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Comparative Regionalism and Constitutional Imitations in the Integration Process of Central America

Abstract: *This article will present some preliminary conclusions drawn after conducting the first stage of a research, which intends to study the constitutional characteristics of the Integration Process of Central America (in its diachronic and synchronic dimension) by means of assessing its legal and extralegal formants in order to verify if its structure and modality are a result of a specific historical and cultural context with elements of originality and innovation; or if they are a mere consequence of a strict “constitutional imitation” of foreign external models (EU) shaped by the interests of the dominant “criolla” economic elite; or if in addition we are in the presence (in terms of regional integration) of a “symbolic constitutionalization”. This comparative analysis will enable to develop further theory to answer the question of the use of the European Union as an appropriate “tertium comparationis”, as well as to empirically verify the existence of an “Euro-Latin American dialogue” and its corresponding “key words” by focusing on the a cross-comparative approach of the historical formation of the European collective singulars (N. Elias and R. Koselleck) and of its legal constitutional system.*

Keywords: Integration Process of Central America; Constitutional Identity; Comparative Constitutional Law.

1. Introduction

This article is part of an ongoing research project designed to study the constitutional characteristics of the integration process in Central America (in its diachronic and synchronic dimension) by means of assessing its legal and extralegal formants with the purpose of confirming if the structure and modality of the various integration efforts – that the Central American region has been pursuing throughout the last century – are a result of a specific historical and geographical context, or if they are a mere consequence of a strict “constitutional imitation” of foreign external models, in particular that from the European Union, shaped by the interests of the dominant “criolla” economic elite of the region.

Hence, the research's main objectives will be to identify, describe and produce an analysis of the interacting historical, sociological, legal – institutional and structural – factors which might have influenced the Central American integration process. The results will lead us to respond a very complex question about the originality and the true existence of a “Central American Constitutional Identity” by means of verifying the dissociation between political language and the reality of reference regarding the constitutional law of the Central American States, as well as the existence of “local figurations” based on classic authors of the political and constitutional thought from the Central American context. The study also intends to introduce an innovating way to compare the two integration systems (EU-SICA) by discovering the underlying structural differences among them.

However, it is important to note that the relevance of discovering a regional constitutional identity in Central America transcends the detection of mere regional particularities. It would set out a point of self-recognition of its specific legal culture that should be embraced in its authenticity and dignity developed with scientific independence and dignity.¹

From the results of this research we hope to contribute to enhance the debate on the theoretical and methodological problem: should European regional theories and integration models be transplanted to other contexts? Moreover, we plan to add new inputs to the debate on the originality of the Central American legal culture by providing a better understanding of the regional integration phenomenon, following the notions of self-reflection and critical methodology.²

The present research will then explain the relevance of addressing the complex problem of the “Central American Identity” from a legal comparative (and critical) perspective, and of the use of intersected methods of comparison, both to generate empirical data to better support theoretical arguments on the issue under study.

¹ See L. ZEA, *El pensamiento latinoamericano*, Ariel, Barcelona, 1976; and P. GUADARRAMA GONZÁLES, *Humanism and Cultural Authenticity in the Latin-American Thought*, in «Anales del Seminario de Historia de la Filosofía», 21, 2004, pp. 169-183.

² See G. MARINI, *Foreword Legal Traditions: A Critical Appraisal in the Construction of Legal Traditions*, in «Comparative Law Review», II, 1, 2011, pp. 1-5. M. CARDUCCI, *Argomento comparativo e presunzione di isomorfismi interordinamentali: spunti critici dalla prospettiva latinoamericana*, in *Studi in on. di Aldo Loiodice*, Bari, Cacucci, 2012, pp. 1577-1589.

2. What justifies this Research?

The need for this research derives from the absence from the world literature of comparative constitutional law of an organic study of “Central America” as its main object. Few exceptions can be found in the international law studies.³ Although in the past two decades, no systematic debate regarding the Central American Constitutional Identity has been promoted some works could serve as reference.⁴ However, the state of research is characterized by a large amount of descriptive,⁵ policy-oriented⁶ and theoretical⁷ literature concerned mainly about the Central American

³ See in Italy: P. PENNETTA, *Integrazione europea ed integrazioni latino-americane e caraibiche: modelli e rapporti*, Bari, Cacucci, 2009; M. PANEBIANCO - F. GUIDA - A. DI STASI, *Introduzione al diritto comunitario comparato. Il diritto dell'integrazione latino-americana*, Salerno, Edisud, 1993; M. PANEBIANCO, *I modelli di integrazione in America Latina: l'ALADI Introduzione al diritto comunitario comparato. Il diritto dell'integrazione latino americana*, Salerno, Edisud, 1993; M. PANEBIANCO, *Introduzione al diritto comunitario comparato (diritto internazionale e diritto dell'integrazione nell'Europa comunitaria e in America Latina)*, Salerno, Edisud, 1985; and in the international debate L. FINN, ed., *Comparative Regional Integration: Theoretical Perspectives*, in *The International Political Economy for New Regionalism Series*, Furnham, Ashgate, 2009; and particularly A. MALAMUD, *Latin American Regionalism and EU Studies*, in «Journal of European Integration», XXXII, 6, 2010, pp. 637-657, and with G.L. GARDINI, *Has Regionalism Peaked? The Latin American Quagmire and Its Lessons*, in «International Spectator», XLVII, 1, March 2012, pp. 116-133.

