

# COMPARATIVE COMMUNITY LAW: LATIN AMERICAN SCHOLARSHIP ON REGIONAL INTEGRATION AND THE PERIL OF LEGAL FUNCTIONALISM

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## INTRODUCTION

The governing leaders of several regions worldwide have declared the goal of matching the impressive degree of regional integration achieved by the European Community.<sup>2</sup> One such regional integration attempt is the Andean Community (formerly the Andean Pact), which undertook massive legal reform by incorporating the design of the European polity. Beginning in the 1980s, the Andean Community made use of European Community rules, institutions, and principles. For instance, the Andean Court of Justice (ACJ) borrowed its structure, competences, and procedures from its European counterpart, the European Court of Justice (ECJ). Even its case law was fertilized by the ECJ. This systematic borrowing from Europe led Andean jurists to take pride in their regional integration scheme as being the most advanced in the world.<sup>3</sup>

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2. The European Communities were founded by virtue of the Treaty of Rome. The Treaty of Maastricht, signed in 1992, created the European Union. Which encompasses the European Community (EC), Justice and Home Affairs (JHA), and the Common Foreign & Security Policy (CFSP). I will use the term European Community (EC) to refer to the polity that existed from 1957-1992, since in this period of time, the judicial doctrines relevant to this article were established.

3. For an overview of the legal and institutional reform that transformed the Andean Pact into the Andean Community, see RENATA MARWEGE, *Der Andengerichtshof. Das Rechtsschutzsystem des Andenpaktes mit vergleichenden Bezügen zum Recht der Europäischen Gemeinschaft.* (M. et al. Hilf ed., Duncker & Humblot. 1995).

Despite this institutional progress, it is puzzling as to why the Andean Community has failed to reach its goal of completing a common market and why Andean law has so far failed to influence member states' domestic law.<sup>4</sup> Non-compliance with Andean law or non-implementation of Andean law by national governments appears to be the main difficulty, despite the existence of a supranational Court of Justice.<sup>5</sup> This paper challenges several canons that Latin American scholars have developed on the issue of Andean legal integration. By incorporating external views, it exposes a local narrative that has established an ideal canon, the Community Law. The emphasis on this canon has so far been responsible for the absence of legal critique in the region, as well as for perpetrating some misconceptions.

This article will delve into assumptions of "activist" legal functionalism, an approach that lies at the core of the problem because functionalism seeks to produce social change in foreign settings by focusing almost exclusively on the functions law is capable of carrying out.<sup>6</sup> In general terms, legal functionalism asks questions related to the tasks the law is intended to perform and the needs of social systems. It looks for answers like: How do legal rules work? What are the consequences of a legal rule? What social institutions lead some legal rules to be more effective than others?"<sup>7</sup> These assumptions are drawn from sociological traditions, which studies social systems and factors that contribute to the survival of those systems. According to many social scientists, the constitutive units of a social system contribute to its survival, operating as a function of stability.<sup>8</sup>

Comparative legal studies have taken advantage of substantive postulates of sociological functionalism, especially when the

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4. Karen Alter *Jurist Advocacy Movements in Europe and the Andes: How Lawyers Help promote International legal Integration*, Center on Law and Globalization Research Paper No. 08-05 (2008).

5. The current tariff scheme was established in 1995, but is considered to be an 'imperfect customs union', because of the numerous products that were exempted and the heterogeneous treatment given to member status. For an official overview on this issue, see the web site of the Andean Community, <http://www.comunidadandina.org/comercio.htm>.

6. Legal functionalists are divided into two groups: 'The legal "reactivists" hold that law answers to social needs or interests and, consequently, emphasize law reform as the adaptation of the legal system to the changing socio-economic environment . . . The "activists" stress the leading role of law in bringing about social change; they try to use law to change society'. GUNTER FRANKENBERG, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L. L.J., 435 n.80 (1985).

7. BERYL HAROLD LEVY, *ANGLO-AMERICAN PHILOSOPHY OF LAW. AN INTRODUCTION TO ITS DEVELOPMENT AND OUTCOME* (Transaction Publishers 1991).

8. See generally, ROBERT K. MERTON *SOCIAL THEORY AND SOCIAL STRUCTURE: TOWARDS THE CODIFICATION OF THEORY AND RESEARCH* (Glencoe, Ill, The Free Press, 1957); TALCOTE PARSONS *THE SOCIAL SYSTEM* (Glencoe, Ill.: The Free Press, 1951).

goal is to learn how rules work or function in foreign legal systems. According to Konrad Zweigert, rules that perform the same function can be compared across legal systems,<sup>9</sup> allowing lawmakers and judges to draw lessons and take ideas from such observations in order to devise solutions to problems and needs faced by their home legal order.

I argue that the activist functionalist strategy for legal reform is plausible to some extent, but its shortcomings create the danger of replacing legal critique with unsound legal comparison based on stretched concepts and borrowed authority. This article addresses the consequences of reforms based on functionalist assumptions, especially when the outcome fails to achieve the desired goals. Andean scholarship shows that this kind of failure entails the danger of subsuming the result into a prescriptive utopia that I have called Comparative Community Law.

In many regional integration schemes – notably, the Caribbean Community (CARICOM), the African Union, and the Association of Southeast Nations (ASEAN) – legal systems take lessons and borrow rules from, or often imitate, the European Union. By focusing on the experience of the Andean Pact in borrowing from the legal model of the European Union, this article seeks to contribute to the methodology of comparative problem-solving.

