Private International Law and Law of Integration

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I. INTRODUCTORY REMARKS

The inspiring subject for this article is the relationship between private international law and law of integration, including their links and reciprocal influences.

Latin America is a fertile place for integration since the period of decolonization. Numerous events have left their traces in this sub-continent, contributing to the promotion of regional integration.

It is true that considerable efforts in such direction have not been successful or have not reached the goals envisaged by integrationists. As early as in 1826, liberators had the ambition to launch an integration project, which could not be realized due to political, societal and economic differences among Latin-American countries, which until now prevent the instauration of sub-regional schemes in Latin America and Caribbean countries.[1]

One cannot find a process, whether conceived within an institutional structure or embraced in intergovernmental scheme that could serve as a good model for the region. There are clear political deficits in all blocks in the region, weakening integration. Though, courageous attitudes and support by Governments are present at the early stage of intergovernmental negotiations, such enthusiast is likely to decline and dilute as protectionist and unilateral policies gain space.

For all existent excellent *normative acquis* and comprehensive institutional structures, if there is no desire of implementation and no genuine inclination toward integrationist authority, if regional conviction and spirit are missed and, definitely, if political determination has not effectuated the integration, it is hardly possible to enhance confidence, in an integration project.[2]

However, today's perception is that some elements can improve the existing scenario. Unlike what happened in the past, current proposals have attracted the attention of civil society, leading to the creation of networks made of private actors, including workers, professionals, NGOs, collegiate associations, network of judges, students, and diverse stakeholders. All together they act as a strong support in securing continuity of the integration

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1 Susana Czar de Zalduendo, "Finales de Siglo XX: Nuevo regionalismo. Siglo XXI: Síntomas de cambio en la integración regional", en Negro, Sandra, Directora; *Evolución jurídico-institucional. Derecho de la Integración* (Montevideo/Buenos Aires: IBdeF, 2012) 2-31.

2 Adriana Dreyzin de Klor, "Un acuerdo no muy 'acorde' aprobado en el marco del Parlamento del Mercosur", en *DeCITA 11*, 2009, CEDEP, Asunción, 418.

schemes and advancing reforms with political, social, economic and cultural dimensions. In this context, there is some hope on the horizon.

In my view, it is highly arduous delivering noble doctrines or theories. Yet, new ideas are emerging. It is, nevertheless, undeniable that premises accommodating circumstances undergo modifications through time. Circumstances in a given period of time are not those that operate in the other. Among significant changes, one can mention the impact of the Human Rights (HR) in the region.[3]

Indeed, this is the premise where our conviction is made as regards the integration at this time. The subject to be addressed has multiple dimensions and is likely to lead us to the so-called regional governance.

The term 'governance' is to be understood as an underlining phenomenon that enhances a new form of management, protagonists of which are public and private actors, and that is characterized by governing and of developing models.[4]

II. SETTING THE SCENE

At this point, after a brief introduction, this paper focuses on the following questions:

1. What kind of topics in the context of the Law of Integration and Private International Law deserve special attention?
2. What is the relationship between these two legal regimes?
3. Is it necessary to have specific rules of PIL in relation to integration?

We should not forget that an affirmative reply would result in the creation of a new normative model on this matter.

At the end of this paper, I will share my reflections based on the outcomes of the present analysis.

A. *Making the Terms Accurate*

1. Law of Integration

The law of integration denotes a set of legal rules governing all forms of economic association, which is basically distinguished from the community law, insofar as the latter, in

3 Claudia Lima Marques e Bruno Miragem, *O novo Direito Privado e a Proteção dos Vulneráveis*, Editora Revista dos Tribunais (2012) 112.

