

Can PARLASUR Change it all? An Analysis of its Impact on the Integration Process of Mercosur in the Light of the Evolution of the European Parliament

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Abstract

This paper explores some of the institutional insufficiencies existing in Mercosur under the POP regarding the implementation of joint policies, and analyzes how the creation of Parlasur could mitigate said insufficiencies by setting forth a movement from traditional international law to communitarian international law. Through a comparative law perspective, this paper traces the differences regarding applicability and hierarchy between European law and Mercosur law under the POP and examines the impact of the evolution of the European Parliament in the integration process of the EU in order to understand how the creation of Parlasur could be seen as a decisive step in the deepening of Mercosur integration, subject to the political will and joint efforts of the Member States.

Key words: Mercosur, European Union, Parlasur, European Parliament, Comparative Law, communitarian law, integration process.

Resumen

Este artículo explora algunas de las insuficiencias institucionales del Mercosur conforme al POP respecto de la implementación de políticas conjuntas, y analiza cómo la creación del Parlasur podría iniciar una transición del derecho internacional tradicional al derecho comunitario que mitigaría estas insuficiencias. Desde la óptica del derecho comparado, se trazan las diferencias de vigencia y jerarquía entre el derecho europeo y el del Mercosur conforme al POP, y se examina el impacto de la evolución del Parlamento Europeo en el proceso de integración de la UE, con el objeto de comprender por qué el Parlasur podría ser un factor decisivo para profundizar la integración del Mercosur, sujeto a la voluntad política y a los esfuerzos conjuntos de los Estados Miembros.

Palabras claves: Mercosur, Unión Europea, Parlasur, Parlamento Europeo, Derecho Comparado, derecho comunitario, proceso de integración.

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The topic of Latin American integration is as old as the independence wars themselves. The yearning for the *Patria Grande*, preached by figures such as San Martín and Bolívar, has become part of the political folklore of the south of the continent. When the negotiations that led to the creation of Mercosur were taking place, this ideal was cited in order to give strength to the project of creating a common market as a way to fulfill the objectives of the Treaty of Montevideo of progressively developing Latin American integration. Mercosur is, however, a long way from the mythical *Patria Grande*. Still, the integration process is not necessarily doomed to failure. On the contrary, if the proper actions are taken, in the future, integration in Latin America could resemble what the European Union (EU) is today: a modern type of confederation or “community of states”.

In a community, member states, without waiving their sovereignty, delegate certain functions into intergovernmental or autonomous bodies, and acknowledge the rules stemming from these bodies as binding upon them and superior to their domestic legislation. Thus, the impact of law-making on integration is great. In the EU, the ordinary legislative procedure is carried out jointly by the European Commission (which represents the interests of the EU as a whole), the European Parliament (EP) (which represents the people) and the Council of the EU (which represents the member states). While the Commission has the power to initiate laws, the EP and the Council of the EU adopt them. This structure resembles that of the government of federal countries: an executive branch with power (either constitutional or informal) to propose bills, and a legislative branch organized in two chambers, one representing people and the other, the different states. Despite the fact that the EP and the Council of the EU are separate institutions and not two divisions of the same body, they are so closely connected as far as law-making is concerned that the result of their interaction is the same one achieved by bicameral legislatures: ensuring a combination of proportional representation for the people and equal representation for the states.

When comparing this situation with that of Mercosur, Hekimian (2003) asserted that “although Mercosur aims to establish itself as an integrated democratic community, up to now it has evidenced a substantial degree of *institutional insufficiency*” (p. 20). Among the causes of said insufficiency, he mentions lack of parliamentary representation and lack of internalization of Mercosur law. Indeed, in 2003 Parlasur –

the Parliament of Mercosur– was yet to be created. Moreover, under the Protocol of Ouro Preto (POP), Mercosur law was binding on the member states, but not until they incorporated it into their domestic legislation, and even when it was incorporated, it had no special hierarchy regarding domestic law. Since the execution of the Protocol up to the present date, however, certain measures have been taken in order to progressively revert these situations. If they are successful, then the integration in Mercosur could eventually deepen up to the point of establishing a community of states.

The POP created three decision-making bodies: the Consejo del Mercado Común (CMC), which, being in charge of the political leadership of the integration process, is the highest body in Mercosur; the Grupo Mercado Común (GMC), which has been expressly established as the executive body of the block, and the Comisión de Comercio del Mercosur (CCM), which aids the GMC in connection with the joint commercial policies. The protocol, however, created no legislative organ but was limited to setting up a body in which each country's legislatures would be represented: the Comisión Parlamentaria Conjunta. This body has an equal number of representatives for each member state, appointed by the states' legislatures. The purpose of setting up such a body was to accelerate the domestic procedures in connection with the adoption of the rules of the decision-making bodies of Mercosur.

