CHAPTER VI

SOME LEGAL REFLECTIONS

1. Latin American Tendencies towards Integration

LATIN America is making different feeble attempts at greater supranationalization. On the one hand, after the initial steps of the Andean Pact, MERCOSUR and NAFTA, the CAFTA[1] is advancing and maybe the ALCA[2] will, too.

Some countries of the MERCOSUR are advancing proposals for different degrees of greater integration: some speak of the creation of a common legislature, others of a common currency; lawyers have long asked for some form of common judiciary. There is even an Association for MERCOSUR Public and Administrative Law, which has been very active.

These efforts will evolve and are a positive sign, but they are not enough in the long run: a greater emphasis on integration, and a different one in my view, needs to be envisaged. Yet, those projects are a telltale sign that the time is ripe to at least ponder a greater, more vigorous design in the same direction.

2. The Foreign Priorities of the EU

The EC Treaty provides in Art. 177 that development cooperation in humanitarian aid must be concentrated on the most disadvantaged developing countries. The aim in general is fostering sustainable economic and social development, combating poverty, developing the rule of law, respecting human rights, and so on. Those commitments may involve sub-

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[1] A free trade pact between the countries of Central America and the US: "CAFTA free trade talks kick off", *Herald World Trade*, January 13, 2003.

[2] The project for a free trade agreement of the whole of the Americas: "The United States hopes it could also be a stepping stone to a 34-nation Western Hemisphere free trade zone by 2005", *op. loc. cit*.

stantial amounts of money. The goals that I am proposing here may not perhaps satisfy the criterion of concentrating aid on the most disadvantaged countries, but since it is not monetary aid but rather institution building, then again, perhaps it is not an important deviation from those parameters.

3. The Steps to be Taken

Obviously, in order to have a functioning supranational state, power has to be transferred from the national entities to the supranational body: "In this context, community law must be preferentially, immediately and automatically applied over internal law, in all Member States, to both the national entities and citizens. The national constitutional bodies also find that they cannot control the constitutionality of community law before the Supreme Court or Constitutional Courts of the country"[3].

But we should be wary of postponing integration in a context such as the one I am contemplating, with minority EU and US participation, for legal or constitutional reasons. It is true that the best way of doing this is through constitutional reform. But even then, the Constitution is a living organism that has to be interpreted according to the times. We are already submitted, in law and in fact, to many non-national extraneous wills. It would only be legal hypocrisy to say that that cannot happen in a more open and transparent way, that it has to continue in the semi-darkness of today. That kind of double standard is also part of our culture[4].

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[3] BREWER CARÍAS, ALLAN RANDOLPH, Constitutional Implications of Regional Economic Integration, *in: Etudes de Droit Public Comparé*, Brussels, Bruylant, 2001, pp. 453-522, esp. p. 460.

[4] It has always been like that, in many different manifestations, for instance presidents who "dressed like aristocrats while affirming solidarity with the poor": SHUMWAY, *op. cit.*, p. 119. A national joke told as an old fictional "story" is still apt today: Three cars, each carrying a president, are going to a meeting: the US, the Soviet Union, and Argentina. When the US car arrives at a crossroads, the driver asks his President which way he should go, and is told: "To the right, of course." When the Soviet car arrives, the driver is instructed: "To the left, of course". When the Argentine car arrives, the answer is: "Signal a left turn, but go to the right." Populism in our country has always been like that: a leftist rhetoric, anti-imperialist discourse, nationalistic symbolism, etc., and a reality of compromise with local corporations and big business, mixed with paternalism and real or apparent empathy for the masses.

The empirical order is not to modify the Constitution first, for we still do not know what has to be changed and how. The empirical order should be like it was in Europe with the Maastricht Treaty ratification process in 1992. First, you decide at a supranational level what kind of treaty all countries are willing to enter into. Then, and only then, will each country proceed with the necessary constitutional amendments, or a consulting referendum, or even by judicial approval of the constitutionality of laws approving the treaty[5]. No formula will be satisfactory for every country, but all will in the end need to ratify and respect the treaty, for their survival depends on that. In the case of Great Britain (rather obviously) no constitutional provision was made and yet integration did not suffer because of that. The fact that Great Britain has not yet entered the Euro is the result of its own political decision, not any lack of provision in a Constitution which it does not anyhow have.