⁴ J.M. GARCÍA LAGUARDIA, *Centroamérica en las Cortes de Cádiz*, México City, Fondo de Cultura Económica, 1971; E. DE LA TORRE VILLAS - J.M. GARCÍA LAGUARDIA, *Desarrollo histórico del constitucionalismo hispanoamericano*, México DF, UNAM, 1976; J.M. GARCÍA LAGUARDIA - C. MELÉNDEZ CHAVERRI - M. VOLIO, *La Constitución de Cádiz y su influencia en América (175 años: 1812-1987)*, San José, Instituto Interamericano de Derechos Humanos, 1987; also: M. FERRER MUÑOZ, *La Constitución de Cádiz y su aplicación en la Nueva España*, México DF, UNAM, 1993; and in Italy: E. ROZO ACUÑA, *Il costituzionalismo del Messico e dell'America Centrale. Evoluzione politico-costituzionale e Carte costituzionali*, Torino, Giappichelli, 2008.

⁵ See A. FUENTES MOHR, *La creación de un Mercado Común. Apuntes Históricos sobre la Experiencia en Centroamérica*, Buenos Aires, INTAL-BID, 1993.

⁶ See A. DE LA OSA, *Cooperación e Integración entre Gobiernos de Centroamérica*, in «Revista Nueva Sociedad», 186, 2003, pp. 64-68; J. CANDA, *Integración y Libre Comercio*, in «Revista Nueva Sociedad», 189, 2004, pp. 49-53.

⁷ See C.M. CASTILLO, *Growth and Integration in Central America*, New York, Praeger, 1986; I. COHEN, *Ensayos sobre Integración Económica*, Tegucigalpa, Banco Centroamericano de Integración Económica, 1998; for more references also see the review from W. GLADE, *A Central American Triptych: Three Views of the Integration Process*, in «The Latin American

economic integration process, while most academic contributions on the field of the “Central American comparative law” have mainly focused on formal comparison, “non–problem based” approaches or highly theoretical and conceptual work, most of them lacking solid methodological base or critical analysis.⁸

Furthermore, other studies, even when contributing towards a better understanding and characterization of the “Latin and Central American Regionalism”, often build their analysis, conclusions and recommendations on a “universalist” theoretical framework that departs from the European experience without deepening into the structural differences between the institutional and legal organization of the integration systems that are being compared.⁹

Even when belonging to the field of international relations and political economy, some literature on the Central American integration – which presents a more critical perspective –, is considered as enlightening for some economic, political and sociological factors that might have influenced the process¹⁰ and therefore capable of enriching the collection of scientific works on the subject of study.

Research Review», XI, 3, 1976, pp. 128-132, that can be found at <http://www.jstor.org/stable/2502508>.

⁸ See M.A. EKMEKDJIAN, *Introducción al Derecho Comunitario Latinoamericano*, Buenos Aires, Ediciones de Palma, 1994; R. CHAMORRO MORA - C.F. MOLINA DEL POZO, coords., *Derecho Comunitario Comparado. Unión Europea-Centroamérica*, Managua, Imprimatur, 2003; R.A. SANCHEZ SANCHEZ, *The Politics of Central American Integration*, New York-London, Routledge, 2007, and C. SALAZAR GRANDE – E. ULATE CHACÓN, *Manual de derecho comunitario*, Managua, Corte Centroamericana de Justicia, 2009.

⁹ See F. RUEDA-JUNQUERA, *European Integration Model: Lessons for the Central American Common Market*, Jean Monnet/Robert Schuman Paper Series, VI, 4, EUCE, University of Miami, 2006, and J.A. SANAHUJA, *Regionalismo e integración en América Latina: balance y perspectivas*, in «Revista Pensamiento Iberoamericano», 0, 2007, pp. 73-104. He describes and analyzes the “*new and open regionalism*” as a strategy applied by several integration regional groupings in Latin America and argues that there are still many “significant barriers” to be changed in order to achieve a deeper integration. According to the author the changes should mirror the institutionalism of the European Union.

¹⁰ See R. MOLINA CHOCANO, *Integración Centroamericana y Dominación Internacional. Un Ensayo de Interpretación Sociológica*, San José, Editorial Universitaria Centroamericana, EDUCA, 1974; A.J. CHAPARRO, *¿Por qué ha fracasado la integración latinoamericana?*, Caracas, Monte Ávila Editores, 1991; R. ZAMORA, *La nueva integración centroamericana: “muerta la integración, viva la integración”*, Colección Prospectiva, Vol. 3, San José, Lara Segura y Asociados, 2003; J.P. PÉREZ SÁINZ - M. MORA SALAS, *La persistencia de la miseria en Centroamérica*, San José, FLACSO, 2007; and E. TORRES RIVAS, *La Piel de* 10

3. *The Central American Constitutional Identity*

The “problem” of the Central American Constitutional Identity will be addressed in terms of a gathering of “common constitutional” features shared by the countries that historically and geo-politically have taken part of the Central American integration process.

As it is known, that of the “identity” of the European Union is a major topic of discussion on the construction of European integration, both at its cultural and institutional level, and for the legitimization of the historical process of creation of the EU as a new international organization with independent and supranational powers and legal competences. This “identity issue”, among others, has evolved in parallel with the problem of territorial and social cohesion and of cultural diversity.¹¹

Aside from few studies from the most influential classical authors of the Central American constitutional law,¹² a similar amount of studies and discussions on the “regional identity question” does not exist in the Central American context despite the scientific, political and constitutional relevance of such a study. By examining the historical, semantic and conceptual reasons for this difference in the way the various actors of the regional process perceive the importance of the issue, it will be possible to respond some of the “similarity-diversity” questionings.