## I. LEGAL FUNCTIONALISM AND THE ANDEAN PROBLEM

### A. WHAT IS THE ANDEAN PROBLEM?

The Andean Pact was established by the Cartagena Agreement. On March 10, 1996, the member states agreed to a reform that transformed the Andean Pact into the Andean Community. This new entity showed a striking resemblance to the polity of the European Community. A General Secretariat was established as the executive organ. A Commission, comprised by the representatives of the member states, was provided legislative powers. A Parliament was established with some deliberative powers and given the mission of representing the people of the Andean region. Finally, the Andean Court of Justice (ACJ) was established on May 28, 1979 and began its work on January 5, 1984.

The driving forces behind the Andean Community can be traced back to the late 1970s, when the Andean Pact failed to achieve its goal of establishing a common market. This was

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9. KONRAD ZWIEGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 34-35 (Mohr Siebeck, 1996).

largely due to the endemic non-compliance of community rules, especially those establishing deadlines for the dismantling of trade barriers.<sup>10</sup> One of the planned landmarks in the road towards the common market was the establishment of a customs union, but the member states of the Andean Community repeatedly postponed the deadlines in 1976, 1978, 1987, 1996 and 1997.<sup>11</sup> Consequently, Andean Pact nations were unable to meet the goals set out in the Cartagena Agreement. Furthermore, Andean policymakers were concurrently aware of Europe's successful establishment of a supranational legal order with the capacity to embed itself into the national realm in order to accomplish a common market.

Overall, the Andean problem was similar to the European experience prior to the development of supranational legal integration in Europe.<sup>12</sup> However, while the European Community succeeded in its enterprise of establishing and implementing its common market, the member states of the Andean Community have so far failed to deepen integration (*i.e.* implement the common market<sup>13</sup>).<sup>14</sup> The establishment of a supranational legal order, the procedure of preliminary rulings, and the role of the European Court of Justice as supreme interpreter all played key roles in making European Community Law effective, despite the

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10. JUNTA DEL ACUERDO DE CARTAGENA, EVALUACIÓN DEL PROCESO DE INTEGRACIÓN 1969-1979, 12, 84 (Grupo Andino 1979); ESTUARDO HURTADO LARREA, *Los Incumplimientos y la Acción Asignada a la Competencia del Tribunal*, in EL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA 72-73, (BID-INTAL ed., 1985); JUNTA DEL ACUERDO DE CARTAGENA JUNAC, Sobre el cumplimiento de los compromisos derivados del Acuerdo de Cartagena y de las Decisiones de la Comisión § 30° período de Sesiones de la Comisión (Unidad de Comunicaciones ed., 1983). Francisco Orrego Vicuña, *Los presupuestos jurídicos de un proceso de integración económica efectivo*, REVISTA DERECHO DE LA INTEGRACIÓN, 73 (1977) (speaking of a break within the Andean Group); Alejandro Daniel Perotti, *Los tribunales comunitarios en los procesos de integración. El caso del Tribunal de Justicia de la Counidad Andina*, 8 REVISTA DIKAION, 193 (1999).

11. For an overview of these decisions that postponed the deadlines for the Andean customs union, see Felix Arellano, *Comunidad Andina: de la Zona de Libre Comercio a la Unión Aduanera. Los Nuevos Temas*, ALDEA MUNDO 8 (16) (2004), available at <<http://www.saber.ula.ve/handle/123456789/18166>>

12. JUNTA DEL ACUERDO DE CARTAGENA JUNAC, *Informe de la Junta sobre el establecimiento de un órgano jurisdiccional del Acuerdo de Cartagena*, VI Derecho de la Integración, (1973).

13. J.L. DA CRUZ VILAÇA & JOSÉ MANUEL SOBRINO, *The European Union and the Transformation of the Andean Pact into the Andean Community*, EUR. FOREIGN AFF. REV., 42 (1998). María Alejandra Rodríguez Lemmo, *Study of selected international dispute resolution regimen with an analysis of the decisions of the Court of Justice of the Andean Community*, 19 ARIZ. J. INT'L & COMP. L. 905 n. 489 (2002); JUNAC, Evaluación del Proceso de Integración 1969-1979 Grupo Andino 12.

14. For an attempt to generalize from this fact, see Walter Mattli, *Explaining regional integration outcomes*, 6 J. EUR. PUB. POL'Y 2 (1999).

initial opposition of the European Community's member states.<sup>15</sup> Consequently, these circumstances led to the decision to transplant<sup>16</sup> the European Court of Justice and its systems of legal remedies into the Andean Community<sup>17</sup> on May 28th, 1979.

## B. THE APPLICATION OF LEGAL FUNCTIONALISM TO THE ANALYSIS OF COMPARATIVE LEGAL SYSTEMS

In analyzing the success of the transplant of legal systems from one region to another, legal functionalism reveals its advantage. In brief, functionalism provisionally reduces the complexities of social reality to a few assumptions, in order to highlight the role of law in providing solutions to problems and needs of a given social system.<sup>18</sup>

In the field of comparative legal studies, the legal functionalist approach is based on three essential premises. First, the "problem-solution approach" is where a given practical problem is used as the starting point to search for a solution.<sup>19</sup> Once a

15. Walter Mattli & Anne-Marie Slaughter, REVISITING THE ECJ, 52 (1) International Organisation, (1998); WALTER MATTLI & ANNE-MARIE SLAUGHTER, CONSTRUCTING THE EUROPEAN COMMUNITY LEGAL SYSTEM FROM THE GROUND UP: THE ROLE OF INDIVIDUAL LITIGANTS AND NATIONAL COURTS (Robert Schuman Centre ed., European University Institute, 1996). For a critical view of this position, see Geoffrey Garrett, *The politics of legal integration in the European Union*, 49 International Organisation (1995); Walter Mattli & Anne-Marie Slaughter, *Law and politics in the European Union: a reply to Garrett*, 49 International Organisation, (2001).