The experience of other European countries seems to prove the same point, although it has been argued in many different ways. Belgium and The Netherlands chose to read their constitutions broadly and argue that existing provisions were enough to ratify the new treaty[6]. The Constitutional Court of Spain, perhaps more conservatively, decided that a reform was necessary and it was duly made; although later reflections seem to suggest that it was not enough, because only a minor point had been debated and therefore reformed, no one seems to find there a practical problem anymore[7].

In Latin America many sub-regional projects of integration have been made in recent history, and they have not developed well. It may be argued that such backwardness is due to the lack of constitutional provisions[8], but it can also be said that the real cause is the unwillingness of the local lords and chieftains to relinquish their power to a greater common authority. Given their natural unwillingness to have their own power re-

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[5] BREWER CARÍAS, *op. cit*., p. 461, although he advocates formal constitutional reform, p. 460. All Latin American countries have had difficulties in fulfilling their duties under their national constitutions. They have had to conform to the Inter-American system of Human Rights and the San José of Costa Rica Court. Our perpetual indebtedness and frequent bankruptcy also greatly limits national decisions. Grouping in a continental entity would help us avoid the worst mistakes. So the point is not constitutional reform, which in due time anyhow will have to be made, but rather institutional reform, in fact and not in words we cannot abide by.

[6] BREWER CARÍAS, *op. cit*., p. 486.

[7] BREWER CARÍAS, *op. cit*., p. 489.

[8] BREWER CARÍAS, *op. cit*., p. 462.

stricted, and their clienteles and patronage system menaced, they will only bow to external pressure to make amendments. That is why I make this request for integration with EU and US participation.

4. Referendums and Other Legal Acts

Some countries are already prepared to sign in, just by act of Congress; my country is practically one of them: its Constitution allows Congress to cede sovereignty to supranational entities on the basis of reciprocity and equality. If we were to advance to EU and US participation as minority votes without equal burdens, a referendum or a constitutional reform would perhaps be needed. Also, special problems should be considered, such as those that the Argentine Constitution establishes for integration treaties with non-Latin American countries[9].

Perhaps all countries would need to hold a referendum or change their constitutions to allow for this to happen. Those legal acts will have to be studied when the time comes, if this idea were to hold some water. Otherwise, considering the legal aspects now is nothing but a waste of time. Suffice it here to say that there are not insurmountable constitutional or legal problems for supranational integration. Should the idea ripen, only then would the more elaborate mechanisms have to be considered. The Organization of American States has more than fifty participants acting as "observers", who represent States from other regions of the world. Their role is unclear and so is their influence. I again suggest, instead, considering the model of the Inter-American Development Bank, where there is a clear influence and participation of those two foreign blocks, the US and the EU.

5. At First, Only Decision-making at the Top of the New Supranational State

I have been asked whether all this means that each Ministry in each country will have a sort of foreign parallel public officials, doubling eventually all the major costs of a Ministry.

Let us take this comment at face value, first, and say: Yes, even if it doubles the cost of a Ministry it will be infinitely cheaper than what the

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[9] See GELLI, MARÍA ANGÉLICA, *Constitución de la Nación Argentina. Comentada y Concordada*, Buenos Aires, La Ley, 2001, p. 525.

Ministry normally costs for being corrupt, clientele-oriented and inefficient as it is today.

But my proposal is obviously not that one. It is a more cautious and mixed approach. I do not think that each country should have a complete set of parallel foreign public officials. I only suggest that the whole supranational state should have a collegial body with foreign minority participation of the US and the EU.

From there on, those participating in the continent-wide level of the problems all countries are facing, will be able to determine what the next steps that have to be taken are.

Much as NATO has a combined leadership that produces reciprocal influence between the military and political apparatus of one country and the others. Much as the EU produces a mixed result that is different than what any single country would have done alone. Much as a Supreme Court and similar tribunals should be composed of people of different origins, background, sex, political affiliation, and so on: it is their interaction that will be valuable.

Democratically elected governments will perhaps produce clientele-oriented leadership, which has no wish to create an efficient and stable bureaucracy. But when major decisions would, in the future, have to be submitted to the approval of the supranational governing body, that would be the time to evaluate whether a new paradigm is being applied, or whether the same old practices that have prevailed in all of our history are still the governing guide of our leaders' actions and proposals.