3.1 *The Integration Process of the Region*

The Central American integration is a political phenomenon, which is not new or alien to the political-economic history of the Central American countries.¹³ Since their declaration of independence from Spain, in 1821,

Centroamérica: una visión epidérmica de setenta y cinco años de su historia, San José, FLACSO, 2007.

¹¹ See D. FERRI, *La Costituzione culturale dell’Unione Europea*, Padova, Cedam, 2008; P. RIDOLA, *Diritto comparato e diritto costituzionale europeo*, Torino, Giappichelli, 2010, e P. LOGROSCINO, *Governare le differenze*, Bari, Cacucci, 2008.

¹² See A. POSADA, *Instituciones políticas de los pueblos hispano-americanos*, Madrid, Hijos de Reus, 1900; L. OTERO MARINAS, *Las Constituciones de Guatemala*, Madrid, Instituto de Estudios políticos, 1958; and R. GALLARDO, *Las Constituciones de la República Federal de Centroamérica*, Madrid, Instituto de Estudios Políticos, 1958.

¹³ By Central America we mean the region consisting of the nations of Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. Nonetheless, whether or not to include Belize and Mexico in the region is still on debate.

the countries of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua have historically shown a strong inclination to form associations and organizations in the name of a common ideal or “identity”.¹⁴

The first attempt of integration can be tracked back to the early years of independency of the five former Central American colonial main provinces. After a short period of time of annexation to the Mexican empire of General Iturbide, the newly independent countries (Guatemala, Honduras, El Salvador, Nicaragua y Costa Rica) – lead by the liberals –, decided in 1823 to form a federal organization called “United Provinces of Central America”.¹⁵ This Federal Republic began a program of economic reform and development that improved the economic impasse that resulted from the wars of independence; but soon the intense localism, the harsh partisan competition among Central American leaders, the political “caudillismo”, but mostly the inability of the federal government to collect taxes at the refusal of the member States to contribute to the central government treasure, led to an inevitable disintegration of the Federation in 1838; and so did Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica emerge as sovereign autonomous Republics.

It should be noted that after the failure of the Federal Republic a constant desire – mostly of a political nature – to reintegrate or merge the five countries can be mapped throughout the region’s integration history. A number of integrationists efforts validate this affirmation: a) the Central American Confederation (1842-1845); b) the “República Mayor de Centroamerica” (1896-1898); c) the Washington Treaty (1910); and d) the Federal Republic of Central America (1921).

Despite all these failed attempts, the five countries never excluded the idea that the union was a major factor to ensure their sovereignty against the influence of other nations; and that only through joint efforts would they be able to occupy a place respected within the international community of nations.¹⁶ This is why in 1950 the Central American

¹⁴ Still nowadays some national constitutions and symbols continue to recall the unity among them, as for example most their flags preserve the old federal motif of two outer blue bands and an inner white stripe.

¹⁵ Also known as the Federal Republic of Central America. For more details about this topic see C. MINSTER, *The Federal Republic of Central America (1823-1840). Five Nations Unify, Then Fall Apart, About.com Guide*, in <http://latinamericanhistory.about.com/od/historyofcentralamerica/a/09republicofCA.htm>.

¹⁶ See CASTILLO, *Growth and Integration in Central America*, cit.

countries decided to embark on a new gradual and functional program of economic integration. On October 14th 1951, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica and Panama established the Organization of Central American States (Spanish acronym ODECA), which during its first operative decade, reached significant achievements and established the bases for the forthcoming region's economic, social and political integration.¹⁷

At the beginning of the nineties, after more than a decade of intern civil wars in several countries of the region, the presidents of the Central American States decide sign the *Tegucigalpa Protocol that reforms the Charter of the ODECA and established the Central American Integration System*.¹⁸ The *Protocol* entered into force on February 1, 1993 and defined a number of new and wider goals for the member states, among which are the achievement of the integration of the region in all its aspects and the transformation of Central America into a region of peace, freedom, democracy and development.

According to the letter of the *Tegucigalpa Protocol*, the instituted "Central American Integration System" (abbreviated as SICA by its Spanish acronym) constitutes the political and institutional framework for the integration process of the region and its conceived as a "systemic process" consisting of four main "subsystems": economic, political, social-cultural, and the sustainable management of natural resources.¹⁹

3.2 *The Identity Problem*

Apart from the common historical background shared by these five countries, the "identity characteristics" featured by the previously described integration efforts, are still not clear. For example, other countries not historically bounded to the "Central American Tradition" have been

¹⁷ See C. CLOSA, "E pur si muove": teorías sobre la integración europea", in «Revista de Estudios Políticos (Nueva Epoca)», 85, 1994, pp. 339-363.

¹⁸ See SICE, *Background on the Central American Integration*, 2007, in http://www.sice.oas.org/SICA/bkgrd_e.asp.

¹⁹ For a more updated description of the SICA see: I. PAPAGEORGIOU, *The Central American Integration System*, in *The democratization of International Organizations: First International Democracy Report 2011*, Center for Studies on Federalism, in http://idw.csfederalismo.it/attachments/462_SICA-papageorgiou.pdf, and the SICA's official website: <http://www.sica.int>.

accepted into the process either as actual member States (like Panama, that became independent from Colombia in 1903, or Belize that became independent from the United Kingdom only until 1981, also a member of the Caribbean regional integration organization CARICOM) or even as associated States (which is the case of Dominican Republic that neither geographically nor historically has ever been involved in any of the previous common efforts for the construction of the Central American integration).