16. I use the term 'transplant' in the sense Alan Watson used it. See Alan Watson, *Legal Transplants and European Private Law*, 4.4 Electronic J. OF COMP.L. 1, 1-5 (Dec. 2000), available at <http://www.ejcl.org/44/art44-2.html>.

17. Although the concept of "transplant" does not appear in Latin American literature on this issue, the fact that the ACJ emulated the ECJ has been acknowledged by numerous authors. See e.g., J.L. da Cruz Vilaça & José Manuel Sobrino, *Del Pacto a la Comunidad Andina: El Protocolo de Trujillo de 10 de marzo de 1996 ¿simple reforma institucional o profundización en la integración subregional?*, 26 Gaceta Jurídica de la CEE, 20 (1996); MARKUS FRISCHHUT, DIE ROLLE DER JUDIKATIVE IN DER AUSFORMUNG DER VERBANDSGEWALT SUPRANATIONALER ORGANISATIONEN; EUGH, ANDENGERICHTSHOF, SUPREME COURT UND CONSEIL CONSTITUTIONNEL IM VERGLEICH (Peter Lang GmbH, 2003); Ricardo Vigil Toledo, *La Consulta Prejudicial en el Tribunal de Justicia de la Comunidad Andina.*, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO, 939 (2004).

18. Besides legal functionalism, there is considerable work on European integration that explores 'integration through law' and perceives law as an agent of integration: sometimes even 'the agent *par excellence*', JO HUNT & JO SHAW, *Fairy Tale of Luxemburg? Reflections on Law and Legal Scholarship in European Integration*, in A. WARLEIGH-LACK (ED.), REFLECTIONS ON EUROPEAN INTEGRATION: 50 YEARS OF THE TREATY OF ROME, FORTHCOMING). See also M. CAPPELLETTI, et al., INTEGRATION THROUGH LAW: EUROPEAN AND THE AMERICAN FEDERAL EXPERIENCE: VOL 1: METHODS, TOOLS AND INSTITUTIONS (Walter de Gruyter, 1985).

19. Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 BROOKLYN J. OF INT'L L. 405 (2007); KONRAD ZWIEGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG (Mohr Siebeck, 1996).

system has adopted this approach and has implemented a particular rule on a functional basis, then the original targeted purpose can be compared to the actual outcome of the rule. By comparing expected effects with the actual results, functionalism can also serve as a tool for assessing the impact (and thus also the adequacy) of the rule. Importantly, however, prior to performing the comparison the functionalist comparativist strip the rules of any dogmatic content. Thus, with the help of the comparative perspective, he or she will be able to assert whether the compared rule works or functions well. However, because rules are reduced to functions, it will be impossible to make a substantive evaluation or a dogmatic critique.<sup>20</sup> In other words, if the desired social change is achieved, it will satisfy the functionalist lawyer, who will suggest that the rule was functionally appropriate. The critical legal scholar, however, will not be satisfied.

The second premise of functionalism is that different legal systems solve similar problems.<sup>21</sup> The legal functionalist assumes that the problems faced by the Andean Community in its struggle to deepen integration are similar to the difficulties experienced by the European Community in the establishment of the European common market.

The third premise of functionalism is *praesumptio similitudinis*, the idea that similar social problems tend to be solved by identical legal solutions.<sup>22</sup> Since the European Community was an outstanding example of how to master the problems of a common market, it seemed plausible to assume that there was a causal link between the establishment of community law and the accomplishment of a common market.

These three premises show that functionalism handles complex realities by simplifying those realities, stripping the rules from the overtones that blur their social function<sup>23</sup> and, if necessary, completely do away with doctrine.<sup>24</sup> Since the compliance problems in the Andean Community called for a fairly simple solution, both the analysis by Andean policy-makers<sup>25</sup> and the

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20. Ralf Michaels, *The Functional Method of Comparative Law* 42-43 (Duke Law School Working Paper Series: Duke Law School Faculty Scholarship Series, No. 26, 2005).

21. Brand, *supra* note 21, at 409.

22. *Id.* at 410.

23. *Id.* at 411; see ZWEIGERT & KÖTZ, *supra* note 21.

24. Michaels, *supra* note 22, at 42-43.

25. After pledging for the establishment of a supranational court, the Junta argues: "se requiere de la preexistencia de normas sobre las cuales deben aplicar su juicio diariamente. Se requieren normas positivas, procedimientos establecidos e instituciones con capacidad coactiva." JUNAC, EVALUACIÓN DEL PROCESO DE INTEGRACIÓN 1969-1979, 12,15, 131-33 (Grupo Andino 1979).

dialogue with European officials seemed to favor the adoption of such a reform strategy.<sup>26</sup>

## II. INABILITY TO EXPLAIN DIVERGING OUTCOMES: AN ENDEMIC PROBLEM OF LEGAL FUNCTIONALISM

If a certain intricate social question requires a solution in a given legal system and no domestic rule has so far addressed this specific problem, then the legal functionalist strategy would suggest observing and taking notes of foreign experiences. This solution would be easier, and more prudent, than addressing legal problems with previously untested solutions. If a certain foreign legal solution seems adequate to resolve a given domestic problem, importing well-functioning foreign laws into the domestic realm appears to be the most reasonable course of action.<sup>27</sup>

As previously explained, this approach to inquiry seems to be especially suited for situations that lack thorough descriptions of background conditions that might influence the performance of rules. Some scholars have stressed that the advantages of such a strategy can be found in all cases of legal transplantations;<sup>28</sup> others have made a case for the use of this specific strategy in the Andean integration process.<sup>29</sup> A faithful believer of functionalism<sup>30</sup> would assert that transplanting solutions into systems that appear to be similar, or systems whose differences empirical research has not yet assessed, would be a very effective process.

