administration of justice and the prosecution of crimes in México is not in the exclusive hands of federal authorities, as is the case in Venezuela.

The Mexican version of the implicit powers clause can be found in the last section of article 73 of the Mexican Constitution.<sup>65</sup> The implicit powers clause of the Mexican Constitution resembles that of the United States Constitution, but is in sharp contrast to that of the Venezuelan Constitution, in the sense that an implicit power can only be deduced or derived from an explicit one. However, in México the implicit powers clause has not had the relevance that it has had in constitutional practice in the United States.<sup>66</sup>

Mexican jurists have debated for a long time on the subject of concurrent powers. In principle, it can be argued that the rigid system for the division of powers derived from the formulation of article 124 of the Mexican Constitution allows no room for concurrent powers to exist. If a power has not been expressly delegated to the federation (or prohibited to the states) by the constitution, or if it cannot be identified as federal through the application of the implicit powers clause, then it has to be a power of the states. However, the Mexican Supreme Court has referred to the existence of "con-

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fall under their exclusive jurisdiction, such as potable water, cemeteries, markets, parks, public security and transit. However, this power has to be exercised according to the bases provided by the legislature of the state to which they belong. *See id.* art. 115. It must be pointed out that unlike the federal and local legislatures, the municipalities cannot pass "enactments" (*leyes*). They are able to produce rulings that are known as *bandos de policía y buen gobierno*, *reglamentos*, *circulares*, and *disposiciones administrativas*. *See id.*

62. *See id.* art. 73 (referring only to legislative powers). For other powers expressly delegated to the federal government see CONST. MEX. art. 74 (referring to the powers of the Chamber of Deputies), art. 76 (listing powers of the Senate), art. 89 (listing powers of the President), and art.s 103-07 (enumerating powers of the federal courts).

63. *See id.*

64. *See id.* art. 73.

65. *See id.*

66. In México, the expansion of federal powers has taken place through multiple reforms to article 73 and not through judicial interpretation based on the implicit powers clause. *See id.*

current powers” in the Mexican legal system,<sup>67</sup> and the Mexican Constitution itself uses the term in article 73.<sup>68</sup>

There is a semantic problem at the root of this discussion. Specifically, whether “concurrent powers” exist or not in México depends on the content that is assigned to this notion. If through the use of “concurrent powers” we mean the possibility of cooperation or coordination of different levels of government in the design and implementation of public policies in one subject area, then we must accept that concurrent powers are possible in the Mexican legal system. However, if we understand that the notion of “concurrent powers” refers to an area of powers delegated to the federation, but that can be “occupied” by the states, as long as the federation does not decide to step in, then these types of powers are not possible under the Mexican legal system.<sup>69</sup> This is the case because of the rigidity of article 124 of the Mexican Constitution concerning the distribution of powers between the federation and the states that was discussed previously. Drawing on this notion, two distinguished Mexican jurists, Mario de la Cueva and Jorge Carpizo,<sup>70</sup> argue that the existence of “concurrent powers” is not possible in the Mexican legal system. On the one hand, no constitutional clause refers explicitly “concurrent powers,” and their existence cannot be deduced from any constitutional article (or a combination of articles). On the contrary, the “rigid” system for the allocation of powers as defined by article 124 of the Mexican Constitution, impedes the appearance of the powers that can be “occupied” by the states until the federation decides to step in.<sup>71</sup>

The words “concurrent powers” are used in México with different meanings. The Mexican Supreme Court has stated that there are “concurrent powers” in the federation and the states in the area of taxation, which means that both levels of government are able to tax the same bases. Moreover, when article 37 of the Mexican Constitution defines the Congressional power to issue legislation to establish the “concurrence” of the federal government, the states and the municipalities in the area of “human settlements” (*asentamientos humanos*) and in the area of environmental protection, it refers to the possibility of cooperation amongst the different levels of govern-

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67. As will be discussed, several decisions of the Mexican Supreme Court have referred to the existence of “concurrent powers” of the federation and the states in the area of taxation.

68. According to sections of article 73 of the Mexican Constitution, the National Congress has the power to pass enactments that establish the “concurrence” of the federal, state and municipal governments in the areas of “human settlements” (*asentamientos humanos*) and environmental protection. See CONST. MEX. art. 73.