4. *The Methodology of Comparison*

The research will apply three methods to perform constitutional comparison:

- 1) Comparison of the two regional integration processes – European Union and Central American Integration – as real legal systems²⁰ defined in constitutional terms. An examination of the “constitutional factors” that contributed to the effective implementation of a particular integration process will be performed according to the recent methodological guidelines developed in Europe, particularly under the terms of “comparative supra-national law”.²¹
- 2) Linguistic constitutional comparison between the States that historically have always been involved in the processes of the regional integration in Central American.²² Thus, this method will be considered as an actual “Latin American comparative

²⁰ The term “system” is used in accordance with the broad approach promoted in Italy by P. Catalano and G. Lobrano with regard to the originality of the “Latinamerican Constitutionalism”; see also G. LOBRANO, *Modello romano” e “costituzionalismo latino”*, in «Teoria del Diritto e dello Stato. Rivista di cultura europea e scienza giuridica», 2, 2007, pp. 222-277.

²¹ Methodology recently reconstructed and utilized in Italy by O. POLLICINO, *Allargamento dell’Europa a Est e rapporto tra Corti costituzionali e Corti europee. Verso una teoria generale dell’impatto interordinamentale del diritto sovranazionale*, Milano, Giuffrè, 2010.

²² We mean Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama, since the United Provinces of Central America of 1823-24, until the current Central American Integration System SICA.

constitutional law”.²³ We will also apply the specific categories of the European-italian comparative law methodological framework: a) the “legal formants” and “critotypes” of Rodolfo Sacco;²⁴ b) the “factors of influence” and “distinction” developed by Léontin-Jean Constantinesco;²⁵ c) the “constitutional imitation” theorized by Giuseppe De Vergottini.²⁶

3) Comparison of the structural relationship between national and supranational legal orders within both European and Central American integration law systems, based on Peter Häberle’s theory that distinguishes among: *Verfassungsverbund* and *Staatenverbund*. By discovering whether the supranational judge is capable or not to produce a “practical effect” within the domestic legal system transforming the national constitutions into “*Teilverfassungen*” we should be able to demonstrate the type of relationship (*Verfassungsverbund*, *Staatverbund* or “Pick and Choose System”)²⁷ within the compared legal orders (national and supranational). This will consent a further comparison of the two different experiences of regionalism and to answer whether the SICA does imitate or not the EU by examining “indicators” of comparability. (See table 1 and 2).

4.1 The “*Tertium Comparationis*”

The European Union is usually considered – by the mainstream Latin-American comparative regionalism and the majority of the Central American integration actors – as a successful “model of integration” worth

²³ According to the major contribution of J. CARPIZO, *Derecho constitucional latinoamericano y comparado*, in «Anuario Iberoamericano de Justicia Constitucional», 10, 2006, pp. 73-107.

²⁴ See R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in «The American Journal of Comparative Law», XXXIX, 1, Winter 1991, pp. 1-34.

²⁵ L.J. CONSTANTINESCO, *Tratado de Derecho Comparado. Introducción al Derecho Comparado*, Madrid, Editorial Tecnos, S.A., 1981.

²⁶ In addition to his classic manual of comparative constitutional law, see G. DE VERGOTTINI, *Derecho Constitucional Comparado*, México, UNAM, 2005; see also: *Modelos constitucionales e innovación*, in *Estudios de Teoría del Estado y Derecho constitucional en honor de Pablo Lucas Verdú*, Tomo II, México DF y Madrid, UNAM y Universidad Complutense de Madrid, 2000.

²⁷ See CARDUCCI, *Argomento comparativo*, cit.

of being imitated. Supposing that this “inspiration” or “imitation” of the European integration could be somehow justified on a political level. It is argued that it should be also examined and justified at a legal scientific level.²⁸

In an attempt to take distance from the well-known tendency to use the European integration experience as a “model” of the community method of integration that should enlighten and inspire other integration efforts²⁹ – as this could mislead our study towards a pre-assumption of similarity among both processes under study and distort the results – this study intends to apply the European Integration experience as “tertium comparationis” to check if the Central American Integration is similar or just functionally equivalent to the European Union.³⁰

In order not to reduce the EU into a historically decontextualized (permanent, unquestionable and universal) comparator, two important European historical paths are studied:

- the historical path of formation of the European “collective singulars” as true “characters of the contemporary age”;³¹
- the path of historical background of the European integration as a genuine “constitutional order” of rules and rights, taking into account the case law³² and the doctrine,³³ considering

²⁸ See F. VENTER, *The Inevitability of Constitutional Comparison*, paper prepared for Workshop 17, International Association of Constitutional Law, VIII World Congress, Mexico City, December 2010, in <http://info.juridicas.unam.mx/wcc/ponencias/17/314.pdf>.

²⁹ See Ph. F. DE LOMBAERDE – L. SÖDERBAUM – L. VAN LANGENHOVE - F. BAERT, *The Problem of Comparison in Comparative Regionalism*, Jean Monnet/Robert Schuman Paper Series, vol. 9, No. 7, Coral Gables, FL, University of Miami, April 2009, in which they state that «the treatment of European integration as the primary case or ‘model’ of regional integration still dominates many of the more recent studies of regionalism and regional integration, which is an important part of ‘the problem of comparison’ within this research area».