Nevertheless, legal functionalism has a particular pitfall when compared to the sociological traditions of functionalism. Social functionalists are concerned with the stability of the social systems and the patterns of behavior or cultural traits that conform to them. If some social traits, practices or behaviors threaten the stability of social systems (*i.e.* when they have become dysfunctional) they can adapt or be replaced by other equivalent traits or conduct that perform the same function and

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26. On the advising role played by officials of the European Community, among them Pierre Pescatore (by that time judge of the ECJ), Gerard Olivier (European Commission), Maurice Lagrange (Advocate General), and Walter Much (European Commission), see FRISCHHUT, *supra* note 18, at 249.

27. Michaels, *supra* note 22.

28. Gebhard M. Rehm, *Rechtstransplantate als Instrument der Rechts-reform und-transformation*, 72 RABELSZ 8 (2008).

29. 'Sobre la base de esta presunción teórica [the insufficiency of the state as answer to modern needs] se reforzaban los argumentos a favor de un enfoque supranacional, pues sólo un ordenamiento regional nuevo superpuesto a los internos podría satisfacer esas necesidades. La falta de investigación empírica permitía que esa presunción se aceptara sin cuestionamiento' Orrego Vicuña, *supra* note 10, at 77.

30. BRAND, *supra* note 21, at 415-18.

can keep the social system stable.<sup>31</sup> Law, however, cannot be adapted nor replaced as easily as a social practice. Here, the legal functionalists have difficulty because dysfunctional laws remain until their abrogation.

Until now, functionalism has been overtly attacked on grounds of its method and its assumptions, but the subsequent empirical failure of activist functionalism have been under-theorized.<sup>32</sup> Specifically, recurrent unexpected outcomes present an almost insurmountable challenge to any predictive aspirations that such an approach may have had regarding the attainment of the proclaimed social purpose of laws. This is especially the case if legal functionalism is used as a device for bringing about social change. If the expected social change does not occur after a given rule has been established, legal functionalism may falter in trying to provide adequate answers on its own.<sup>33</sup> Thus, evaluation in the aftermath of the reform of the domestic legal system seems to be the shortcoming of functionalism.<sup>34</sup>

### III. THE JUDICIAL CONSTRUCTION OF ANDEAN COMMUNITY LAW

A few years after its establishment, the ACJ incorporated two doctrines into its case law from the inspiration of earlier rulings made by the European Court of Justice<sup>35</sup>. These were the doctrines of direct effect and supremacy of Andean Law<sup>36</sup>. The

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31. PARSONS, TALCOTT, *THE SOCIAL SYSTEM* 27, 36 (The Free Press of Glencoe 1951); ROBERT K. MERTON, *SOCIAL THEORY AND STRUCTURE* 75-136 (The Free Press 1968).

32. What I call failure of a functional strategy (i.e. unforeseen subsequent developments or even undesired outcomes) should not be confused with rejection of a borrowed set of rules by the targeted system.

33. "The comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be put on notice and go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough." KONRAD ZWEIGERT, ET AL., *INTRODUCTION TO COMPARATIVE LAW* 40 (Clarendon Press 3rd rev. ed. 1998).

34. Michaels, *supra* note 22, at 43.

35. By the time the Andean Court took on its activities, milestones of European case law were already in place. *E.g.* Case 3/62, *Comm'n v. Luxembourg*, 1962 E.C.R. 855; Case 26/62, *NV Algemene Transport v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 3; Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 1141; Case 6/72, *Europemballage Corp. v. Continental Can Co.*, 1973 E.C.R. 215; Case 8/74, *Procureur v. Dassonville*, 1974 E.C.R. 837.

36. According to the doctrine of direct effect as established by the ECJ, individuals can rely on EC law in an action before a national court against a member state. The doctrine of Supremacy entails that EC law prevails over national law, rendering the latter inapplicable in case of conflict. Cf., RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE. THE POLITICS OF JUDICIAL INTEGRATION* 37-46 (St. Martin's

ACJ uses the same language in this rulings as the ECJ did and the circumstance that the Andean rulings came almost thirty years later.<sup>37</sup> This demonstrates cross-fertilization or transplantation. However, a closer look will reveal that the ACJ's brief acknowledgment of the European Community's legal order as a source of inspiration is not essential to the Andean problem argument, nor a formal source for the rulings. Rather, it is vindication for a doctrinal choice that, apparently, was already made. In this judicial discourse, European case law appears in the narrative of the Andean Court as a mere example of what a fully operative integration process looks like.<sup>38</sup> The doctrines of direct effect and supremacy of community law are therefore treated as an inherent part of Andean Law. In the Andean Court's view, the doctrines were an eminent part of every Community Legal System, of which European Community law was simply a natural example.<sup>39</sup>

