

## CHAPTER IV

### THE FACTS (CONTINUED). THE WORLD CONTEXT

#### *1. The Seat of Power: Local Regions, the Nation State, Supranational Organizations, International Law and Jurisdiction; Foreign National Jurisdiction*

POWER has been shifting away from the Nation State, inwards towards local regions<sup>1</sup> and outwards originally towards the international institutions<sup>2</sup>, then to the supranational state and beyond; towards greater international

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<sup>1</sup> See ANTHONY, GORDON, Public Law Litigation and the Belfast Agreement, *European Public Law*, vol. 8, n° 3, pp. 401-422, 2002; MORISON, JOHN, Constitutionalism and Change: Representation, Governance, and Participation in the New Northern Ireland, in: *Fordham International Law Journal*, New York, vol. 22, april 1999, n° 4, pp. 1608-1627. "Globally there has been a trend for state governments to lose power also through devolution to substate, regional, provincial, and local political entities. In many states, including those in the developed world, regional movements exist promoting substantial autonomy or secession": HUNTINGTON, SAMUEL, *The Clash of Civilizations and the Remaking of the World Order*, New York, Touchstone, 1997, p. 35. BREWER CARÍAS, ALLAN RANDOLPH, Regionalization in Economic Matters in Comparative Law, in: *Etudes de Droit Public Comparé*, Brussels, Bruylant, 2001, pp. 139-159, esp. pp. 140-1, 154-9, concludes that economic regionalization is frequently linked to administrative or political regionalization.

<sup>2</sup> "International institutions now assert the right to judge and to constrain what states do in their own territory": HUNTINGTON, *op. loc. cit.* Some authors point out that there is also "cross conditioning", when international lenders, both public and private, agree on conditions that the receiving country is to meet; even technical country missions sometimes are composed by members of different international lenders, such as the WB and the IMF. JIMÉNEZ CASTRO, *Préstamos y programas de ajuste estructural*, *op. cit.*, p. XIX, tells of such "cross conditioning" by the IMF, WB, IDB, AID, "the Club of Paris" and other international private commercial banks.

law<sup>3</sup> and jurisdiction<sup>4</sup>, sometimes even applied by local courts<sup>5</sup>. In the meantime, there is a touch of greater national or bi-national<sup>6</sup> foreign jurisdiction<sup>7</sup> as part of the ongoing process towards more international jurisdiction<sup>8</sup>.

The world seems to be moving, slowly and perhaps inexorably, towards a new federalism<sup>9</sup>, where the former Nation States will act as local intermediate entities<sup>10</sup>; for they inevitably suffer, in this process, “losses in sovereignty, functions, and power”. This “weakening of states” and the percep-

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<sup>3</sup> See for instance ALTER, KAREN J., *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford OX2 6DP, 2001. In another vein, some anthropologists ask “Does the proliferation of global agreements initiate a spatial order that represents an important shift from the territorial claims of colonialism and nationalism - a ‘post-colonial’ space?”: GUPTA, AKHIL, *Postcolonial Developments*, Durham, Duke University Press, 1998, p. 299.

<sup>4</sup> The most interesting example of supranational jurisdiction is discussed in BROWN, NEVILLE L. / KENNEDY, TOM, *The Court of Justice of the European Communities*, 5<sup>th</sup> ed., Sweet & Maxwell, London, 2000.

<sup>5</sup> Both phenomena are well examined in VOLPI, MAURO, *Le forme di Stato*, in: MORBIDELLI, G. / PEGORARO, L. / REPOSO, A. / VOLPI, A., *Diritto costituzionale italiano e comparato*, Bologna, Monduzzi, 1997, pp. 413-27. Sometimes the tendency favors Indigenous people: see ANAYA, S. JAMES, *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996, chapter 3, pp. 75 et seq.

<sup>6</sup> As in the case of the NAFTA panels: see LEMIEUX, DENIS / STUHEC, ANA, *Review of Administrative Action Under NAFTA*, Carswell, Ontario, 1999.

<sup>7</sup> There are many examples. One of them is that of the American FCPA. See CRUVER, DONALD R., *Complying With the Foreign Corrupt Practices Act. A guide for U.S. Firms Doing Business in the International Marketplace*, 2<sup>nd</sup> ed., American Bar Association, Chicago, 1999.