³⁰ See R. MICHAELS, *The Functional Method of Comparative Law*, in *The Oxford Handbook of Comparative Law*, M. REIMANN & R. ZIMMERMANN, eds., Oxford, Oxford University Press, 2006, pp. 339-382.

³¹ According to the formula used in Italy by R. VIVARELLI, *I caratteri dell'età contemporanea*, Bologna, Il Mulino, 2005.

³² See Sentences: Van Gend en Loos of 1963, Flaminio Costa-Enel of 1964, Stauder of 1969, the *Handelsgesellschaft* of 1970, *Simmmenthal* of 1978.

also that only between 1980 and 1990 (and after the sentence Les Verts from 1986 and the famous “*Opinion*” 1/1991 from 14 December 1991) the expression “European Constitution” has been started to be used by the European Court of Justice.

4.2 *Formants and meta-formants of comparison*

Only through the extraordinary contributions of Norbert Elias, on long-term formation of conceptual categories of the European institutions³⁴ then called “collective singular” of the European history by Reinhart Koselleck, and of Leopoldo Zea on the Latin American identity and its cultural and institutional specificity³⁵ we will be able to understand the formation of these two “similar but different” contexts.

The cross-examination of the legal formants of the Central American Integration (legislation, jurisprudence and doctrine) and the “meta-formants” of the socio-cultural features that shaped the “collective singulars” (such as the idea of nation and community) in Central America, will provide a proper historical perspective of the formation of the constitutional identity and therefore help us respond the following questions:

- Is the Central American regional integration process a product of a “constitutional imitation”?
- Does it contain elements of originality and innovation?
- Is there an “influence” of the “criolla elite”?³⁶
- Are we in the presence of “symbolic constitutionalization”?³⁷

³³ With reference to the theories of I. PERNICE on “Multi-level Constitutionalism”, M. POIARES MADURO on “Contrapunctual Law”, J.H.H. WEILER on “Constitutional Tolerance” and F. PALERMO on “Costituzionalismo integrato”, see F. PALERMO, *La forma dello Stato dell'Unione Europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Padova, Cedam, 2005.

³⁴ See N. ELIAS, *El Proceso de la Civilización, Investigaciones Sociogenéticas y Psicogenéticas*, México City, Fondo de la Cultura Económica, 1989; T. QUINTANEIRO, *The Concept of Figuration or Configuration in Norbert Elias' Sociological Theory*, in «Teoría & Sociedad», II, 2006, pp. 54-69.

³⁵ To read more about Zea see: A. SALADINO – Y.A. SANTANA, comp., *Visión de América Latina, Homenaje a Leopoldo Zea*, México DF., Fondo de la Cultura Económica, 2003.

³⁶ According to H. BLOOM, *The Anxiety of Influence*, Oxford-New York, Oxford University Press, 1973.

The answers to the previous questions are fundamental to empirically verify the actual existence of a “dialogue” between Europe and Latin America and its corresponding “key words” suggested by Peter Häberle.³⁸

4.3 *Linguistic Comparative Study of the Constitutions of Central America*

On a second level of comparison we will carry out an empirical study on the “constitutional language” used by the Constitutional charts of the member States of the Central American Integration System, according to the methodological framework of Marco Lupoi³⁹ and the methods recently developed by Michele Carducci to endorse the theory of “the geopolitics of translation”.⁴⁰

It is well known that the “moment of the writing” of the law⁴¹ has always been considered as one of the crucial elements that defines the identity within the EU (for example: how and what to write as legal rules for a European Union?). Following the same logic, we believe that “the moment of the writing” must equally be studied in both the historical founding acts of the various central American integration processes⁴² as well as in the texts of the constitutions of each central American country to seek similarities, repetitions, correspondences, innovations or linguistic constructions, that could validate attempts of originality in the construction of the legal rules of integration as well as the identification of a common axiological core within the constitutional identity of the Central American countries.

³⁷ According to the categories of M. NEVES, *Costituzionalizzazione simbolica e decostituzionalizzazione di fatto*, Lecce-Cavallino, Pensa, 2005.

³⁸ See P. HAEBERLE - M. KOTZUR, *De la Soberanía al Derecho Común: Palabras Clave para un Dialogo Europeo-Latinoamericano*, México City, UNAM, 2003.

³⁹ About the “legal flows” see: M. LUPOI, *Profili (anche linguistici) dei flussi giuridici*, in the Accademia della Crusca website, 2002: http://www.accademiadellacrusca.it/img_usr/Profili_Lupoi.pdf.

⁴⁰ Promoted at the Euro-American Didactic Center for Constitutional Policies of the Faculty of Social, Political and Territorial Sciences of the University of Salento, Italy. See M. CARDUCCI, *Le traduzioni tedesche nel costituzionalismo latinoamericano tra Ethos Iberico e «flussi» dell'autore-traduttore*, in «Diritto Pubblico Comparato ed Europeo», 3, 2011, pp. 724-744.

⁴¹ Theorized by C. PINELLI, *Il momento della scrittura*, Bologna, Il Mulino, 2002.

⁴² Using the compilation and analysis provided by GALLARDO, *Las Constituciones de la República Federal de Centroamérica*, cit.