The Court's argument is that the validity of Andean law as a norm that enjoys supremacy and direct effect is a result of its community law nature generally. This is contrary to the idea of considering European Community law as a legal source, or as a major influence on Andean law. A critical observer from outside the Andean legal system might object that by neglecting its European origins, the validity of such a supreme and direct effective

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Press 1998) Elsewhere I have argued that semantic similitude between rulings of both courts has led to some misconceptions, and the tendency of Andean Law to follow principles of International Public Law instead of principles of EC-Law, produced a diverging outcome. However, not only would the Andean Jurisprudence inhibit further integration, but also bolster a conceptual frame that would become dominant in the work of South American scholars of regional integration; see OSVALDO SALDÍAS, *Supranational Courts as Engines of Disintegration. The Case of the Andean Community*, October (5) Berliner Arbeitspapiere zur Europäischen Integration, (2007). Helfer, L, Alter, K., and Guerzovich F. advanced an interesting argument in an ongoing project, suggesting that the ACJ has managed to create 'islands' of a rule of law within the realm of intellectual property protection. LAURENCE HELFER, et al., *BUILDING AN INTERNATIONAL RULE OF LAW IN ANDEAN COUNTRIES: THE ANDEAN COURT OF JUSTICE AND DISPUTES OVER INTELLECTUAL PROPERTY PROTECTION* (2008).

37. Explicit references to European case law are made, e.g., in case 2-IP-88 citing the *Costa v. ENEL*, as well as *Simmenthal*, at page 2, and case 39/70 *NORDDEUTSCHES VIEH- UND FLEISCHKONTOR GMBH v HAUPTZOLLAMT HAMBURG-ST. ANNEN 1ST OF OCTOBER 1974*, [1974] ECR 899 AT PAGE 4. SEE RULING ACJ [TJCA] 2-IP-88, GOAC N° 33, 26TH OF JULY 1988

38. See Rodolfo Sacco's approach regarding the declaratory statements of law vis-à-vis its operational rules, in Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L., 31 (1991).

39. On the supremacy of Andean Law the Court states: "En primer término, se hace necesario puntualizar que el ordenamiento jurídico de la integración andina prevalece en su aplicación sobre las normas internas o nacionales, por ser característica esencial del Derecho Comunitario, como requisito básico para la construcción integracionista." *AB Volvo* at 2.

supranational norm inevitably requires the assumption that the legal system is homegrown. This assumption, in turn, faces a question of all new legal systems: is this new supreme legal system, Andean law, valid because the ACJ declared it to be valid and shaped its doctrines?<sup>40</sup> Or, are the validity of the new doctrines to be traced back to a constitutional moment like the ECJ did? The ACJ does not ascribe to any of those interpretations. In its reasoning, the ACJ declares that the new doctrines are valid because they are a basic requirement for any regional integration scheme and an essential feature of Andean Community law itself.<sup>41</sup> At this point in the analysis, if the Andean doctrines do not obtain their legal validity from their European source and instead, as the ACJ suggests, validity does not stem from the Court's recognition but from the Andean legal system itself, then confusion may arise about the origin of the Andean doctrines of "direct effect" and "supremacy," and its chain of validity.

Ontologically speaking, when judges rule on the validity of a given norm, they make an internal statement of the validity of that rule. They presuppose the efficacy of a legal norm despite the fact that an external opinion of an individual, for instance, could vary by level of observable efficacy of a legal norm.<sup>42</sup> However, the judge does not base his or her decision on the observable, empirical, or expected efficacy of a given rule, but rather on the grounds of his or her *own* statement of validity. Thus, from a normative point of view, if the Andean Court uses and acknowledges as inspiration legal arguments that were developed in European Community law, but concurrently makes a statement affirming the validity of Andean Law that attributes its direct effectiveness and supremacy to its belonging to "Community Law" or a "New Integration Law,"<sup>43</sup> then it appears that the developing Andean legal system is running perfectly parallel to, not behind, the European Community's legal system. This is because the Court never recognizes or suggests that the European legal order, or any of its elements whatsoever, might constitute a source of law within the Andean legal system. Case 2-IP-88

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40. Such an argument would belong to Legal Realism. This approach suggests that rules do not constitute Law until a Court has confirmed its validity. H.L.A. HART, *THE CONCEPT OF LAW* 65 (Oxford University Press, 1994) (1961).

41. '*En primer término, se hace necesario puntualizar que el ordenamiento jurídico de la integración andina prevalece en su aplicación sobre las normas internas o nacionales, por ser característica esencial del Derecho Comunitario, como requisito básico para la construcción integracionista*' (*ibid.*)

42. Hart made a distinction between the primary rules –which prescribed conducts and behaviours- and secondary rules –which could identify primary rules. *Id.* at 91-94.

43. '*Nuevo Derecho de la Integración*', see ruling 1-IP-87 *Aktiebolaget VOLVO*, p. 2.