In the EU, the situation is different. Among the legislative acts in the EU there are regulations, which are binding and immediately applicable throughout the Union. One of the most important consequences of this kind of legislative acts is that they are applicable in every member state, irrespective of what the vote of each member state representative's vote was during the decision-making process. Of course, when the decision is a highly important one (such as the admission of a new member into the Union), all member states must agree to it before it is implemented, and therefore, each member state has a veto power.

Hence, even though Mercosur is a process of regional integration, under the POP its rules were governed by traditional international law, and not by communitarian international law, as is the case in the EU. Under the POP, each Mercosur member state has a veto power on absolutely every rule passed by a Mercosur body. Pastori (2001)

quotes Otermin's opinion that this system of internalization is similar to that applied to international treaties (p. 106).

Many circumstances may affect the actual implementation of the joint policies. For instance, it is not hard to imagine a situation in which the political party to which the president of one of the member states belongs is not the majority party in the legislature. Since members of the CMC are the International Relations and Economy Ministers of each state, members of the GMC are appointed by each government and members of the CCM answer to the International Relations Ministers of each state, any decision taken by a Mercosur body is, ultimately, a decision favored by the Administration. Therefore, an opposing legislature may refuse to pass a law incorporating said decision for political purposes only. Were this to happen in any of the member states, the decision would not be enforceable anywhere in Mercosur due to the internal political circumstances of a member state. It may also occur that one of the countries does not agree with a measure to be taken by Mercosur, but it is nevertheless adopted due to the vote of the other countries' representatives. In such a case, the dissenting country could choose not to ratify the decision, thus precluding it from being in force.

Pastori (2001), however, notes that, in practice, countries adopting Mercosur regulations before they are enforceable tend to deem them applicable since the date of adoption by the country, without waiting for the rest of the countries to incorporate them (p. 109). This is, nevertheless, an internal practice which could be discontinued at any time since under the POP the member states are not bound by a regulation until 40 days after the last member state has adopted it. Consequently, severe criticism arose among the legal scholars from the different Mercosur countries.

Puñal (2005), for instance, claims that Mercosur lacks an efficient institutional structure in connection with the adoption of rules which are immediately and directly applicable in the member states, as well as superior to domestic legislation, thus failing to provide economic and social agents with certainty as to an efficient development of the integration project, which is, one of the key purposes of any integration process (p. 74). Indeed, in addition to not providing for an immediate application of community laws, neither the Treaty of Asunción (TA) nor the POP state whether the decisions taken by a

Mercosur body will have any special hierarchy in respect to the domestic legislations of the member states once they are applicable.

Consequently, the question of superiority of community law is left to each country to answer, which poses a new problem due to the lack of correspondence among the criteria adopted by the member states. According to the 1994 reform to the Argentine Constitution, integration treaties are superior to the laws passed by Congress; hence, all the rules arising in connection with said treaties are superior to the domestic laws. The Venezuelan Constitution indicates that the rules adopted in connection with the integration treaties shall be considered immediately binding and shall have primacy over domestic legislation. The Paraguayan Constitution, while establishing that international treaties form part of the country's law, does not indicate whether rules derived from integration treaties shall enjoy any preferential hierarchy or not. The Uruguayan Constitution also fails to include any express provision concerning the hierarchy of international treaties and the rules arising therefrom, although the tendency is to acknowledge that international treaties are superior to domestic laws. Neither does the Brazilian Constitution make any special reference in connection with the hierarchy of the international treaties and the law arising according to them. In case of conflict, the Federal Supreme Court of that country rules as to the hierarchy of the rules, following, in general, the principle that *lex posterior derogat priori*²⁸.

In the EU, on the other hand, the matter as to whether European law was to be superior to domestic law or not was addressed by the European Court of Justice (ECJ) in the landmark case *Costa v. ENEL* in 1964. There, the court established the doctrine of supremacy of European Community Law over national law in the following terms, which were later enshrined in the Treaty of Lisbon.

Whether community law is directly applicable to the member states and superior to domestic law or not has a significant impact in the integration process itself. Consequently, Mercosur saw the need to change the procedure for the adoption of joint legislation and thus the CMC adopted a series of decisions that amend the procedure

28 Even though Bolivia is not a full member of Mercosur yet, it is worth noticing that its constitution establishes that international treaties ratified by the country shall have the same hierarchy as domestic laws.

established by the POP. One of them was Decision N° 23/00, pursuant to which Mercosur laws will be immediately applicable (that is, not subject to any subsequent incorporation into the member states' domestic legislation) if the member states jointly understand the importance of the norm in connection with the integration process, and if such a provision is included in the text of the norm. The Decision also established that when the decisions, resolutions and directives include a date or a term for their incorporation, the member states shall be bound to incorporate them by the agreed-upon date.