69. See JACINTO FAYA VIESCAS, *EL FEDERALISMO MEXICANO* 103-06 (1998).

70. See generally CARPIZO, *supra* note 57.

71. The wording employed by article 72.1 of the German Basic Law could be useful to illustrate what the second notion of “concurrent powers” refers to in the Mexican Constitution. Article 72.1 of the German Basic Law states that “in the area of concurrent legislation, the Länder has the power to legislate, as long as the Federation has not made use, through an Act, of its legislative competence.” Grundgesetz (Constitution) art. 72.1 Länder means land in English (translated by author).

ment in relation to the same policy area,<sup>72</sup> but not to the phenomenon of “occupation” of areas and possibility of displacement that is characteristic of the second notion of “concurrent powers” described above.

There is another notion that adds to the already existing confusion on the use and understanding of the term “concurrent powers” in México. Forensic law uses the term “concurrent jurisdiction” to refer to the possibility that litigants have of bringing their case before either federal or state courts. This occurs whenever the controversy involved requires the application of a federal enactment or an international treaty in the areas of civil or criminal law, and only when private interests are involved.<sup>73</sup>

Finally, it must be mentioned that the Mexican Constitution foresees other kind of powers, which have been called by legal doctrine “coinciding powers” (*facultades coincidentes*) and “coexisting powers” (*facultades coexistentes*). The former may be exercised both by the federal government and the states. An example of this kind of power can be found in paragraph 4 of article 18 of the Mexican Constitution which states that “[t]he Federation and State Governments shall create special institutions for the treatment of delinquent minors.”<sup>74</sup> Coexisting powers refer to a situation in which part of the subject matter can be regulated by federal law and part by the state. For example, section XVII of article 73 of the Mexican Constitution states that the federation has the power to legislate in the area of “general communication routes” (*vías generales de comunicación*), which implies that state legislatures have the power to legislate in the area of “local” communication routes.<sup>75</sup>

### B. The Constitutional Allocation of Tax Power

In principle, one would have to resort to the residual clause to define the allocation of tax powers in the Mexican federal system. As such, it must be understood that all those areas of taxation not expressly allocated to the federation (nor prohibited to the states) in the Mexican Constitution, are reserved to the states.

By analyzing article 73 of the Mexican Constitution the taxes allocated to the federation can be discovered.<sup>76</sup> Article 73 defines the bases that can be taxed by the federal congress. On the other hand, articles 117 and 131 establish some taxes that cannot be created by the states.<sup>77</sup> In addition, according to article 115 of the Mexican Constitution, taxes on real property correspond to the municipal level of government.<sup>78</sup> This simple picture of the distribu-

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72. See CONST. MEX. art. 39.

73. See *id.* art. 104.

74. *Id.* art. 18.

75. See CARPIZO, *supra* note 57, at 99-101; CONST. MEX. art. 73.

76. See CONST. MEX. art. 73.

77. See *id.* arts. 117, 131.

78. See *id.* art. 115.

tion of taxes in México in reality does not correspond to the actual distribution of tax powers.

The simplicity of this picture has been complicated by the interpretation that the Mexican Supreme Court has given to article 73, section VII of the Mexican Constitution which states that the federal Congress has the power "to create the taxes that are necessary to meet the requirements of the budget."<sup>79</sup> The Mexican Supreme Court has interpreted this to mean that Congress has the power to create all taxes necessary to finance all the items of the budget.<sup>80</sup> The relevance of this interpretation lies in the fact that article 73 does not mention either income tax or the value-added tax as taxes that belong to the federation. In spite of this, however, the federation taxes income of individuals and corporations, as well as value-added to services and goods.<sup>81</sup> Simply, the federation has unlimited powers of taxation.

Both the Mexican Supreme Court and legal commentators have asserted that in México there are "concurrent powers" in the area of taxation. By this, they mean that some (not all) bases can be taxed in equal terms by the federal government and the states.<sup>82</sup> The federation can tax all imaginable bases, while the states can tax those bases that are not expressly allocated to the federation and those that are not prohibited. This is why Sergio de la Garza asserts that in the area of taxation, the federation has "unlimited concurrent powers" and that states have "limited concurrent powers."<sup>83</sup>

In the past, the practical result of the application of these criteria was a situation in which the federation had very wide powers to tax any base or source, even those that after a reading of the residual clause, could be identified as belonging to the states, thus, creating conflicts between federal and state authorities in taxation. After many years of fiscal chaos, a system of fiscal coordination was envisioned in order to delimit the taxable bases that corresponded to each level of government, and to provide some uniformity.<sup>84</sup> The first law on fiscal coordination was adopted in 1953, but the system was strengthened and reinvigorated between 1979 and 1980, as part of a "tax package" that also introduced the value-added tax in México.