*Cavelier c/ Colombia* repeatedly reaffirms this contention of a parallel, albeit diachronic, fate. In that case, the ACJ states that supremacy of “Integration Law” would be bolstered by the European Court of Justice in *Costa/ENEL*<sup>44</sup> and *Simmenthal*.<sup>45</sup> European Community case law is thus concordant *with* – rather than the *source of* – Andean Integration Law.<sup>46</sup>

This emerging vision of the European and the Andean legal systems as part of a category called the “New Integration Law,” or simply the “Community Law,” entails the shaping of an abstract order made visible through three relevant rulings.<sup>47,48</sup> If these rulings are considered together, they depict an understanding of Community Law as a higher normative order, encompassing both European Community law and Andean law. From this viewpoint, the first distinctive feature of Community Law is the basic jurisdictional function of a supranational court with the competence to interpret it.<sup>49</sup> The second feature of Community Law is supremacy over national law.<sup>50</sup> According to the Court, supremacy must be applied in Andean law because it is an essential characteristic of Community Law, as well as a prerequisite for the “integrationist construction.” The Court explains the substance of this doctrine, citing the European Community *Simmenthal* case for this purpose, and claims that this European

44. Case 6/64, *Costa v. ENEL*, 1964 ECR 585, 1141.

45. *Simmenthal*, 1976, E.C.R. 1871.

46. “En cuanto al efecto de las normas de la integración sobre las normas nacionales, señalan la doctrina y la jurisprudencia que, en caso de conflicto, la regla interna queda desplazada por la comunitaria, la cual se aplica preferentemente, ya que la competencia en tal caso corresponde a la comunidad. . . Así lo ha señalado reiteradamente el Tribunal de Justicia de las Comunidades Europeas (ver principalmente Sentencias *Costa/ENEL* de 15 de junio de 1964, y la Sentencia *Simmenthal* de 9 de marzo de 1978) *en concordancia, en este punto, con el espíritu de las normas de la integración andina.*” El Tribunal De Justicia Del Acuerdo, July 26, 1988, “*Cavelier v. Colombia*,” *Gaceta Oficial de Acuerdo de Cartagena [GOAC]* (1988-Nº 33-2) (Grupo Andino) (emphasis added).

47. Notably rulings in case 1-IP-87 *Aktiebolag VOLVO*, ruling 1-IP-88, G.O.A.C. Nº 33 of 26th of July 1988, *Stauffer Chemical v. Colombia*, and ruling 2-IP-88 *Cavelier v. Colombia*.

48. See *AB Volvo* at 2; El Tribunal De Justicia Del Acuerdo, July 26, 1988, “*Stauffer Chemical v. Colombia*,” *Gaceta Oficial de Acuerdo de Cartagena [GOAC]* (1988-Nº 33-2) (Grupo Andino); and Case 2-IP-88, *Cavelier v. Columbia*, 33 GOAC, 3.

49. “Éstos [the national courts] de otra parte, tampoco están facultados, en general, para interpretar las normas contenidas en Tratados Internacionales, tarea que compete exclusivamente a las partes, las cuales, en el caso del Pacto Andino, la han delegado en el órgano judicial comunitario, como medio para lograr la solución pacífica de posibles conflictos que puedan presentarse en el proceso de integración andina; con lo que, además, el nuevo Derecho de la Integración adquiere plena vigencia en la vida misma de los países de la Subregión.” *AB Volvo* at 2.

50. It is important to note that the ACJ has used the concepts of *Preeminencia* and *Supremacía* indistinctively in several occasions. See *Cavelier* at 3.

“thesis” is *also* applicable within the Andean legal order.<sup>51</sup> The third feature of Community Law is direct effect. In its ruling in *Stauffer Chemical*,<sup>52</sup> the Court states that this doctrine, along with supremacy, are concepts that properly pertain to Community Law.<sup>53</sup>

Admittedly, courts that openly engage in legal reasoning that follows foreign law as a formal source appear to be the exception.<sup>54</sup> It is clearly easier to justify a judicial course by stressing the accuracy and plausibility, rather than the authority, of a foreign ruling.<sup>55</sup> Acknowledging foreign judicial arguments as inspirational was also the choice, for instance, of the German *Bundesverfassungsgericht* and the United States Supreme Court.<sup>56</sup> Thus, why should the Andean rulings differ from several other constitutional courts? The answer lies in how subsequent South American scholarship internalized, reproduced and even refined the canon of Community Law. The assumption of a superior normative system embedded itself into the Andean narrative, and monopolized the legal discourse of regional integration. As I show in part IV, this internalization caused Andean law not to be a subject of scholarly legal critique.

#### IV. SOUTH AMERICAN SCHOLARSHIP AND THE COMMUNITY OF FATE

In comparing two legal systems, it is difficult to agree on the role of legal education and legal scholars within the analysis – particularly whether they are, in general terms, an inherent part of the concept of Law.<sup>57</sup> Legal scholars have written quite profusely on regional integration in Latin America.<sup>58</sup> Yet, even

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51. “El Tribunal de Justicia de las Comunidades Europeas, en las sentencias antes citadas [*Costa v. ENEL* and *Simmmenthal*], ha afirmado la preeminencia absoluta del derecho comunitario sobre el interno, tesis que resulta ser también aplicable en el ordenamiento jurídico de la integración andina conforme antes se indicó.” *Cavelier* at 3.

52. Case 1-IP-88 *Stauffer Chemical v. Colombia*.

53. “Esta norma, que ratifica los conceptos propios del derecho comunitario como son el denominado efecto directo y la primacía, regula tanto el campo de los derechos sustantivos como el de los actos procesales.” *Stauffer Chemical* at 8.

54. See Rehm on the Turkish judicial experience with the transplantation of the Swiss Civil Code. Rehm, *supra* note 30, at 7,33. See also Watson, *supra* note 17.

55. On judicial cross-fertilization, see Anne-Marie Slaughter, *A Global Community of Courts*, 44 *Harv. Int'l L.J.* 191 (2003).