Subsequently two important empirical data should emerge:

- a. the hetero or auto-qualifications of the constitutional language, according to the study method developed by the Italian comparatist Lucio Pegoraro;⁴³
- b. the presence and significance of the “preambles”, according to the reading and understanding guidelines developed and used by Michel Troper and Peter Häberle.

4.4 *Isomorphism or Identity?*

As has already been noted by a number of comparative legal scholars, the Latin American legal system has been always identified as an “order” where legal theories and principles⁴⁴ have traditionally been imported or borrowed.⁴⁵ Traditionally, these borrowings are associated with different purposes:⁴⁶ as a way of filling in gaps; as a means of clarify obscurities in the statutes and precedents in hard cases; as a way of legitimizing its practice through the borrowing of authority arising from consolidated institutions; as a way of increasing the level of international legitimacy of the practice of the court; or even as for mere rhetorical purposes.

Accordingly the borrowing or “cross-fertilization” phenomena (primarily identified in the use of foreign materials by constitutional courts) might configure itself at any level of legal interaction among two different legal systems – such as the regional integration systems – fostering the transfer – from one legal context to the other – of “policies and theories” and the following construction of “isomorphisms”⁴⁷ that suggest the configuration of “imitation phenomena”.

⁴³ See L. PEGORARO - S. BALDIN, *Costituzioni e qualificazioni degli ordinamenti. Profili comparatistici*, in L. MEZZETTI, ed., *Presidenzialismi, semipresidenzialismi, parlamentarismi: modelli comparati e riforme istituzionali in Italia*, Torino, Giappichelli, 1997.

⁴⁴ Exported from the main places of production such as Europe and the United States.

⁴⁵ See N. TEBBE - R. TSAI, *Constitutional Borrowing*, in «Michigan Law Review», CVIII, 4, January 2010, p. 459-522.

⁴⁶ See J. PINTO BASTOS - A.C. CABALLERO, *Beyond the Borders of The National Constitution: Cross-Fertilization and Global Constitutionalism*, at http://paperroom.ipsa.org/papers/paper_2833.pdf.

⁴⁷ See C. RADAELLI, *Policy Transfer in the European Union: Institutional Isomorphism as a Source of Legitimacy*, in «Governance», XIII, 1, January 2000, pp. 25-43; and D. ARGYRADES, *Good Governance, Professionalism, Ethics and Responsibility*, in «International Review of Administrative Sciences», LXXII, 2, June 2006, pp. 155-170.

To discover if the regional integration process (understood as a reflection of the constitutional and juridical culture in Central America) it's an authentic imitation of the European Model, the study should verify if the ostensibly "exported" theories and policies still maintain its functionality when "imported" for the construction of a likely "isomorphic" Central American System of Integration (SICA). In order to do so two important elements of the latter should also be analyzed in depth:

- a. the Economical Subsystem of the SICA, where a determinant influence of the "criolla" entrepreneurial elites⁴⁸ not only constitute an important part of the decision-making system,⁴⁹ but foremost had exercise the leadership over the direction of the Central American Integration process;⁵⁰ and
- b. the Central American Court of Justice (henceforth CCJ from its acronym in Spanish) where the phenomena of "legal transplant" and "cross-fertilization" – in the sense of reception of a structure and principles of the European Community Legal System to the Central American Integration System – has been detected⁵¹ in

⁴⁸ In the form of "Economic dominating groups", recently under study by a research project "Confronting transnationalization: the economic, environmental and political strategies of Central American economic groups", funded by the Latin America program of the Norwegian Research council, see http://www.norlarnet.uio.no/research-in-norway/featured-research/2011/old_elites.html.

⁴⁹ See F. CARDOSO, *The Entrepreneurial Elites of Latin America*, in «Studies in Comparative International Development (SCID)», II, 10, 1966, pp. 147-159; and L. OBREGON, *Between Civilization and Barbarism: Creole Interventions in International Law*, in *International Law and the Third World: Reshaping Justice*, edited by R. FALK, B. RAJAGOPAL and J. STEVENS, London, Routledge-Cavendish, 2008.

⁵⁰ This phenomenon has been addressed by A. SEGOVIA CÁCERES, *Integración Real y Grupos de Poder Económico en América Central. Implicaciones para el desarrollo y la democracia en la región*, San José, Friedrich Ebert Stiftung, 2005.

⁵¹ See A.D. PEROTTL, *Sistema de la Integración Centroamericana: La Corte Centroamericana de Justicia*, en «Revista de Derecho Privado y Comunitario», 1, 2005, pp. 597-627, and *La autoridad de la Doctrina de la Corte Centroamericana de Justicia: su aporte a la consolidación del bloque regional y la actitud al respecto de los Tribunales Constitucionales de los Estados Miembros*, Madrid, Fundación AMELA, 2007.

many of its sentences which repeatedly use to European Jurisprudence to set its own doctrine.⁵²

Peter Haberle's theory on *Verfassungsverbund* and *Staatenverbund* allows to perform a comparison that considers the following structural differentiation factors:

1. Which and how many constitutional texts are involved in the regional integration, process?
2. Does the conflict among these texts produce an apparent antinomy (AA) or a real one (RA)?
3. Is there reciprocity among national and supranational judges when it comes to the application of these texts?
4. The supranational judge's decision produces a "useful effect"?
5. Which judges have the last word when interpreting or judging: the supranational (SN) or the national one (N)?
6. The supranational decisions are domestically binding?