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79. *Id.* art. 73, § 7.

80. See CARPIZO, *supra* note 57, at 110.

81. See CONST. MEX. art. 73.

82. See the decision of the Supreme Court on the constitutionality of the federal act that created the tax for the possession or use of automobiles (*Impuesto Sobre la Tenencia o Uso de Automóviles*). See 44 S.J.F. 14 (1972).

83. See SERGIO FRANCISCO DE LA GARZA, *DERECHO FINANCIERO MEXICANO* 220-30 (1990).

84. See *id.*

The logic of this system of coordination can be summarized as follows: the federation and the states enter into agreements of coordination, by which the latter give up their power to create certain taxes in exchange for participation in a federal fund integrated with 13% of all tax revenues of the federal government (excluding those related to taxes on external trade).<sup>85</sup> By the 1990s, as a result of the system of fiscal coordination, 81% of the tax revenues of the total public sector were received by the federal government, while the states and the municipalities received only 16% and 3%, respectively.<sup>86</sup>

### III. BRAZIL

#### A. *The Allocation of Legislative Powers*

Brazil's Constitution of 1988 organized the distribution of legislative powers on the basis of a peculiar version of the residual clause. Article 25.1 of the Brazilian Constitution states that "[t]o the States is reserved jurisdiction over the matters not forbidden to them by this Constitution."<sup>87</sup> This version is peculiar because the reservation of powers to the states seems to depend not on an enumeration of the limited powers that the federation is allowed to exercise, but on an enumeration of prohibitions to the states. However, in spite of this wording, both Brazilian doctrine and judicial interpretation state that the powers not delegated to the federation nor to the municipalities are reserved to the states.<sup>88</sup>

Articles 21 and 22 of Brazil's Constitution enumerate powers that have been delegated to the Union. Interestingly, article 22 gives the federal legislature exclusive power to create civil, penal, procedural, electoral, and labor law. This means that the states cannot draft their own "codes" in any of these matters. However, in contrast to the Venezuelan Constitution, in Brazil each state has its own system of courts.<sup>89</sup>

It is important to note that an important difference does exist between the afforded powers of articles 21 and 22. Article 22 allows the delegation of powers to the states: "[a] supplemental law may authorize the States to legislate on specific questions to the matters listed in this article."<sup>90</sup> For this reason, constitutional doctrine in Brazil identifies the non-delegable powers of article 21 as "exclusive powers" and the delegable powers of article 22 as "privatized powers" (*competencia privativa*).<sup>91</sup>

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85. See JAIME SEMPERE, *LAS FINANZAS PÚBLICAS EN MÉXICO* 95 (1995).

86. See *id.* at 97.

87. C.F. art. 25.1 (1988).

88. See JOSE AFONSO DA SILVA, *CURSO DE DIREITO CONSTITUCIONAL POSITIVO* (9th ed. 1994).

89. See C.F. arts. 92, 125.

90. *Id.* art. 22.

91. See DA SILVA, *supra* note 88, at 419-20.



For its part, article 30 of Brazil's Constitution defines the powers allocated to the municipalities. These powers include the power "to legislate on matters of local interest," to supplement federal and state legislation where applicable, to institute and collect the taxes under their jurisdiction, to create, organize and suppress districts, to organize and render either directly or by concession or permission, essential public services.<sup>92</sup>

In addition, the system for the allocation of powers of Brazilian federalism foresees "common powers" and "concurrent legislation." Article 23 refers to areas in which the Union, the states, the Federal District, and the Municipalities can legislate simultaneously. Coordination amongst these entities is achieved through supplemental law.<sup>93</sup> Examples of areas which may be regulated simultaneously include the area of public assistance and health, protection of documents, works, and other assets of historical, artistic, and cultural value.<sup>94</sup> This is in addition to culture, education and science, and the protection of the environment.