56. REHM, 7, also footnote 299.

57. For a German view on the teaching of European legal studies, see CLAUDIO FRANZIUS, *Europawissenschaft in der Ausbildung*, in *Europawissenschaft*, (G. Schuppert, et al. eds., 2005). Legal reasons given by judges and scholars, as well as their conclusions, are among the ‘legal formants’ that Rodolfo Sacco sees in each legal system, in SACCO.

58. In this paper I make an interpretative exercise based on the bulk of scholarly writings on the issue Andean integration that has been published by Latina

from the early 1980s (when the ACJ was established) and especially in the 1990s (when the Andean System of Integration (SAI) and MERCOSUR<sup>59</sup> were established), Latin American legal literature on regional integration and international public law was strikingly homogeneous. Central to most of this literature were the subjects of supranationality and the ceding of sovereignty, whether they were discussed as novel characteristics (as in the case of the Andean Community) or whether scholars addressed their lack of existence (as in the case of MERCOSUR). Interestingly enough, an impressive majority of Latin American scholars tend to view the Laws of the European Community, of the Andean Community, and of MERCOSUR as elements of the same category, albeit in dissimilar stages of progress.<sup>60</sup>

Just as the Andean Court would do in its rulings, most Latin American scholars have considered it accurate to call this higher

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American scholars. It is important to emphasise that I do not claim to be exhaustive about the presented literature. On the contrary, it is a selection that I consider to be representative. They show little variation among them, and my argument is based on a consistent pattern of their narrative. In other words, I have found no significant challenge to the mainstream position on the topic among Latin American scholars.

59. The EC-inspired Andean System of Integration was established on the 10th of March 1996 by the Trujillo Protocol. MERCOSUR was established by the Treaty of Asunción on the 26th of March 1991.

60. See CASTOR DÍAZ BARRADO, *IBEROAMÉRICA ANTE LOS PROCESOS DE INTEGRACIÓN: UNA APROXIMACIÓN GENERAL* 63 (Boletín Oficial del Estado 1999) (stressing the similitude with the EC); MARÍA TERESA MOYA DOMÍNGUEZ, *DERECHO DE LA INTEGRACIÓN* 95, 263 (Ediar 2006); MIGUEL ÁNGEL EKMEKDJIAN, *INTRODUCCIÓN AL DERECHO COMUNITARIO LATINOAMERICANO* (con especial referencia al MERCOSUR) 21-22 (Ediciones Depalma 1994); VÍCTOR RICO FRONTAURA, *EL DERECHO DE LA INTEGRACIÓN EN LA COMUNIDAD ANDINA* 78 (Secretaría General de la Comunidad Andina 2001); Luis Carlos SÁCHICA, *La Acción de Nulidad en el Ordenamiento Jurídico Andino*, in *El Tribunal de Justicia del Acuerdo de Cartagena* 52 (BID-INTAL ed., 1985); LAURA DROMI SAN MARTINO, *DERECHO CONSTITUCIONAL DE LA INTEGRACIÓN* (Universidad Complutense 2002); JOSÉ MANUEL SOBRINO, *DERECHO DE INTEGRACIÓN, MARCO CONCEPTUAL Y EXPERIENCIA DE LA UNIÓN EUROPEA* 323, 389 (Secretaría General de la Comunidad Andina 2001). Eduardo Hurtado Larrea argued - one year after the establishment of the Court and prior to its first ruling - that the Andean system was more advanced than that of the EC, since the ACJ allegedly had more sanctionatory powers than the ECJ. LARREA, *supra* note 10, at 71, 77.

Arguing the case for MERCOSUR, Díaz Barrado suggests that MERCOSUR is not yet Community Law because it lacks, among other things, a dispute settlement body. BARRADO, *supra*, at 65; ADRIANA DREYZIN DE KLOR & AMALIA URIONDO DE MARTINOLI, *DERECHO INTERNACIONAL PRIVADO Y DE LA INTEGRACIÓN REGIONAL* 18 (Zavalía 1996). Interestingly enough, Ekmekdjian argues that 'technocrats' that designed MERCOSUR did not adequately follow the EC model, since they assumed that Community Law was a branch of International Public Law instead of an autonomous legal field, EKMEKDJIAN, *supra*, at 271-72; Moya Domínguez suggests that there is a difference between Community Law and Integration Law, the former being a type of the latter, therefore only the Andean Group would have achieved Community Law. MOYA DOMÍNGUEZ, *supra* 65, at 95, 221, 263.

normative category Community Law,<sup>61</sup> or Integration Law.<sup>62</sup> The works of those scholars indicate no particular dogmatic dimension, nor do they provide theoretical reasons for arguing in favor of what they consider to be essential components of Community Law. As I argued before, this is a consequence of having reduced norms to a function. Furthermore, these scholars are not compelled to justify the existence of alien institutions because, in their eyes, European law does not appear to have fertilized or validated the Andean system. The awareness of “otherness” appears to be missing to a great extent, and the European Community experience seems therefore to be a valuable confirmation of, rather than a causal factor for, the rightfulness and natural character of these kinds of processes.<sup>63</sup> Although most of these scholars cite cases of European Community law, these cases function only as examples of how Andean law should progress if it were to become a complete system.<sup>64</sup> It is as if Andean and European Community law belonged to the same category. As a result, with both regions thereby being part of a “community of fate” or *Schicksalsgemeinschaft*.<sup>65</sup> Where previ-