<sup>8</sup> Also national courts play a role as part of the supranational judicial system. See CRAIG, PAUL, *The Jurisdiction of the Community Courts Reconsidered*, in: DE BÚRCA, GRÁINNE / WEILER, J. H. H., *The European Court of Justice*, Oxford University Press, New York, 2001, chapter 6, p. 179.

<sup>9</sup> Or, in another perspective, “a new regime of discipline in which governmentality is unhitched from the nation state to be instituted anew on a global scale”: GUPTA, *op. cit.*, p. 321.

<sup>10</sup> In any case, the phenomenon is not new; “...global communities act across borders as more than citizens of their home status and identify to varying degrees with inherently universalizable norms”: BRYSK, ALISON, *From Tribal Village to Global Village. Indian Rights and International Relations in Latin America*, Stanford University Press, Stanford, 2000, chapter 5, pp. 188 et seq.

tion that there are “failed states”<sup>11</sup> is a fact that cannot really be denied. The first, inward shifting of power away from the Nation State is clear not only in Europe but also in the United States<sup>12</sup>.

Latin America is only a part of that phenomenon, with emphasis on a premature loss of power of the Nation State, towards international organizations and other supranational bodies<sup>13</sup>, but also towards other more powerful Nation States. This is not really new in history, just different<sup>14</sup>. By contrast, the tendency towards inwards regionalization is always weak in Latin America, where the tradition has been of continuous centralization; only recently have some steps been taken that might show a possible reversal of such history: but this is just a perception, by no means a fact<sup>15</sup>. The attempts at supranational organization have also been historically weak, but the loss of power at foreign or international hands is all too obvious and quite clearly growing.

The case of growing foreign national jurisdiction as a step towards a not yet fully developed international jurisdiction is clear in certain international crimes that have not yet been fully ascribed to the ICC at The Hague: organized crime and terrorism, money laundering, past cases of genocide and torture, etc. The US, UK, Spain, France, Israel, Germany, etc., have exercised and sometimes still exercise such jurisdiction in par-

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<sup>11</sup> HUNTINGTON, *op. loc. cit.*; “Argentina is widely perceived as a national failure”: SHUMWAY, *op. cit.*, p. x.

<sup>12</sup> NOONAN, JR., JOHN T., *Narrowing the Nation’s Power. The Supreme Court Sides with the States*, University of California Press, 2002.

<sup>13</sup> For a general overview, see ATKINS, *Latin America and the Caribbean in the International System*, *op. cit.*, pp. 220 et seq.

<sup>14</sup> It is easy to prove that the international order was not established between equals, even at its genesis. See ALLOT, PHILIP, *Mare Nostrum: A New International Law of the Sea*, in: *American Journal of International Law*, 86: 764 (October 1992); ZUPPI, *La prohibición ‘ex post facto’ y los crímenes contra la humanidad*, *ED*, 131: 765; ZUPPI, *El derecho imperativo (‘jus cogens’) en el nuevo orden internacional*, *ED*, 147: 863; *La noción de soberanía en el nuevo orden internacional*, *ED*, 151: 781. I mention this fact in *An Introduction to Law*, *op. cit.*, chapter X.

<sup>15</sup> This is a very complex issue. In Latin America, it seems every writer has tried to emphasize regionalization, seeing it as a good prospect for the country (myself included), but it is dubious, at least, if the results that can be shown are enough to form a reality. See GELLI, MARÍA ANGÉLICA, *Constitución de la Nación Argentina. Comentada y Concordada*, Buenos Aires, La Ley, 2001, pp. 750-766. Curiously enough, the only jurisdiction having gained real new authority is the federal district, but it is perceived as not yet enough. See GELLI, *op. cit.*, pp. 766-792.

ticular cases. Since they are as well known as they are debatable and are being actually debated, I need not go into that here<sup>16</sup>.

It should be stressed that the tendency the world is now following is the grouping of states, as is happening with the ever-growing European Union. It would, then, be historically fallacious to point out how those apparently insoluble problems that we have nowadays, in fact also appeared a couple of centuries ago in what today are developed societies. While it is true that those countries arose out of their troubles without resorting to external integration, that was in the past.