6. International Tribunals: A Sine Qua Non

In all probability the Executive and Legislative Power of any future supranational Inter-American State will follow the hazardous complexities that the EU has shown. That has a historical justification and we should not try to avoid it; we should use the lessons of comparative history and law.

But the one and foremost lesson we must never lose sight of, is that without international tribunals nothing will really be workable. That was the mistake of all previous efforts towards integration. It should not be repeated. We shall return to that later (paragraph *8.4*).

7. The Special Case of the US

We all know that the US has a different version of globalization, and that it does not submit gladly to international tribunals. Since the US itself is a federation, and the most powerful in the world at that, it does not want to enter other bodies where it would be required to relinquish power. Yet it has to find its rather tortuous way around the UN, WTO, ICC, etc. Its contradictions are even more obvious in that it fosters international treaties against corruption, but without international tribunals. The rule these treaties establish is that of national foreign jurisdiction.

The US Supreme Court interpretation has been even more direct: no treaty "can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution"[10] as interpreted by itself, of course. That traditional view, understandable in a superpower, is also sometimes followed by other authors in Latin American countries[11], where the debate has rather less justification in practical terms of existing sovereignty.

But the question here is not to submit the US or the EU to legislation enacted by a new Inter-American State. That would indeed be preposterous and neither the EU nor the US would accept that. But perhaps an arrangement can be attained whereby US and EU representatives may receive judicial immunity from the local states, but are nevertheless subject to the jurisdiction of new international tribunals, as we explain below. A third option is to grant them immunity from local jurisdiction, but expressly provide for their submission to the judiciary of their own countries of origin.

8. The Eternal and Universal Fight Against Corruption

A long doctoral thesis by NOONAN proves in detail that corruption has been widespread across all civilizations[12]. A masterly brief lecture by LORD DENNING stresses that corruption has always been eternal, our vigilance should as well. There are many more important contributions[13].

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[10] BREWER CARÍAS, *op. cit*., p. 507, and his references.

[11] GELLI, *op. loc. cit.*

[12] NOONAN JR., JOHN T., *Bribes*, Macmillan Publishing Company, New York, 1984.

[13] For instance ROSE-ACKERMAN, SUSAN, *Corruption and Government: Causes, Consequences, and Reform*, Cambridge, Cambridge University Press, 1999.

The US has recently been pressing Latin America and European countries for international anti-corruption laws and foreign jurisdiction on certain crimes like money laundering and foreign bribes. Yet it does not trust the international jurisdiction of the Hague International Criminal Court, which anyway does not yet cover corruption as a crime against humanity, although corruption and money laundering are always a part of international terrorism and other similar current universal crimes.

Europe is quite rightly pushing for international tribunals but, in the meantime, it is not being very helpful to the world in the fight against corruption. Moreover, corruption is a cultural trait that needs two participants in order to function: a corrupt officer in Latin America *and a public or private European briber*. Europe has progressed in judging criminals of international status for crimes committed either at home or abroad, but only Spain, to my knowledge, is trying in its own courts some cases of foreign corruption. Corrupt Latin Americans come to Europe and count on a normal reception, not jail, and even more, a good reception and even hearty acceptance in some academic circles. Neither you nor we have full social control of that kind of cultural contamination by foreign corruption: but we must at least be aware of it rather than promote it. Many of my friends here know of at least two or three names in Latin America that frequent some European academic circles as if they were honest[14]. That is a bad omen for European civilization. To retain the moral high ground, that is one of the battles you should not lose.

You should devote more attention to your share of the international and national responsibilities with the first international treaty on foreign corruption ("without regard to where the crime was committed": Art. 7°) and the second treaty against transnational organized crime and corruption, including money laundering (Arts. 6° and 7°), other forms of foreign corruption (Art. 8°), preventive measures against corruption (Art. 9°), seizure of illegal funds (Art. 10), and its Second Protocol on Migrants, etc.

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[14] The alphabet provides an easy guide: A, B, C, D… There is one crook in academia for each letter. My Spanish friends know all of them very well.

About twenty-five years ago, I chose not to attend the events to which they were invited. It was the wrong approach. I now attend academic meetings even if they are also present, only I orally denounce the corruption. The fact that that has cost me some friends would not bode well for developed civilizations, were it not for the fact that it also brought many more ones that are new. Something is fundamentally wrong when it is all right to be a known corrupt person and still be socially acceptable and even defendable. We have a tango in my country for that. For us, it is a familiar phenomenon. It should not be for you.