4 Adriana Dreyzin de Klor y Mariela Morales, *Ampliación del Mercosur. El caso Venezuela*, (Buenos Aires: Zavalía Editores, 2009). For illustrative reflection, please see Celestino del Arenal, "La Nueva Sociedad MUNDIAL y las Nuevas Realidades Internacionales: un reto para teoría y para la política", *Cursos de Derecho Internacional y Relaciones Internacionales* (Bilbao: Ed. De la Universidad del País Vasco, 2002). The author underlines the change from the traditional idea of an international society of nations to a global partnership, in which processes of transformation such as interdependence and globalisation are modifying balance of international relations. These are, nowadays, characterised, by debilitation of role of the state as main actor and empowerment of new players, as well as by an intertwining between internal and external affairs of the States. One can observe, in international scenario, the process of diffusion of power – phenomenon that implies a change in conception of power and distribution of power between the actors – and regional integration scheme, among others, as a new dominating factor in international society.

general, exercises supranational authority. In this context, legislative and judicial bodies are vested with specific competences, as opposed to intergovernmental models of cooperation where any kind of delegation of authority exists.[5] In other words, "this common law" to all member states that form part of an integration model does not apply to the intergovernmental models of cooperation, since in this second case, the rules need to be incorporated in the domestic legal system of each country in conformity with the constitutions of the respective state.

Yet, it is not possible to identify in the world a process that is purely supranational as organs, holding legislative and jurisdiction authorities, always coexist with those of intergovernmental characteristics. The difference between intergovernmental and regional model lays in the interest at stake. When the interests of the states are protected, we are in front of an intergovernmental body. When it comes as satisfaction of the regional bloc over national interests, we are in front of a body of supranational authority.

The European Union is a clear example of a supranational model while the Mercosur is exemplified as intergovernmental model.

Another remarkable significant aspect, as regards the Law of Integration, is the classification of the sources into primary and derived law. The fundamental instruments, and their amendments, modifications and complements are integrated with the primary law, insofar as derived source, as the term suggests, is law evolving from the implementation of the objectives contemplated by the primary law.

2. Private International Law, what are we trying to clarify?

Of course, I will not enter into the definition of this law since this is not an objective of investigation.[6] I prefer to focus on the function of this legal area, basically its societal function as it reflects changes in politics, economics and cultures.

From this positive point of view, it does not escape from the essential factors that, contemporarily, influence all science that conditions its development and direction on trans-frontier relations of individuals. Political and economic considerations exert an influence in its future development.[7]

We could, then, recall that the modern PIL is developed in the context of an international society of sovereign states, which is a prevailing situation.[8]

What are phenomena to be qualified as such?

The traditional structure of sovereign societies coexists with international organisations, which have been made aligned in pursuance to ordering system for external relations. By this means, the cooperation is developed at the international level and constitutes an important

5 Ricardo Alonso García, *Sistema jurídico de la Unión Europea* (3rd ed., Madrid: Civitas/ Thomson Reuters, 2012) 136; Cesar E. Salazar Grande y Enrique N. Ulate Chacón, *Manual de derecho comunitario centroamericano*, Editorial orbi.iure (2009) 21.

6 On this topic, please see Gilberto I Boutin , *Derecho Internacional privado* (2nd ed., Panamá: Ed. Maître Boutin, 2006) 147.

7 José C. Fernández Rozas y Sixto Sanchez Lorenzo, *Derecho Internacional Privado* (6th ed., Madrid: Civitas/Thomson Reuters, 2011) 37.

8 Ibid.

element of the contemporary PIL, as manifested in different forums where codifications take place.[9]

However, it is undeniable that states have gradually and progressively become socially and economically interdependent. As this interdependency increases, relationships become more complex.[10]

Thus, it comes to an explanation that, for some time, the light has touched upon the phenomenon of political, social, economic and legal areas that confluence in a new escalation of integration schemes of states, with different entity of organisation, a new political and socioeconomic context that affects and conditions, and influences in a decisive manner in Private international law; in other words, we are confronting an unprecedented functional scenario, in which also unquestionably arises problems-solving stage. From this juncture emerges a new legal system, which is called Private International Law of Integration.[11]

What segment or what is the sector in which the PIL exerts more influence? Undoubtedly, influence is found in situation where the sources of the law get along with a PIL of domestic origin, and PIL created through consensus and cooperation; an Institutional Private International Law emerges, which can affect similar legal situations but in its own manner.[12]

B. *What Is the Connection Between Law of Integration and PIL?*

The connection depends on different circumstances and different variables.