The notion of "concurrent legislation" in Brazil is defined in article 24 of Brazil's Constitution which states that the absence of a federal law means that the states can exercise full legislative jurisdiction until the federation decides to "occupy" the area with a federal enactment which prevails over state law. However, article 24 also includes an important qualification which makes clear that the scope of the Union's "concurrent power" is restricted to establishing "general rules."<sup>95</sup> The matters that fall within the field of "concurrent legislation" include tax, financial, penitentiary, economic and city planning law, commercial registries, production, and consumption.<sup>96</sup>

There is no implicit powers clause mentioned in the text of the Brazilian Constitution of 1988. However, Brazilian courts have developed this concept through a series of decisions.<sup>97</sup> Therefore, implicit powers are a functional element for the operation of the Brazilian federal system.

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92. See C.F. art. 30.

93. See *id.* art. 23. In Brazil, "supplemental laws" are those that require an absolute majority in Congress to be approved. See *id.* art. 69.

94. See *id.* art. 23.

95. See *id.* art. 24. Article 24 of Brazil's Constitution, paragraphs (1) to (4) states:

- (1) Within the scope of concurrent legislation, the jurisdiction of the Republic is limited to establishing general rules;
- (2) The jurisdiction of the Republic to legislate under general rules does not preclude the supplementary jurisdiction of the States;
- (3) if there is no federal law on general rules, the States exercise full legislative jurisdiction to provide for their peculiarities;
- (4) The supereminence of a federal law over general rules suspends the effectiveness of a State law to that extent that it is contrary thereto.

*Id.*

96. See *id.* art. 24. Other matters that fall within "concurrent legislation" include forests, hunting, fishing, fauna, preservation of nature, protection of the environment, education, culture, court procedure, social security, and health protection. See *id.*

97. See DA SILVA, *supra* note 88, at 420. The Supreme Federal Tribunal of Brazil interpreted a section of Brazil's 1891 Constitution to state that the Union had the power to expel

### B. *The Constitutional Allocation of Tax Power*

In Brazil, the constitutional technique for the allocation of tax power is different from the method used to divide powers among the federation, states, and the municipalities.<sup>98</sup> The Brazilian Constitution has adopted an exhaustive, integral, and complete method for the allocation of powers in the area of taxation.<sup>99</sup> This is a “rigid” system in which each component of the Brazilian federal structure (Union, states, Federal District and municipalities) is conferred express power to institute specific taxes.

The complex system for the allocation of powers in Brazil can be understood by looking at the system as an articulation of two different principles. On the one hand, the power to tax specific bases or sources is allocated to different components of the federal structure (*discriminação pela fonte*), but they also have to share with the others the revenue yielded from their taxes (*discriminação pelo produto*) according to formulas defined by the Constitution.<sup>100</sup>

In this way, some taxes are allocated exclusively to the federation. For example, the Union has the power to institute taxes on imports of foreign goods and exports, on income, industrialized products, credit and foreign exchange transactions, rural property, and large fortunes.<sup>101</sup> It also has a residual power to create taxes that are not listed in article 153 “provided [the powers] are non-cumulative and have a specific taxable event or assessment basis other than those specified in the Constitution.”<sup>102</sup> This in addition to having an “extraordinary tax power” to create taxes whether or not included in its taxing power, upon the imminence or in the case of foreign war.<sup>103</sup>

For their part, the states and the Federal District have the power to create taxes on the transfer by death and donation of any property or rights, on transactions relating to the circulation of goods, and on the ownership of automotive vehicles.<sup>104</sup> Moreover, according to article 156, the municipalities can institute taxes on urban real property and on retail sales of liquid and gaseous fuels.<sup>105</sup>

As we have seen, the Union, the states, the Federal District and the municipalities have fixed and perfectly defined constitutional powers to institute specific kinds of taxes. However, this does not mean that the revenues

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foreigners, this, in spite of the fact that the Constitution did not mention such power expressly. *See id.*

98. This section of the essay will refer only to taxes (*impostos*) and not to fees (*taxas*) and assessments by virtue of public works (*contribuição de melhoria*), which are also regulated by Brazil’s Constitution.

99. *See generally* DA SILVA, *supra* note 88.