We cannot just simply observe how some nations today go asunder (most clearly my own country, of course), and wait for some miraculous internal change to happen; least of all, when those problems have been rampant throughout all of their history, as is the case of corruption in my country. Change in corrupt practices has never happened from the inside of my country. That is why, in my view, simply waiting for something different to happen in the future, all by itself, is rather suicidal.

## 2. "Democracy" vs. "Sovereignty"

Throughout history mankind has developed these two concepts as if they were compatible. They sometimes are not. The Argentine Constitution accepts to delegate absolute unilateral sovereignty into supranational states on condition that it be done on a reciprocal and equal basis.

One pull of the forces of gravity is towards the local autonomous region: we feel that if our region has more power, at the expense of the national sovereign state, then our kind of "democracy" will be better, because stronger, at the local level. That seems to be right.

The other pull of gravity, towards a supranational state, does not necessarily function anymore on the basis of equality. Of course, words can be played with, and one would be able to say that international democracy means an equal vote of each state no matter how big (in terms of territory and economy) and populated or small and underpopulated it is. That is the way it works in the UN General Assembly, but it is not the way it functions in the Security Council.

The European Union is a different, more interesting case. When you join small states (in terms of geography, population and economy), with larger states (again in terms of geography, population and economy), the rules

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<sup>16</sup> Some examples are mentioned in my book *An Introduction to Law*, *op. cit.*, chapter X.

have been adapted. In that case varying sizes (in terms of territory, population and economy) of countries change the scales of “equality” towards some new equilibrium of (implicitly different) “international democracy,” where not each state’s vote counts the same if it has very different population, economy and territory.

In a sense, a new - still implied - concept of “international democracy” commences to be a counterweight to the absolute notion of “sovereignty.”

Perhaps the notion of reciprocity will have to be reconsidered, as well.

### 3. *Cause and Consequences*

Both the EU and the US spend large amounts of money on trying to cope with some of the consequences of bad governments in Latin America: man-made disasters, or natural disasters that national governments cannot manage on their own. You may include famine, extreme poverty, inequality, fiscal irresponsibility, over-spending, over-indebtedness, etc.

My question is: how much more expensive is it for the US and the EU to try to solve the causes of these problems (bad public governance), rather than merely attacking the consequences?

And is attacking the consequences of much use when you do not enter into the causes?

The EU tried colonization in the past, and it did not work. The US tried direct intervention, support for local coups d’Etat by military regimes, and they did not work either.

So now they are trying to help solve the consequences of maladministration by trying to address the very governments that do it and try to convince them to do it differently this time, when they are being helped from abroad. They also try to implicate civil society in these efforts, to avoid the problems of bad public governance, corruption, patronage, and so on. Does it work? I am afraid not.

### 4. *A Time for Nation Building*<sup>17</sup>?

The case of Afghanistan is useful for looking at the problem from another point of view, that of the US and possibly Europe. In 1945 the US thought it could transform societies. It tried that in Japan and Germany, which trend fell later into disbelief. Afghanistan has brought the problem

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<sup>17</sup> We take the lead from JAMES DAO, “Nation-building: back in style?” *New York Times*, republished in the *Buenos Aires Herald*, November 28, 2002, p. 17.

to the forefront of discussions: How do you rebuild a nation that has not been functioning for years? Or do you try not to rebuild, but to build something new?

Unless someone can help Afghanistan to put in place a government that can be a provider of public goods, “people will look for help to those who do provide those things - which is the warlords.”<sup>18</sup>

With a difference in quantity and perhaps quality of the problem, it is essentially still the same problem that JAMES NEILSON has mentioned in the paragraphs cited above.

### 5. *What, a New Imperialism?*

It would be naïve to think that the great powers do not always exert their influence over emerging countries, even today. As we explained elsewhere (*An Introduction to Law*, chapter IX), countries exert influence over others in numerous non-transparent ways. Not just the big ones. Small countries try to defend their interests in foreign countries, too. Their leverage may be smaller, but it is real nonetheless.

In the case of the US and the EU and other big international organizations, it may be said that nowadays too many individuals and institutions exercise some kind of influence in foreign countries, without the benefit of internal legal and social controls in their own native society. What I propose here is to make those influences transparent and overt, subject to public scrutiny both at home and abroad; to channel them through a single main course instead of the myriad ways in which they are now exercised by too many countries and international organizations.