Generally, analysis is made on the model on which regional integration is based and its legal sources.

The integration, as widely known, recognises ambit of mechanisms ranging from the area of tariff preferences to economic union.

According to our understanding, whatever the degree of integration is, graded from the lowest to the highest, say, superficiality to profundity,[13] all of these require agreements on private international law. What is the objective of a customs union? Or what is the purpose behind the creation of a free trade zone? Seemingly, the answer is an attempt to foster exchange of products through an economic freedom, offering the parties mutual benefits.

What is the indispensable corollary in pursuance to a free economic circulation?

Facilitate it; It, then, comes to designating a highly consistent tool. The best means for such achievement that consist of economic freedom, liberty, free circulation of juridical

9 Silvio Batello, *El orden público en el derecho internacional privado del MERCOSUR*, (Córdoba: Advocatus, 2012) 152.

10 Maurice Shiff/ Alan Winters. The authors endorse that regional integration has become a framework of INTERNATIONAL relations, particularly during the last decade, in order that each country in the world practically makes part of, at least, one regional or multilateral scheme. Also, here comes the trend that exists to deepen integration with consecutive regulation of other issues apart from trade. This reflects, in normal way, the necessity for promotion to global level, new alternatives of governance, and objectives such as security and development. *Regional Integration and Development*, The International Bank of Reconstruction and Development /World Bank, Washington, 2003.

11 cf Boutin (n 6); cf Rozas y Sánchez Lorenzo (n 7).

12 Adriana Dreyzin de Klor, "La primera opinión consultiva en MERCOSUR ¿Germen de cuestión prejudicial?" *Revista española de Derecho Europeo Nº 23* (Madrid: Thomson/Civitas, 2007) 455.

13 For the studies and models of integration, please see Ricado X. Basaldúa, *Mercosur y derecho de la integración* (2rd ed., Buenos Aires: Abeledo Perrot, 2011) 103-126.

decisions, so as to promote international judicial cooperation.[14] Taking into account international judicial cooperation, of free movement of decisions, reference is made to one of the pillars that form the triptych nurturing this branch of law.[15]

On the one hand, the link between law of integration and private international law is crystal clear and convincing from the fact that entails law of integration and necessitates norms of judicial cooperation.

On the other hand, international scene, as a backdrop, demonstrates the necessity to become part of regional schemes in which development of exchange processes, as well as, of movement of persons, capitals and services takes place.[16] It is, of course, necessary to enact a legislation that guarantees these freedoms as to satisfy the times and requirements.

If it is a desire for a common market, as we know, to foster freedoms of four movements, regulatory spectrum, as regards private international law, shall be accorded to this objective and, consequently, embark on pertinent substantive fields. As yet, at this point, we cannot minimise the differences between integration and community law explained earlier. Significance has to be given to differences in their foundations and their influence on the propositions of private international law.

Thus, in relation to Community's legal ordering, plurality of legal systems is considered mitigated by existence of common norms originating in the bodies of integration, characters of which are of immediate applicability, direct effect and supremacy. In addition, from the other angle, a judicial system appears that guarantees uniform interpretation of Community law.[17] On the other hand, operating limitation remain for the national legislature at the time of ascertaining rules of domestic private international law in conjunction with the Community's legal principles and *normative acquis* generated at the core of the organisation.

While not entertaining these characters, but requiring its incorporation, neither the integration law assumes same contingency degree, nor provides certainty that is observed in Community law.