100. *See id.* at 609.

101. *See* C.F. art. 153.

102. *Id.* art. 154.

103. *See id.*

104. *See id.* art. 155.

105. *See id.* art. 156.

yielded by these taxes remain in the hands of the authority that collected them. Following a constitutional tradition that started since the 1930s, the Brazilian Constitution of 1988 has established a system for the appropriation of tax revenues by which the different levels of government share part of their revenues with the others.

In some cases, it is the federal government that creates and collects the tax, but its yields have to be shared with the states, the Federal District and the municipalities. For example, the proceeds from the collection of federal tax on income and earnings of any nature paid by the states and the Federal District, by their autonomous government entities and by foundations instituted or maintained by them, shall be attributed to the states and the Federal District.<sup>106</sup>

In other cases, Brazil's Constitution distributes fixed percentages of tax revenues to the different levels of government. For example, the states are entitled to 20% of the proceeds from the collection of taxes not listed expressly in the Constitution in favor of the federation, but collected by the latter in terms of article 154.1.<sup>107</sup> For their part, municipalities are entitled to 50% of the proceeds from the collection of the federal tax on rural property, for property located in the municipalities, and to 50% of the proceeds from the collection of the state tax on the ownership of automotive vehicles licensed in their territories. This, in addition to 25% of the proceeds from the collection of state tax on transactions of distribution of goods and on the rendering of services of interstate and inter-municipal transportation and of communication services.<sup>108</sup>

Brazil's Constitution also allocates tax revenues collected by the federal government to special funds from which other levels of government can benefit. For example, article 159 states that 47% of revenue collected from taxes on income and earnings and on manufactured products collected by the federal government shall be distributed in the following manner: a) 22.5% to the Participation Fund of the states and of the Federal District; b) 22.5% to the Participation Fund of the municipalities; and c) 3% for allocation to programs to finance the productive sector of the North, Northeast, and Center West regions.<sup>109</sup> Furthermore, article 160 of the Brazilian Constitution specifically states that the federal government shall not withhold nor restrict in any way the delivery and use of the money in the special funds by the states, Federal District, or municipalities.<sup>110</sup>

State public finances have been significantly strengthened as a result of the new constitutional arrangement concerning the allocation of tax powers among the different levels of government in Brazil. Through this method of

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106. *See id.* art. 157.

107. *See id.*

108. *See id.* art. 158.

109. *See id.* art. 159.

110. *See id.* art. 160. However, this prohibition does not prevent the Union from delivering the funds on condition of payment of its credits. *See id.*

allocating tax powers, the federal government now absorbs 45.6% of tax revenues, the states absorb 47.4%, and the municipalities receive 7.0%.<sup>111</sup> As such, it is fitting to state that Brazil has developed a successful process of fiscal decentralization.<sup>112</sup>

#### IV. ARGENTINA

##### A. *The Allocation of Legislative Powers*

The cornerstone of the system of allocation of powers in Argentina's Constitution lies in its residual clause.<sup>113</sup> Article 121 of the Constitution of Argentina states "[t]he provinces reserve to themselves all the powers not delegated to the Federal Government by this Constitution, as well as those powers expressly reserved to themselves by special pacts at the time of their incorporation."<sup>114</sup> The first part of this clause resembles the residual clause of countries like the United States and México, but it uses the term "provinces" instead of the concept of "states," to refer to sections of the Argentinean federation.<sup>115</sup> Jurists have debated on whether these components are "states" with "sovereignty" or "provinces" with "autonomy." There are a series of Supreme Court decisions that accept the former notion. But there are others in which "sovereignty" has been denied, while accepting their nature as "states."<sup>116</sup>

For practical purposes, "provinces" have the power to create local governmental institutions, elect governors, legislators and other authorities, this without the intervention of the federal government.<sup>117</sup> In addition, they have the power to pass their own (local) constitution, create regions, sign international treaties (with specific limitations), and exercise the eminent domain (*dominio originario*) on the natural resources that exist within their territory.<sup>118</sup>

The second part of article 121 establishes an exception to the principle of equality among the provinces. This was included in order to constitutionalize the *Pacto de San José de Flores*, of November 11, 1859, entered into by the State of Buenos Aires and the Argentinean Confederation.<sup>119</sup> This Pact

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111. See *Ministerio de Fazenda* (visited Feb. 25, 2000) <<http://www.receita.fazenda.gov>>.