⁵² For an updated compilation of the CCJ sentences see: A. GOMES VIDES, *Jurisprudencia de la Corte Suprema de Justicia, Resoluciones, Precedentes, Votos Disidentes*, Managua, Corte Centroamericana de Justicia, 2011.

Type of relationship	How may constitutional texts?	Type of autonomy	Reciprocity among judges?	Useful effect?	Who has the last word?
Inter-ordin. Unione Europea (Verfa-Verbund.)	<i>At least two (Constitutions, the four EU Foundational Treaties including (ECHR- and the Nice Charter)</i>	<i>RA</i>	<i>No, it's vertical within the UE but It's horizontal among ECJ in Luxembourg and the ECtHR in Strasbourg</i>	<i>YES</i>	<i>SN Judge</i>
Inter-Ordin. (Staaten-Verbund)	<i>Only two (Constitutions and international Treaties)</i>	<i>AA</i>	<i>NONE</i>	<i>YES</i>	<i>N Judge</i>
"Pick and Choose System"	<i>Only Two (Constitutions and int. Treaties)</i>	<i>RA</i>	<i>NONE</i>	<i>NO</i>	<i>N Judge</i>

1. What are the "issues" on which judges (N and SN) dialogue: Fundamental Principles (FP), Fundamental rights (FR), Functions and Powers (F)?
2. When deciding on the latter, does the SN judge uses a mutual confrontation "cross-constitutionalism" (C), or a unilateral "Borrowing" of judicial argumentations (B)]?
3. The SN judge's reasoning is TOPICAL (rhetorical) regarding values (T), or Functional regarding the community interests (F)?
4. The comparative methodology of the N judge is individualist (I) [protection of freedoms], nationalist (N) [protection of national and constitutional interests and identity] or functionalist (F) [protection of supranational community interests]?

Type Of Relationship	Which issues?	“Cross” o “Borrowing”?	Topical (rethorical) or functionalist reasoning?	Methodology?
Inter-ordin. EU (Verfassungs-Verbund.)	PF-FR	“Cross” (the common european constitutional traditions)	F: Only (Primauté)	I+F
Inter-Ordin. (Staaten-Verbund)	PF-FR	“Borrowing” (experiences from other legal orders)	T and F T: because they reaffirm values not yet consolidated F: because they turn them into common values	I+F+N
“Pick and Choose System”	F	“Borrowing” (from EU experience)	F: functionalist, because they promote the primauté	N

6. Conclusions

The official documents of the SICA and the Central American Court of Justice (CCJ) refer to “regional integration” as it is done in the European Union context, but based on the next findings, the two processes seem to be are very different. The SICA could be characterized more as a Conference of States or international organization than as a community system⁵³ that operates within the international law logic of a “Pick and Choose System”.⁵⁴

After performing a comparison using the third method described in the previous section some preliminary conclusions can be drawn:

⁵³ See T.C. HARTLEY, *The Foundations of European Community Law*, Oxford, Oxford University Press, 2007.

⁵⁴ Expression used by Shaw when referring to the possibility of a State to regard as legally obligatory or not an international treaty: see M.N. SHAW, *International Law*, Cambridge, Cambridge University Press, 2003, also called “à la carte” by prominent internationalists like Jakson.

1. The SICA cannot be characterized as a *Staatenverbund*,⁵⁵ because the State members are not equally bounded by all the treaties that regulate the regional integration. Even under the context of “state cooperation” provided by the *Protocol of Tegucigalpa*, the States members of the SICA have concluded a number of other international agreements that are not integrated with the *Protocol*, and then maintain full legal independence with respect to it.⁵⁶

Such a thing does not occur in the European community legal order which is viewed as a unitary legal system, where its norms are inter-related and consequently form a system with mutual dependencies.⁵⁷ This asymmetry on the international reciprocity among the member States of the SICA produces important effects:

- a. The treaties remain independent and therefore only bind those States which decide to join, resulting in precisely the phenomenon of “Pick and Choose System”, which in fact does not guarantee a consistent regional integration.
- b. This also explains why the SICA is predominantly intergovernmental in its structure. The government of the SICA is controlled by the “Meeting of the Presidents” and the “Council of Ministers”, composed of representatives of the Governments of Member States.⁵⁸
- c. Contrary to what happens within the European Legal system,⁵⁹ the SICA has no clear, nor uniform system of organization and

⁵⁵ As an “*Alliance of States*” according to R. BARENTS, *The Autonomy of Community Law*, The Hague, European Center, 2004.

⁵⁶ Aside from the *Protocol of Guatemala* in the October 29, 1993, amended in 2003, that establishes the “Central American Economic Union” and ratified by Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, the *Treaty of Central American social integration* of March 30, 1995 has been only ratified by El Salvador, Guatemala and Panama; while the *Treaty for Democratic Security* of 15 December 1995 has been ratified by Belize, El Salvador, Honduras and Nicaragua.

⁵⁷ See R.A. WESSEL, *The Constitutional Relationship between the European Union and the European Community: Consequences for the Relationship with the Member States*, in J.J.H. WEILER & A. VON BOGDANDY, eds., *Jean Monnet Working Papers*, 2003, in www.jeanmonnetprogram.org/papers/03/030901-09.html.

⁵⁸ Articles 13-15 and 16-22 of the *Protocol of Tegucigalpa*.