C. *Is It Necessary to Have Specific Rules of Private International Law in Integration Schemes Creating As Such a New Forum for Codification?*

According to the notions recently demonstrated, in my opinion, the answer is affirmative. In all cases in which integration processes are realised, it is appropriate to develop rules governing matters as regards private international law. Logically, proper instruments can be manifested in form of operationalising mechanisms, which develop and guarantee the integration objectives. However, it needs to be emphasised that the institutional private international law obtains limits rooted in substance and subject to the principle of subsidiarity.

The first limitation is resulted from the objectives established by fundamental documents, so cooperation, free movement of judgments and private law on succession are substantive areas, which complement the integration of PIL's normative basis *acquis* from this facet, which is subject to necessary harmonisation and approximation policies. This limitation

14 As regards international judicial cooperation, please see Nadia de Araujo, *Direito* Internacional *Privado, Teoria e Practica Brasileira* (4th ed., Renovar, 2008) 277; Adriana Dreyzin de Klor/ Teresita Saracho Cornet, *Trámites judiciales internacionales*, (Buenos Aires: Zavalía, 2006).

15 Eugenio Hernández-Breton, *Problemas contemporáneos del derecho procesal civil internacional venezolano* (Caracas: Editorial Sherwood, 2004) 16-17.

16 Cf Schiff/ Winters (n 10)

17 Lucianne Klein Vieira, *Interpretación y aplicación uniforme del derecho de la integración. Unión Europea, Comunidad Andina y Mercosur* (Montevideo/Buenos Aires: IbdeF, 2011) 26.

responds to the need to respect national identities of the involving states because delegation of competences excludes the matters, as their harmonization and unification are not necessary for the purposes of integration.

As regards principle of subsidiarity, it is necessary to remind that this principle implies the capacity of relevant legislating organs to intervene as long as purposes of the action to be undertaken cannot be sufficiently achieved by the State Parties. In other words, the purposes can be better achieved by the law of integration, which regulates the issue in realm that does not constitute exclusive competence in the course of regional integration. Nevertheless, for the sake of enforceability, the effects of the action proposed are quite noteworthy.[18]

One point deserving attention, in the phase referred to as codification of private international law, is that development remarkably increases. The exponential multiplication of agreements recalls us to have a look at websites of various codifying forums. This phenomenon is certainly an ingredient of complexity mainly in systems that do not have hierarchy of the institutional rules determined and must be positioned in the compatibility clauses making a good part in many international agreements, although this is not a single nebulous cause. The complexity arising from this situation is evident, each time, with great persistence in the domestic jurisprudence of the States, constituting problems of delimitation between conventions of most variable nature. May there be ignorance of existence of an international agreement, questions of interpretation, lack of compatibility clauses or conflicts of agreements... In an attempt to solve these difficulties, it comes to rules and principles of public international law that once mostly lent her support to this international private juridical science.

In addition, there are so many forums of codification that give rise to similar described framework, why shall the number of PIL conventions increase arguing that integration shall necessarily lead to generation of norms?[19]

Because conventions for integration in the field respond to an axiology distinct from those that lead to other multilateral agreements. The principles underlying in the concept of integration are proper to these schemes inspire and direct or should inspire and direct to the legislating bodies. There is a different objective, and, hence, a requirement for a diverse solution that sympathises with proposal of each normative forum.

These axioms on what is constructed by law of integration provide direct nexus to PIL and align it with process of catalysing numerous transactions between individuals, in other words, rather than going on for analysis, it makes a magnetising indivisible part of the regional experiences.

Conflict rules in domestic legal systems, as well as, those generated in forums of international codification including, but not limited to, the Hague Conference, the Inter-American Specialised Conference on Private International Law, the United Nations (UN), or bilateral and international treaties and conventions such as Bustamante Code and the Montevideo Treaties of 1889 and 1940; have been inspired by the principle of cooperation. However, we are here before another circumstance; there emerges an ordering resulted from a new ambit of passing legislations that operate as a new forum, whereby emanating rules governing various relationships between those obtaining special prominence, the relations of private law *ad intra*.