112. See generally Gabriel Aghón & Carlos Casas, *Un Análisis Comparativo de los Procesos de Descentralización Fiscal en la América Latina*, in MÉXICO, HACIA UN NUEVO FEDERALISMO FISCAL: EL TRIMESTRE ECONÓMICO 55 (Rogelio Arellano Cadena ed. 1996).

113. Argentina adopted its Constitution in 1853, however it was widely reformed in 1994. See CONST. ARG. (1994).

114. *Id.* art. 121.

115. See *id.*

116. See NÉSTOR PEDRO SAGÜÉS, ELEMENTOS DE DERECHO CONSTITUCIONAL 530 (1993).

117. See *id.*

118. See *id.* CONST. ARG. arts. 123, 124.

119. See generally SAGÜÉS, *supra* note 116.

granted a special status to Buenos Aires, in exchange for its reincorporation into the Argentinean Confederation.<sup>120</sup>

Article 126 of the Argentinean Constitution is also relevant to complete the picture of Argentina's federal system.<sup>121</sup> It establishes a series of prohibitions to the states. In general, states cannot exercise the powers delegated to the Nation. In particular, the states cannot enact laws dealing with commerce, inland or foreign navigation, establish provincial customs, or coin money.<sup>122</sup> But most important, states cannot enact civil, commercial, criminal, or mining codes after "Congress has enacted them."<sup>123</sup> Congress has enacted all these codes, leaving no "provincial" codes on civil, commercial, criminal or mining matters.<sup>124</sup>

Article 75 of the Argentinean Constitution enumerates the powers that have been delegated to the National Congress. Apart from those matters that one would expect to find within the jurisdiction of the federal government,<sup>125</sup> section 12 of article 75 grants the National Congress the power to "enact the civil, commercial, criminal, mining, labor and Social Security laws, in unified or separate bodies, provided that such codes do not alter local jurisdictions."<sup>126</sup> But their enforcement shall correspond to the federal or provincial courts depending on the respective jurisdiction for persons and things.<sup>127</sup>

The Congress of Argentina has implied powers, specifically "Congress has the power to make all appropriate laws and rules to put into effect the aforementioned powers, and all other powers granted by this Constitution to the Government of the Argentine Nation."<sup>128</sup>

The Constitution of Argentina refers to the existence of concurrent powers in article 75.2 (the power to levy internal indirect taxes).<sup>129</sup> However, it seems that by this concept both legal doctrines and Argentina's Supreme Court decisions give credence to a series of powers that can be exercised both by the National Government and by the provinces.<sup>130</sup> In spite of the fact

120. The secession of Buenos Aires occurred in 1852. The pact granted wide powers to the State of Buenos Aires. *See id.* at 533.

121. *See* CONST. ARG. art. 126.

122. *See id.*

123. *Id.*

124. However, the provinces have the power to enact procedural codes. In other words, forensic law is a matter of provincial law.

125. An example of the powers one would expect to find within the jurisdiction of the federal government include the power to borrow money on the credit of the Nation, decide about the use and sale of national lands, establish a federal bank, settle the payment of the domestic and foreign debt of the Nation, regulate the free navigation of inland rivers, coin money, regulate trade with foreign nations and of the provinces among themselves, and to regulate the general post offices of the Nation. *See* CONST. ARG. art. 75.

126. *Id.*

127. *See id.*

128. *Id.*

129. *See id.*

130. *See* SAGÜÉS, *supra* note 116, at 560; GERMÁN BIDART CAMPOS, *MANUAL DE LA CONSTITUCIÓN REFORMADA* 444 (1996).

that “concurrent powers” in relation to other matters are not mentioned expressly, it has been argued that there are other powers of such nature that are foreseen in the Constitution, such as the power to protect environmental rights, and the power to protect indigenous peoples.<sup>131</sup>

With respect to the municipal level of government, its constitutional position in Argentina was always one of subordination to provincial governments. However, the constitutional reform of 1994 introduced for the first time the principle of autonomy at the municipal level of government. According to article 123 of Argentina’s Constitution, “[e]ach province enacts its own Constitution as stated in article 5, ensuring municipal autonomy and ruling its scope and content regarding the institutional, political, administrative, economic and financial aspects.”<sup>132</sup> The extent of the powers of the municipalities depend on the provincial constitutions and other enactments, but at least their autonomy has been recognized at the level of the national Constitution, which implies that the provinces must ensure the existence of some measure of municipal autonomy.