Many foreigners go to Latin America and do *pro bono* work, being commissioned either by non-governmental organizations from their own countries or by their own countries themselves, and most try to be fair, balanced and reasonable in their management suggestions; they believe what they say with all their heart.

Other times, though, the politics are, often, nefarious. And there is also the aptly named “policy du jour.”

But if everything is cloaked in secrecy and there is no public control either in our countries or in their own foreign countries, then it cannot objectively produce good results. Control is more essential to public life

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<sup>18</sup> ALEXANDER THIER, British Department of International Development, cited by DAO, *op. loc. cit.*

when it is exercised under the veil of diplomatic secrecy than when it is done in the open. Now it is a cloak and dagger business, civilian style.

I suggest bringing it into the open in the whole world, both the developing and the developed one. I am thinking of the US and EU as just two blocks of foreign state power, self-controlling each other, both excluding other forms of control, both channeling in the public light what now goes on mainly underground, almost as covert activities.

It is not the reality of effective foreign influence that I suggest to change, only its visibility and its channels and means of influence, and of course its social and political control.

Instead of joining mostly juvenile world condemnations against world power, I would rather suggest a chance for all to see how that power is exercised and how to really influence it for the good of everyone concerned, if that is at all possible.

I think we can put some trust in public institutions and public opinion in both the EU and the US, to control and thereby influence and improve the way their governments contribute to exercise power over Latin America.

It is a fact that they have many able men and women who have proven capabilities for public office at the highest levels. Some of them might be available to represent their regions or their country in an effort at nation building as is formulated here. They might be able to bring a more sensible and reasonable, rational approach to the decision-making process in a supranational state of Latin American Nations.

However, I do not necessarily foresee better people, just better systems and societies controlling and influencing them when exercising some measure of power abroad. That is what the IDB experience leads me to believe.

In order to govern with a clientele-oriented style, you need to have accomplices at all levels of government. Whistleblowers make that difficult to happen. Foreign representatives might act as whistleblowers, if nothing else. The greater perils of corruption do not only lie in the execution of the budget, they mainly lie in the decision-making process: when you contract something that is not needed, on terms that are unfair to society, for a price that is not market-savvy, there you have made the first and most important step of corruption; when bribery occurs, the biggest bribes are paid at that time (up to a hundred million dollars), the rest will be pocket money in comparison (up to a million dollars). From there on, everything falls in place. So you have to try to stop the flow of corruption at the decision-making stage, not merely at the execution stage. The first one is of para-

mount importance; the second one is really secondary<sup>19</sup>. In fact, there are various reasonable systems for internal control in small affairs<sup>20</sup>.

Of course that might lead you to suggest that what is then needed is a different and perhaps better intervention in the affairs of *each* nation, as has already been suggested in the case of my own country. Yet, even if that thought might be a logical implication of the premises, it is really not feasible at all in present times. Public resentment against it would be too strong. On the other hand, an indirect influence such as is exercised in the EU towards its composing countries may prove feasible. Not better, just feasible vs. an unfeasible alternative.

## 6. *Past and Future of Colonies and Empires*

Historians without a clear sense of direction might want to point out that all this talk is reminiscent of the Empire-Colonies relations of the past; that this is an attempt to recreate the colonial past, without even the empires wanting it: which of course they do not.

Please notice this. The present situation allows them to exert whatever influence they desire, without facing the critiques of maladministration or malpractice in foreign public governance. As things stand now, they lobby their position and obtain their results without paying for the consequences of having to really participate in the administration of a failing or failed state<sup>21</sup>.

They also exert such influence in so many different ways and by so many different means that the results are often contradictory or at least inefficient. The criticism towards the IMF for its role in giving excess credit to countries which were obviously under corrupt governments and prone to make inefficient use of the borrowed money, therefore ending by being

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<sup>19</sup> Many colleagues disagree with this statement. However, I think they lose sight of the numbers. The public debt of the Argentine state was augmented, by various executive decrees, in a third of what it was in just a year (2002). Similarly, the practice of privatization with bribes, in the nineties, included gigantic bribes and gigantically bad business decisions. The rest is, really, peanuts.

<sup>20</sup> For an analysis of some of those mechanisms see IVANEGA, MIRIAM ISABEL, *Mecanismos de control público y argumentaciones de responsabilidad*, Buenos Aires, Ábaco, 2003.