In turn, Decision N° 22/04 establishes a procedure for the enforcement of the Mercosur rules that do not require subsequent legislative treatment, and indicates that once the procedure has been adopted, every Mercosur rule shall include the date in which it will be in force, notwithstanding the rules that will be immediately binding if they so provide. One of the most important aspects of the new procedure is that the Mercosur rules enforced accordingly would supersede the domestic laws of lower or equal hierarchy that contradict the community rule.

These Decisions reflect an effort to create an effective incorporation of community law into the domestic legislation of the member states. In doing so, they paved the way for what was to become one of the key elements in the integration process: the creation of Parlasur. In 2005, the Decision N° 23/05 of the CMC approved the Protocol of Creation of the Mercosur Parliament drafted by the Comisión Parlamentaria Conjunta, and by 2006 all the member states had ratified the Decision. The people were directly represented in Mercosur for the first time, since in the old Comisión Parlamentaria Conjunta it was each country's legislature and not the people that was represented. Now, members of Parlasur cannot belong to the states' legislatures. Moreover, while in the Comisión Parlamentaria Conjunta each country was entitled to the same number of representatives, the number of members of Parlasur is proportional to the population of each country. The Protocol also established that by 2014 all the members of Parliament had to be directly elected by the people, although only Paraguay met the deadline. In Argentina, the bill indicating that the Argentine representatives in Parlasur would be directly elected by the people was enacted in January 2015. The CMC set up a final deadline for all Members of Parlasur to be elected: 2020.

The transition from a body representing the legislatures to a Parliament –with all that this word implies– representing the people resembles the history of the European Parliament. In the European Coal and Steel Community the members of the Common Assembly (the body that later became the European Parliament) were appointed by each of the Member States’ national parliaments. In 1976, the Decision and Act on European Elections by Direct Universal Suffrage were signed in Brussels. Thus, *Parlasur* appears to be following in the steps of the European Parliament.

What we should ask ourselves now is if, once *Parlasur* representatives are elected in all Mercosur member states, it will be substantially the same as the European Parliament. The answer would have to be in the negative. Notwithstanding the word “Parliament”, *Parlasur* is only involved in decision-making indirectly. Unlike the EU, it is unable to make rules which are immediately binding on the member states, and it is not included among the decision-making institutions. It can only make recommendations to the decision-making bodies which are, nevertheless, not binding upon them. As representative of the people, *Parlasur*'s functions are connected with rendering decision-making bodies accountable. However, in the future, the situation could be quite different.

If we look at the story of the European Parliament, we shall see that its legislative functions did not appear immediately together with the election of its members but developed gradually. Firstly, under the Treaty of Luxembourg its budgetary powers were increased. Then, the cooperation procedure was created under The Single European Act, thus enhancing Parliament’s role in certain legislative areas, which were extended under the Maastricht Treaty. This treaty also introduced the co-decision procedure in certain areas of legislation which, according to Bux (2017), “marked the beginning of Parliament’s metamorphosis into the role of co-legislator (...) [and] represented an important step forward in terms of Parliament’s political control over the EU executive” (p. 2). Co-decision (known now as the “ordinary legislative procedure”) was then extended to most areas of legislation under the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon.

The increase in power of the European Parliament is directly connected with the fact that its members were elected by the people. Since it is in the people that sovereignty

ultimately lies, no institution is better qualified to make binding rules than one that gets its power directly from them. As we have already noted, a body in which all the states are represented equally is also entitled to a direct involvement in the law-making in order to guarantee that the largest states will not concentrate all the power. Moreover, the history of the EU shows how the legitimacy of an elected parliament can deepen the integration process. Indeed, once a body which represented people directly had been established, member states felt less reluctant to delegate powers on the supranational organization.

In the light of the evolution of the European Parliament, the election of Parlasur members could be seen as the beginning of the process which could eventually lead to a greater integration of Mercosur. If Mercosur is to follow the path of the European Union, as the similar evolution of the parliaments of these two communities seems to indicate, the creation of an elected body can be seen as a decisive step in the deepening of Mercosur integration. We have seen that one of the main barriers to the integration process under the POP was the failure to grant power to the decision-making bodies to create immediately binding laws with primacy over domestic legislation. The creation Parlasur is the last in a series of attempts to solve these problems.

Indeed, its constitutive protocol sets forth that “the accomplishment of the common purposes of the member states requires a balanced and efficient institutional framework that allows for the creation of rules which are effective and which guarantee legal certainty and foreseeability in the development of the integration process” (p.1). Given to the legitimacy people will grant to Parlasur once all this members are elected, this body could gain more and more legislative power (as was the case with the European Parliament). Once the elected body has a significant role in law-making, its legitimacy could turn community laws into directly applicable, superior laws.

What will become of Mercosur depends on the political will and the joint efforts of the Member States. If by 2020 all member states honor their commitment to have elected representatives in Parlasur, a huge step will have been made towards the future of Mercosur as a true community of states. It will be one of many steps in the long journey that started in 1991 when the TA was signed. That it will be a long journey, however, should not be an obstacle. After all, the European Union was not born in one day.

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