### *B. The Constitutional Allocation of Tax Power*

The tax power of the National Congress of Argentina is mentioned in article 75, section one through three. Yet, these rules go beyond the simple allocation of tax power to the federation, and establish the general bases of a system of revenue sharing between the federation, the provinces, and the city of Buenos Aires.

In principle, and by understanding of the residual clause, taxes not allocated to the federation nor prohibited to the provinces are reserved by the provinces. Article 75 section one establishes that national customs, and import and export duties are a matter of federal jurisdiction.<sup>133</sup> Article 75 section two states that the National Congress has the power to levy direct taxes “for a specified term and proportionally equal throughout the national territory, provided that the defense, common security and general welfare of the State so require it,” which means that those direct taxes that do not fall within this notion, belong to the provinces.<sup>134</sup> For their part, indirect taxes are considered a matter of concurrent powers of the federation and the provinces.<sup>135</sup>

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131. See CAMPOS, *supra* note 130, at 444; CONST. ARG. arts. 41, 75.

132. CONST. ARG. arts. 5, 123.

133. See *id.* art. 75, §1.

134. *Id.* § 2; CAMPOS, *supra* note 130, at 173.

135. The Argentinian Supreme Court has played a relevant role in the definition of the reach and limits of the provinces’ power to tax. For example, it has stated that provinces can only create taxes on transactions that exist within their territories, and that the provinces must not damage the policies implemented by the federal government in use of its Constitutional powers, through their power to tax. See SAGÜÉS, *supra* note 116, at 681.

Both direct and indirect taxes are subject to a system of joint participation, except for those, which in part or in all “have specific allocation.” The system of “joint participation” on tax matters takes shape through an “agreement-law” (*ley convenio*). The federal government and each of the provinces negotiate the distribution of the taxes that can be shared (*coparticipables*), such agreements acquire the form of an act once approved by both chambers of Congress. Moreover, the Act passed by Congress requires the approval of each province’s legislature. Through this approval, the provinces adhere themselves to the system of *coparticipación*.<sup>136</sup>

The system of coparticipation is the result of a long historical process of centralization of tax revenues by the federal government. Describing this process, Raúl Bazán reported that in 1935, 90% of public revenues of the province of Catamarca came from its own taxes, while only 10% came from federal subventions.<sup>137</sup> In contrast, in 1995 10% of that province’s revenues came from its own taxes, and 90% from the federal government.<sup>138</sup> Moreover, and to complete this picture of fiscal centralization that prevails in Argentina, it must be noticed that by 1998, 81.52% of tax revenues were collected by the federal government, while 18.47% corresponded to the provinces.<sup>139</sup>

Pedro J. Farías has pointed out that in spite of the federal structure of the Argentinean state, political behavior has been leaning towards centralization, a circumstance that has been the expression of the strength of the federal executive power and the inability of the provinces to resist.<sup>140</sup>

## CONCLUSION

From a distance, it seems that federalism in Latin America has followed general traits of the federal experience of the United States. A residual clause in favor of the states, the implicit powers clause, and the notion of concurrent powers are all operative elements of the constitutions studied in this article. However, a closer inspection shows important differences in design and in the manner in which they function in practical terms.

The constitutions of Venezuela, México, and Argentina each contain a residual clause in favor of the states (or provinces), which resemble the residual clause of the United States. However, Brazil’s Constitution has a different formula, but legal doctrine and judicial interpretation has assigned to

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136. Bidart has noticed a series of defects in the formulation of this part of article 75, and has pointed out a series of problems of interpretation concerning the procedure to negotiate and approve the so-called *leyes convenio* related to the sharing of tax revenue. See Germán Bidart, *Tratado Elemental de Derecho Constitucional Argentino*, in VI LA REFORMA CONSTITUCIONAL DE 1994, 366, 366-69 (1995).

137. See Armando Raúl Bazán, *El Federalismo Argentino: Orden Constitucional y Praxis Política*, in CUADERNO DE FEDERALISMO 141 (1995).