<sup>21</sup> I have been told by left wingers that “failed states” is a right-wing notion. Yet it does seem to have a solid foundation of fact, no matter how disagreeable those facts may be to us. The problem is, do we try to turn the clock back? Is that feasible? Is there any way to improve the way things are now?



unable to pay back the credits, is not really a criticism towards its bureaucracy<sup>22</sup>, for it in turn depends on the major contributors' directions.

So it is the bigger countries themselves that are not making an efficient usage of the money that they give to the IMF to be given to smaller countries. It is not that the money is given without caveats and conditions: it is that the caveats and conditions are not really working, not because the IMF's bureaucracy is sometimes wrong, but rather because the international system itself is not sufficiently coherent.

Such a situation is convenient primarily for those responsible for government in the former colonies, it is, however, doubtful to which extent it is convenient for *all* of the developed world. Those in the local power can enjoy the comforts of power and the State and are not accountable because they can always blame the empire; as for public opinion or the common people in these former colonies, they either do not care to see reality, do not know about it, or know about it but prefer to keep silent.

Those inclined to consider this but one modern version of the old "white man's burden" might say they recognize that European or American control of the emerging countries is nothing new in history. It is now less evident to see, but not less powerful. Can those critics of yore really claim that the old relationship is non-existent, just because it is not apparent for everyone to see? Some would, of course.

## 7. *Does Anyone Care?*

### 7.1 *The Resistance to Assume Further Responsibilities*

A very pertinent question is whether the current governments of the US and the EU would really care to take a more upfront responsibility for the affairs of countries which are so obviously problematic. The intervention in Africa has been seriously diminished because of a perceived insurmountable difficulty to eliminate the problems plaguing many countries in the continent. Somalia may be a case in point.

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<sup>22</sup> Such as MUSSA, MICHAEL, *Argentina and the Fund: from Triumph to Tragedy*, Washington, D.C., Institute for International Economics, 2002; Spanish edition, *Argentina y el FMI: del triunfo a la tragedia*, Buenos Aires, Planeta, 2002. MUSSA's book, faithful to his own formation, is that of macroeconomics: no place there for corruption, clienteles, patronage, or anything but numbers. His ability to avoid reality would entitle him to an honorary Argentine citizenship.

I do not know if now is the time for the US and EU to try again to do something in Africa. Nevertheless, I am sure that Latin America is sliding downwards at an accelerating rate, to the point where there is no hope for change without some kind of different world order. I do not think that the main problem lies in monetary difficulties: these are a mere manifestation of bad governance, for the richness is there. Needless to say, greater responsibility in matters of good public governance, will only place an added burden on the countries so participating.

Egoism would naturally indicate for the EU and the US to just let things stand as they are now. If that is the answer, then it should come as no surprise that sometimes things get out of hand. And to then intervene in self-defense is a late reaction, therefore more expensive in lives and money, in universal good will and cultural influence. The same thing that can be said of extreme inequalities within a single country can be said of extreme inequalities in the world order. I cannot live in peace in my own country in luxury, surrounded by poverty and injustice. I then have to employ part of my resources in self-defense. If I then suffer damage, in spite of my mechanisms of self-defense, it is too late already.

How do I change the system within my own country? I simply cannot, and I do not really want to lose elections and representative governments, even if those that govern do not make a good job of it. Yet, I know too that sovereignty does not exist as it was thought it was going to be when the newer smaller states came into being. I just want to have a fairer world organization, where my own problems are better dealt with, where better public governance than ours is not a privilege earned solely by the EU and the US.

## 7.2 *Should the US and the EU Care?*

Some countries in the EU voice the opinion that the US has brought its current troubles upon itself. The same people would say that if I am living in almost luxury in my own country, but surrounded with peril, I am assuming a risk of unknown dimensions. But the same can be said of the EU as the EU says of the US; both individuals and countries are sometimes living in luxury but surrounded by poverty. The parallel is too obvious to miss, yet we get the criticism without the example.

We, Latin Americans, get progressively unhappy with our reality, and see a better world in Europe or the US. It is almost unavoidable that a sizable part of our population is therefore tempted to go there, legally or illegally. It is just the reverse flow of when Europeans abandoned their conti-

ment, ravaged by wars or famine, in search of a better life in Latin America or other countries. That is also the point DERSHOWITZ makes, when he accuses Europe of being soft on terrorism<sup>23</sup>.