⁵⁹ See WESSEL, *supra*, note 57. According to Wessel when the Union is seen as a unitary system: «The interpretation of the norms should take into account their setting within the legal system of the Union, which reveals the necessity to establish a hierarchy of norms within the legal system of the European Union» (p. 7).

hierarchy of the sources of the integration law. There is no single provision of the agreements about this subject. Even though the Protocol of Guatemala states that the regulations of the SICA are “directly applicable” within the Member States in terms of compulsory and general effects⁶⁰ – terminology imported from the European treaties –, the individual states in this region prefer to adopt internal acts of “internalization” of the rules adopted before allowing full their effect in the domestic legal orders.⁶¹ The Protocol of Tegucigalpa is doubtfully a hierarchically superior agreement within the legal framework of the SICA, as it seems to indicate the Article 2 of the *Reglamento de los actos normativos* (*Normative Acts Ruling*) and an opinion rendered by the CCJ, 24 May 1995 (Case No. 3 opinion requested by the Secretary General of SICA).

2. The Central American Court of Justice (CCJ) is only “mentioned” in the foundational *Protocol*. The determination of its operative regulations is submitted into separate agreement (The Statute of the Court)⁶² that each Member of SICA has had the political will to ratify or not. The CCJ is thus “conditioned” by this “Pick and Choose” logic, which hinders the “Embeddedness” of its powers. In fact, its jurisdiction has not been accepted by all Member States of SICA, as the Statute, which entered into force February 2, 1994, has only been ratified by El Salvador, Honduras and Nicaragua, while Belize, Costa Rica, Guatemala and Panama have not done so.

According to the Statute, the Court embraces the “Central American national consciousness” and is the trustee and guardian of the values that constitute the Central American nationality.⁶³ This suggests that the CCJ should have primarily a “community function” but as a matter of fact the

⁶⁰ Article 55, paragraph 3 of *Protocol of Guatemala*.

⁶¹ SICA members prefer the “dualist” approach for the application of international treaties. On policies about treatment of international law in national legal orders see: J.H. JACKSON, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, in «American Journal of International Law», LXXXVI, 2, April 1992, pp. 310-340.

⁶² Signed December 10, 1992, during the XIII Meeting of the presidents of the SICA, the statute of the CCJ was prepared by the Central American Judicial Board, which brings together the presidents of supreme courts of the states in the region.

⁶³ In continuation of the art. XIII of the Statute of the Court of Cartago of 1907.

CCJ operates more like an international judge and its functions seem “mixed”, unlike those of the Court of Justice of the European Union and are also conditioned by the logic “Pick and Choose.”

3. Unlike the Court of Justice of the European Union, the CCJ has no specific jurisdiction on fundamental rights protection. According to art. 35 of the *Tegucicalpa Protocol*, all disputes relating to the application or interpretation of the *Protocol* – or related acts – should be subject to review of the CCJ. But this competence is limited by the “Pick and Choose” logic, too, because the SICA States are also members of Inter-American Convention on Human Rights and, therefore, are under the jurisdiction of the Inter-American System. Moreover the CCJ has confirmed its own incompetence to rule any case regarding violations of human rights in its sentence “Duarte Moncada” of January 13, 1995; except when violations of human rights have been executed by organs of the SICA, as it was affirmed by the sentence “Viguerie Rodrigo” of October 24, 2000.

Since the art. 25 of the Statute of the CCJ, restricts the provisions of the *Tegucigalpa Protocol* setting a limitation on the competence of the Court – stating that its jurisdiction does not pertain to the matter of human rights – the CCJ and the Inter-American Court of Human Rights signed in 2007 a special Convention for Mutual Cooperation to promote dialogue and mutual cooperation among them.

Despite the recurrent borrowing of ECJ’s sentences by the CCJ this “self-limitation” distances the role of the CCJ with respect to that of the Court of Justice of the European Union on human rights issues.

4. There is scarce or no “dialogue” at all among national courts and the CCJ. First of all, the “preliminary reference procedure” stated in the CCJ’s Statute is optional and no binding as the Statute itself does not bind all members States of SICA. Therefore a “Cooperation Agreement between the CCJ and the National Supreme Courts” was ratified by the three member States of the CCJ’s Statute in order to regulate the mutual cooperation. This agreement also states the use of the preliminary reference procedure as an “optional” tool for standardization of Community law by the national courts of Member States.

Furthermore this “consultation mechanism” is influenced by some contradictory regulations:

a) the art. 37 of the CCJ's Statute provides that the Court's judgments are "binding only to its members with respect to the case decided" (such as *res judicata*);

b) the art. 22 c) also provides that the Court has the competence to rule – upon request of any interested party – about any law, regulation, or administrative decision of any member State of the SICA, when in conflict with the foundational Treaties or any other Central American Community law provision. But on the case of "Coto Ugarte" March 5th 1998, the Court decided that the internal Community law procedures would only start to operate after all domestic remedies had been exhausted: which means not through the preliminary reference procedure but as a "subsidiary" procedure.

c) The art. 22 d) of the Statute provides that the CCJ would also act as a "Permanent Consulting Court" towards the Supreme Courts of the member States, which would seem to "impose" a sort of "cross-constitutionalism" among the States' Supreme Courts. However this mechanism has only been used ONCE by the Court of Justice from Honduras in 1995.

For the reasons above stated the CCJ can be defined – by its factual operation – as an international court, in some way similar to the European Court of Human Rights again distancing itself from the ECJ model of communitarian jurisdiction, which – since the first evolutionary stages of community law – intensively used the "mandatory" preliminary reference procedure to reaffirm the binding character and develop the main principles of the European community law.