138. See *id.*

139. See SUBSECRETARÍA DE INGRESOS PÚBLICOS, SECRETARÍA DE HACIENDA (1998).

140. See Bazán, *supra* note 137, at 128 (citing Pedro J. Farías).

it the same meaning as that of the other three countries. Yet, the combination of the residual clause with the actual allocation of legislative powers in favor of the federal legislature, has resulted in a highly centralized pattern that characterizes the federal experience of the four Latin American countries discussed in this article.

For example, the states (provinces) in Venezuela, Brazil, and Argentina do not have the power to draft their own civil or criminal codes. Venezuela's states do not even have the power to draft procedural codes (and they also do not have a system of state courts or prosecutors for the administration of justice). On the contrary, Mexican states do have all these powers, but this has to be qualified by the fact that state legislatures tend to follow very closely (with some exceptions) the trends set forth by the federal legislature in civil and criminal matters.

With respect to the implicit powers clause, the constitutions of México and Argentina have closely followed the Constitution of the United States. On the other hand Brazil has not followed the Constitution of the United States, but legal doctrine and judicial interpretation has made the notion of implicit powers an operative element of the Brazilian constitutional system. For its part, Venezuela's Constitution (both the 1961 Constitution and the 1999 Constitution) include an implicit powers clause that works in a different way. Under Venezuela's version of the implicit powers clause, these powers are not connected to the exercise of an explicit power of Congress or of another federal authority, but instead are a function of a circumstance which has encouraged further centralization.

The implicit powers clause in Latin America has not been as relevant as in the United States. Particularly in the case of México, where the centralization of legislative powers around the national Congress has taken place through multiple reforms to its Constitution, and not through an expansive interpretation based on the implicit powers clause, as in the United States.

The notion of concurrent powers differs significantly in each of the federal systems of Latin America. In Venezuela's constitutional tradition, concurrent powers seem to be those that can be exercised both by the federation and the states. However, the new Venezuelan Constitution mandates that concurrent powers shall be subjected to the "*leyes de bases*" passed by the national power. In México, legal doctrine still discusses the appropriateness of concurrent powers, while the Mexican Supreme Court has consistently pointed out that on tax matters there are concurrent powers, which means that there are some bases or sources that can be taxed both by the federation and the states. In Brazil, the notion of concurrent legislation refers to a number of areas or matters in relation to which it is possible for the Union, the states and the Federal District to legislate. But the scope of the federation's concurrent power is restricted to establishing general rules. In Argentina, concurrent powers are those powers that can be exercised both by the national government and by the provinces.



Finally, the “fiscal constitution” of the four Latin American countries discussed with regards to the allocation of tax powers can be classified in one of two groups. On the one hand, the constitutions of Venezuela, México, and Argentina use different formulas to achieve the same result, which is the the centralization of tax revenues in the hands of the federal government. Moreover, these three countries have created systems to compensate the states or provinces for their lack of revenues including the “*Situado Constitucional*” in Venezuela, the system of fiscal coordination in México, and the system of “*Coparticipación*” in Argentina. Each of these systems continue to give predominance in the area of political and financial matters to the federal government. On the other hand, the “tax arrangement” of Brazil’s Constitution has developed an equal pattern of distribution of fiscal resources amongst the three levels of government.<sup>141</sup>

Historically speaking, centralization has been a common characteristic of Latin American federal systems. But today, decentralization of powers is part of the political agenda. Brazil has taken decisive steps towards this aim, notably in the area of taxation, but it has also started to suffer from unexpected effects derived from the difficulties to coordinate economic policy in an environment of financial instability, such as that of the late 1990s. Decentralization might not be a good in itself, mainly when it is not accompanied with mechanisms to assure coordination on matters that are vital to the nation.

One might also draw some important lessons from these Latin American federal countries, specifically from Venezuela’s experience with decentralization. However, one must understand that it is not possible for the states or provinces to build up financial and administrative capacity in one day. This means that decentralization must be seen as a long term process of institutional building that will require a very important mobilization of human and financial resources, the breakdown of inertias, as well as the existence of a good measure of political will and determination.

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141. This situation might be good from the point of view of the political autonomy of the states, but might not be so good from the perspective of coordinated economic policy and stabilization.