Naturally, you have the option of deciding not to try to help those surrounding you in the world to overcome their problems (real managerial help, not just humanitarian aid). Just as naturally, then the problems will inevitably come to you. To me, it is simple mathematics. I do not think that either the EU or the US can shut their eyes to world problems that they can help to be solved, and live happily and safely forever.

I do not mention Asian countries, because they on the whole seem to have a better public governance than us. I would not exclude their participation within the framework I am suggesting, of course. It just happens that Asian countries would quite probably not dream of helping us govern ourselves if the EU and the US are not part of the plan too.

### *7.3 The Money Spent on Cultural Projects*

Now and then the European Union or its Member States, and also the US, like to extend their cultural influence on Latin America, be it by teaching the language, making cooperative relations between European Universities and Latin American Universities, launching special cultural projects, etc.

I am not going to suggest that such money is misspent, on the contrary. Nevertheless, the fact that those countries or continents spend money to extend their cultural influence in Latin America proves precisely my point. You cannot cook a meal without getting into the kitchen, and you cannot complain that the kitchen is too hot.

You cannot have a lasting influence on the culture of Latin America if you do not help Latin America get on its own feet in terms of reasonably good public governance. Your help is needed, in governance.

### *7.4 What If the Wrong People Come?*

Of course, we might tempt the wrong people for the wrong reasons. That is why I suggest minority participation only. Too frequently foreign countries want to act in their own economic self-interest, with utter disregard

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<sup>23</sup> DERSHOWITZ, ALAN M., *Why Terrorism Works. Understanding the threat, responding to the challenge*, New Haven, Yale University Press, 2002.

for the interest of the client country. That was shown all too clearly by European participation in Latin American privatizations.

That is currently being shown by international subsidies that go against the international opening of the markets that the same countries preach.

Notwithstanding all that, I have enough faith in more developed societies so as to think that they will somehow manage to send their best and not their worst people. I also have enough faith in my own country and other Latin American countries to loudly complain if those people's actions are addressed merely to enrich themselves further, or their countries, again at our expense.

I have faith in the developed countries to have people who will listen to these cries of complaint, if their country representatives are just lining their own pockets or just helping their own countries get richer and us poorer.

And I have faith in the ultimately good nature of humankind, if it is given a chance. But for that to happen we have to install the mechanisms of change and communication.

I have faith in the enlightened understanding of the developed countries that, in the end, it is also in their own interest that they should try to send good people with serious intentions. Otherwise they will be like they are today, scared or furious at each new bully that decides to part ways with the civilized world. We might fantasize that we are very far away from that. We might also say: "we do not care for you if you do not care for us." But it is not true. We understand that if one suffers, everyone else does. You should, too.

#### 8. *Am I Idealizing the EU?*

It has been pointed out to me that there is scope to be slightly more critical of the EU<sup>24</sup>, as they have experienced difficulties<sup>25</sup> as well. However, the gap between EU's problems and Latin America's problems is undoubt-

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<sup>24</sup> For instance, while corruption is rampant in our countries, it is not at all an unknown phenomenon in Europe. See for instance NIETO GARCÍA, ALEJANDRO, *La corrupción en la España democrática*, Madrid, Ariel, 1997; *La "nueva" organización del desgobierno*, Madrid, Ariel, 1996.

<sup>25</sup> TOMKINS, ADAM, Transparency and the Emergence of a European Administrative Law (1999-2000), 19 *Yearbook of European Law* 217; HARLOW, CAROL, European Administrative Law and the Global Challenge, in: CRAIG, P. / DE BÚRCA, G. (eds.), *The Evolution of EU Law*, Oxford University Press, 1999, p. 261, etc.

edly always widening. No matter how many caveats we might care to add on the merits of EU (and American) participation, I think there can be no doubt that it would benefit Latin America's governance.

The first problem that has been posed to me, however, is: does Europe care? I have been told that with the exception of a handful of countries such as Spain and Italy, Latin America does not play any role in the public opinion of Europeans.

It would seem doubtful, to many, that the EU would ever accept taking up the responsibility of having a minority vote in a new supranational state and thereby remarkably increasing its responsibility for the development of this continent.