18 cf Boutin (n 6); cf Rozas y Sánchez Lorenzo (n 7).

19 Adriana Dreyzin de Klor, *El MERCOSUR: generador de una nueva fuente de derecho internacional privado* (Zavalía, Buenos Aires, 1997) 347.

States Parties cannot retain total legislative and regulatory freedom, but shall set forth a harmonisation, which constitutes effective integrationist process, principally in areas assigned for elimination of discriminations, shall remove legal obstacles to economic activity and make available equitable and common instruments to economic operators. [20]

The decision to share an integrated area is supposed to be a deep and complete evaluation of advantages and disadvantages, of costs and benefits of countries involved. The political will to work, that serves as a driver and means of support of the association, must be accompanied by other signs on legal, economic and social levels, which may appear, among other possible forms, through a solid structuring timber, as substantial basis of trade flows that act as revitaliser of regional scheme and legal instruments that embrace the needs, which gradually lead to appropriate solutions.

New source of law, namely the Institutional Private International Law, shall be integrated by the rules inspired by principles of integrationist confidence, non-discrimination by nationality, and respect of national identity. Regulation as adopted in private external traffics, will be something reflecting the particularities, which detain the process. There exist certain parameters that should have been common to all schemes namely, flexibility and pragmatism, which are metaphorised as indispensable bastion for systemising regulation that captures the current institutional private law conception.

Specifying interrelation between both areas of law entails, apart from locating ourselves in the context of integration, in the relations between States and in juridical relations in respect of private international law, an engagement to other disciplines, especially public international law, given that the necessity of investigating into study of international organisations, their institutions and obligations and rights deriving from them.

Admittedly, the situation brings us to multi-disciplinarity; the integration has a great merit to again reunion of Public International Law and Private International Law; the context interweaves them, has them receiving communion together and, after many years of persistence for conglomeration of these pillars, both disciplines are considered in urgency to actively contribute to development of the schemes.

It is necessary to understand that the right to integration is not a relocation of something international to regional realm, but rather a progressive reality, which gives rise to a new law, which is neither Public International Law nor Private International Law.

But, there are also many other areas of law that congregate, especially constitutional and administrative law, which are deployed in the light of daily arising problems. From different angles, all legal disciplines remain concerned with law of integration, a legal system developing in parallel with national law.

It is a body of law with proper characters and clearly differentiated, constituting fundamental role that is complied by domestic, as well as regional tribunal. The judiciary is obliged to cover tremendous gaps by incorporating himself to scene of judicial activism. [21]

Here, at this point, the concept of governance gains importance, which makes reference to a new conception of public policy and organisational structures on international level designed, nevertheless, for sub-continent. In the context of globalization, governance implies the need to redefine an operative model that changes decision-making process. The concept is actually grounded upon importance of focusing on the capacity of international community for the fulfillment of projection or objectives to be realised from global political vision.

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20 Alejandro Perotti, *Habilitación constitucional para la integración comunitaria* (Montevideo: Universidad Autral/ Konrad Adenauer Stiftung, 2004) 31-35.

21 Jorge W. Peyrano, *Activismo y garantismo procesal*, Ed. (Academia Nacional de derecho y Ciencias Sociales de Córdoba, vol. XLVII, 2009).

Consequently, it is affirmed that debate on governance borders the future of politics in the context of globalisation and some of its effects. Going further to approaching the theme of discourse is actually indispensable although I am not going deeper into the problems, but rather leaving it remaining on the basis that reference to Law of Integration, Human Rights, Private International Law and judicial activism goes hand in hand with the concept of governance from one of its phases as long as the concept includes a tension on significance of sovereignty, range of powers in democracy, the implications as shining in human beings and particularly in the PIL.[22] Recognition of interstate symphony of instruments, which are called to be put in action, requires consideration of issues that are interconnected and where tuning is necessitated for achieving everlasting traceable harmony.