There is quite a difference, I am told, whether you limit yourself to traditional forms of aid while at least in part maintaining the opportunity to blame local paternalism if the effects fall short of expectations, or whether you accept to directly participate in the decision-making in such an obvious way as is here proposed.

I think that this is a question that only the EU can answer.

### *8.1 How the EU Provides Aid*

One of the first problems is that the EU seems to lack a clear focus on its policies towards Latin America<sup>26</sup>. But the interest is undoubtedly there, as the budget allocations would indicate: between € 400 and 500 million/year by the UE, plus € 1,900 from the Member States' aid. The money goes primarily to humanitarian aid: for uprooted people or refugees, migrants, demobilized former soldiers, reproductive health; for those discriminated against or suffering from poverty or disadvantage, children, minorities, prisoners, victims of torture, Indigenous peoples; for rehabilitation and reconstruction; also for developments in democracy, rule of law, human rights, justice, etc.

This aid is channeled through regional international agreements with Central America, the Andean Community, and MERCOSUR, or bilateral agreements (Mexico, Chile), but there does not seem to be a continental scope in the efforts and aid. Since the budgets are made annually, there may also be changes either in the amounts or in the operations that are approved each year.

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<sup>26</sup> Some reports say it is a "thicket of regulations, resolutions, declarations and communications for which there is no road map," OECD's Development Assistance Committee, OJ L 287, 31/10/2001, p. 3.

Spain and Italy have the highest number of returnees in search of employment or a better life, much as their ancestors did centuries ago in the other direction; but the problem is not just theirs. Except for immigration, where a common policy is always the norm, these problems in the EU are considered on a common basis for Europe but individually for the countries of Latin America, precisely because these countries are not united in a supranational state or an economic union.

The problem is common to all countries of Latin America, but since it appears with varying degrees of intensity according to the particular time and country being considered, it is considered as different problems in each country<sup>27</sup>. Moreover, some documents and resolutions stress the need for innovative immigration policies founded on the sovereignty of the countries concerned<sup>28</sup>. That, coming from a European Union whose main starting point was precisely some abdication of sovereignty for the common good, is not a good sign, even though one can read between the lines a possible different message<sup>29</sup>.

In my view, instead of giving primary attention and money to single problems in individual countries, no matter how pressing and distinct they may appear to be on each occasion, the EU should mostly try to devise a continental government of sorts in Latin America to be the recipient of those efforts and the primary object of help (indeed, not to give it money, but to try to improve public governance in the continent).

## 8.2 Existing Programs

It is curious that EU programs under these regulations may include the establishment of democratic structures and the promotion of human rights. Of course this is not bad at all in itself; it just misses the central point, which is the traditional culture of politics in the area. If this is not understood, then the trappings of democracy will be installed and the most blatant human rights violations will be addressed, but the same tradition of inefficiency and patronage will remain under the guise of elected govern-

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<sup>27</sup> Regulation (EC) n° 550/97 of 24 March 1997 on HIV/AIDS related operations in developing countries, OJ L 550, 27/3/1997, p. 1.

<sup>28</sup> See the European Parliament resolution on a global partnership and a common strategy for relations between the European Union and Latin America, 200/2249 (INI), minutes of 15/11/2001.

<sup>29</sup> The same resolution of 2001 suggests that an immigration “observatory” be established up with the responsibility for ongoing and thorough “monitoring” of all issues related to migratory flows between Europe and Latin America.

ments. Democracy is necessary, but it is not enough to produce good public governance. Much the same can be said about regulation n° 2258/96 concerning humanitarian aid for rehabilitation and reconstruction operations in developing countries. Article 1° declares that the final aim must be not just to permit refugees, displaced persons and demobilized troops to return home, but also to help the entire population *resume normal civilian life in their countries and regions of origin*. To resume normal civilian life in an underdeveloped society is to continue to be subject to patronage, corruption, inefficiency, clienteles, and so on. To do things properly, something has to be done about that too.

In turn, resolution n° 1257/96 also concerning humanitarian aid, has covered around € 500 million/year, administered by ECHO, the Commission's European Community Humanitarian Office. The objective in this case is slightly broader, for Art. 3° establishes that the objective is to cope with the consequences of population movements (refugees, displaced peoples and returnees) caused by natural and man-made disasters and to carry out schemes to assist repatriation to the country of origin and resettlement there when the conditions laid down in current international agreements are in place. That includes institution building.

A broader approach is also present in some agreements. In one of them<sup>30</sup> it is established that Community support shall be focused on the preparation of cooperation activities with the recipient countries, CIREFCA<sup>31</sup>, specialized partners such as UNHCR, government bodies, and NGOs<sup>32</sup>. The same approach can be observed in a more recent agreement with Mexico<sup>33</sup>, which provides that the parties shall endeavor to preserve the benefits of the aid already granted to Central America refugees in Mexico and shall cooperate *in the search for lasting solutions*<sup>34</sup>.

### 8.3 A Summary Critique

While all these efforts are oriented towards preventing illegal immigration and resettling immigrants back in their countries of origin as a lasting

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<sup>30</sup> The 1999 Framework Cooperation Agreement between the EEC and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, OJ L 63, 12/3/99, p. 39.

<sup>31</sup> International Conference on Central American Refugees.

<sup>32</sup> Article 26.

<sup>33</sup> OJ L 276, 28/10/2000, p. 45.

<sup>34</sup> Article 38.

solution, at least it is understood that the solution cannot be found in Europe, it has to be found in Latin America and other developing countries. Transnational crime, such as trafficking of migrants, women and children, has been added to the scope of these efforts<sup>35</sup>.

But the point remains, all this has to be done on a continental regional scale and with the express purpose of improving public governance in the area, in order to have really “lasting” solutions. If the paradigm remains that of patronage in each individual country and the rest that has affected the continent for the last five hundred years, then that will not be a lasting solution at all.

A regional supranational organization with EU and US minority participation, or some other kind of international arrangement with a view to nation building is needed, if we are going to realistically try to do anything about such historically unsurmountable problems.

#### *8.4 A Possible Alternative Channel*

My contention is, then, that the EU should channel its aid efforts first towards improving public governance for the continent and its components, because that is the real root of the problems which they try to alleviate with so much budgetary effort.

Badly governed countries, because governed with a traditional culture of corruption, patronage and inefficiency, will always lead to inequality, poverty and crisis. The different crises are sometimes caused by natural disasters, but even then, they worsen when there is not reasonably able public governance to deal with them. If the first objective of having reasonable public governance were achieved, much better results would be obtained with whatever singular help were decided for specific needs in the poorest countries.

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<sup>35</sup> However, not all forms of transnational crime are the object of European preoccupation. The crimes of bribery committed by many European countries and enterprises in the process of privatization in Latin America have not yet been dealt with appropriately by the European Union or its pertinent Member States. The moral obligation is here at odds with the interests of the very governments and groups that are an integral part of the EU. It is a contradiction comparable to that of preaching liberalization abroad and maintaining internal subsidies against imports from the countries that have been told to open their economies. Or to say that the European Development Bank has been established to provide loans to non-EU countries, while in fact its loans are given in support of subsidiaries or joint ventures of European companies and banks.



9. *Exports. Subsidies*<sup>36</sup>

More than fifty years ago we used to profitably export grain and beef, but then international prices went down and, even more, developed countries chose to protect their own grain and beef from imports (farmers are quite powerful in most developed countries); we started to produce steel but now the United States is imposing tariff barriers on that too. (Some industrial lobbyists are also powerful there.) If we cannot profitably export our products, then some supernatural force drives us to export ourselves. It is nothing to be much surprised about, for Europeans have been very busy immigrants to both North and South America. It is now people in South America, of European ancestry, that are making the reverse trip: we shall go into that in the next Chapter.

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<sup>36</sup> See RESNICK BRENNER, MOISES, "Globalize subsidies to pay foreign debt", *Herald World Trade*, January 13, 2003, p. 2: "Countries that preach the eminent virtues of free trade and free markets for resource distribution, are the first to heavily subsidize their own agricultural sector"; according to an editorial of *The New York Times*, December 1, 2002, "The Hypocrisy of Farm Subsidies," "the developed world pays out more than US\$ 300 billion a year in farm subsidies," which is "seven times what it gives in development aid." Developed countries could thus be said to foster inefficiency within their own borders while they preach efficiency in other countries.