III. CONCLUSIONS - REFLECTIONS

It is conclusive for us to reflect that integration is not an end in itself, but a tool for development.

1) The advancement and consolidation of regional process necessitate challenges, working, researching, and analysis, which could be summed up in two keywords, dedication and perseverance. It does not undergo process of catharsis in front of the fearing of the governments to "lose power" that we can raise awareness about the benefits of a partnership scheme. Of much distance is integrationist interest of trying to take over "power" in areas beyond their development and they, therefore, are totally reserved for unilateral, autonomous and autocratic competences of the member states.

2) The noble concept of sovereignty and dialogue, embodied in the sources, contribute to guarantee essential and basic principles ramifying from human dignity. This is possible through a connecting that one can, in vertical, horizontal, and, even, transverse direction, exercise rights in the course of judicial application invigorating them.

3) In details, the "governance" has become a topic of social sciences, substance of which is used with a great variety of connotations. As a result, significance of governance was widened in the way that it turned to connote a term that grasps all forms of direction and creation of social order, including markets, states (governments) and networks. The governance is, *per se*, brought to this platform for continuing discussion of those public and private actors.

4) In this regard, it is not new, the argument that PIL articulates Public International Law and Human Rights, so that it is necessary to deeply analise issues that reflect the subjective and material realm. In this regard, the function of PIL is to be analized considering its methodological and structural dimensions. Principles protecting human dignity are in force, in the phenomenon of integration, as referred to in many sources of law. Likewise - hierarchically superior in some state members – human rights treaties have been incorporated into legal systems of variable range.

5) The construction of supranational legal structures created from authentic legal systems that are accelerated in speedy railway of legal harmonisation, proposing a universal model of fundamental principles of persons, demonstrate a tendency to adoption of equivalent technique

22 Fernando Flores, "Retos de la gobernanza mundial en los albores del derecho global"; Alfonso L. Calvo Caravaca/ Javier Carrascosa González, "Cooperación jurídica como instrumento para el diálogo entre culturas", ambos en: *El discurso civilizador en Derecho Internacional. Cinco estudios y tres comentarios*. Yolanda Gamarra Chopo (Coord.), Colección Actas (Derecho, Institución Fernando El Católico (C.S.I.C.) Zaragoza, 2011).

in relation to substantive and procedural law for negotiation, taking into account prudence and distance, which necessitate subject referred to in either of cases.

6) In relation to codification and substantive areas, in which it operates, in forums of international codification, as departing from one facet, subjects brought for alignments embrace, but not limited to, *lex mercatoria*, transactions, arbitration, which purposefully contributes to overcoming obstacles of ideological concordance. There is, from another facet, accommodation of those who are bringing about and pursuing the path to universalisation of rules and principles as convenient means to harbor entailment of international commerce. In turn, the generator for integration, in parallel, develops demanded instruments on the same subjects, which are valuable while they are differentiated from the others and respond to the axioms, which bring together the states; by any other means, it would, otherwise, constitute just a reiteration, confusing and increasing number of treaties, which are, in itself, already numerous.

7) When no negotiation is resorted for ascertaining obligation, the States are obliged of not disregarding and individuals in charge of co-responsibility, which competes with public and private actors from the moment when we get involved in a regional process. We know that political will is essential, but have bounced back to a concept such as governance and, under one's breath, afford to confront with a new challenge.

8) We work from academia and forums to contribute to economic phases of mechanisms accorded to their objectives. The proposal to improve the scheme, however, cannot be encapsulated among academics.

9) This reasoning brings my consideration to the necessity of submitting to organs pertinent to the operating regional processes, concrete proposal aimed at examining the feasibility and concordance of adopting appropriate alignments in order to improve the private juridical system in each dimension.