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61. See SOBRINO, *supra* note 14, at 34-35; MARCEL TANGARIFE, SISTEMA JURISDICCIONAL EN EL PROCESO ANDINO 161 (Secretaría General de la Comunidad Andina 2001); Alejandro Daniel Perotti, *Algunas consideraciones sobre la Interpretación Prejudicial Obligatoria en el Derecho Andino*, MAYO/JUNIO GACETA JURÍDICA DE LA UNIÓN EUROPEA Y DE LA COMPETENCIA, 105-05 (2001). Perotti, though, refers to legal uniformity through preliminary rulings as being essential for any integration process. EKMEKDJIAN, *supra* note 65, at 271-72; Luis Carlos SÁCHICA, *El Ordenamiento Jurídico Andino y su Tribunal de Justicia*, in EL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA 9, (BID-INTAL ed., 1985); José Guillermo Andueza, *La Aplicación Directa del Ordenamiento Jurídico del Acuerdo de Cartagena*, in EL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA 34-35, (BID-INTAL ed., 1985); SÁCHICA, *supra* note 65, at 52; LARREA, *supra* note 10, at 70. José Andueza goes even further and highlights the differences that he observes between community law system and a federal system. JOSÉ GUILLERMO ANDUEZA, *La Interpretación Prejudicial y el tribunal de Justicia del Acuerdo de Cartagena*, in EL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA 85, (BID-INTAL ed., 1985).

62. Castor Díaz Barrado: “Con carácter general lo que podemos reseñar es que se aprecian, en el ordenamiento andino, desde la perspectiva formal, las características propias de un ordenamiento jurídico de integración.” BARRADO, *supra* note 65, at 57; MARÍA DE LA CRUZ BAYÁ, DERECHO Y PROCESOS DE INTEGRACIÓN 26 (Alexander ed., 2004).

63. Luk Van Langehove noticed and criticized a quasi-teleological aspect that he sees in some discourses about regionness: “[B]ecoming a region is presented as almost a natural and unavoidable process.” Luk Van Langehove, *Theorising Regionhood* (UNU-CRIS, Working Paper No. W-2003/1, 2003).

64. Alan Watson warned against the unsound assumption that each legal system, ‘during its youth passes through a similar process before peculiarities of the nation are imposed upon its juridical order’, naming it a peril of comparative law, ALAN WATSON, *Legal Transplants. An Approach to Comparative Law* 12 (The University of Georgia Press Second Edition ed. 1993).

65. Gebhard Rehm uses this term to refer to the political features that bind a nation, and that allows for differentiation in relation to others that do not share the same fate. See Rehm, *supra* note 30, at 23.

ously even a limited handful of them acknowledged the similarity of the ACJ and the European Court of Justice, none of them point to the nature of European Community law as a transplanted legal institution.<sup>66</sup>

By reconstructing the canons that form this assumed ideal order of Community Law, it becomes apparent that the writings of various South American scholars converge on several components: supranationality,<sup>67</sup> supremacy,<sup>68</sup> and direct effect.<sup>69</sup>

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66. At first glance, Francisco Orrego Vicuña and Daniel Perotti seem to be interesting exceptions to the Latin American mainstream. Orrego Vicuña, on the one hand, expresses his dissatisfaction with the misfit between theory and practice within the Latin American integration projects; but his suggestion though innovating, does not fully escape the assumption of a higher legal order when he claims that flexibility of primary law and functionality of secondary law of integration are possible within integration schemes. He challenges the assumptions that the state is unable to deal with modern problems. He also neglects the alterity of many institutions, but he calls for a close following of the European example of carefully weighting both political and technocratic considerations within the institutional settings of the regional integration projects. VICUÑA, *supra* note 10, at 75-76, 80. Finally, Perotti chose to make a thorough description of the similarities and differences between the ACJ and the ECJ that strike the reader when going through the text of the statutes that govern both courts. But neither connection nor functions seem to govern the analysis, rendering the argument boneless and trivial. When justifying the need for both, the procedure of preliminary rulings and the doctrine of *l'acte claire* in the Andean system, he turns to European scholars. In his conclusion he limits his argument to justifying that his claim in favour of the ACJ is based on the facts of 'experience', for which the ECJ is a vivid example, Perotti, *supra* note 10, at 211, 215, 237; *See also* DROMI SAN MARTINO, *supra* note 65. Alberto Zelada recalls that the Junta examined the antecedents and experiences of the ECJ, and that "these elements had influence over the content of the final ideas elaborated by the Junta." Alberto Zelada Castedo, *El Control de la Legalidad, la Solución de Controversias y la Interpretación Uniforme del Derecho Común en el esquema de Integración del Grupo Andino*, in EL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA 127-28, (BID-INTAL ed., 1985).

67. LARREA, *supra* note 10, at 70 (claiming that supranationality is a principle of Community Law he also adds legal certainty and legal liability of Member states to ). Also, see JORGE LUIS SUÁREZ MEJÍAS, LA RESPONSABILIDAD PATRIMONIAL DEL ESTADO Y EL DERECHO COMUNITARIO 80 (Colección Cuadernos ed., Editorial Sherwood 2006), who makes supranational a synonym of communitarian when he speaks about the Andean system; he also adds legal certainty and legal liability of Member States to direct effect and supremacy.

68. SOBRINO, *supra* note 14, at 56; EDGAR CAMACHO OMISTE, EL MARCO CONSTITUCIONAL Y EL PRINCIPIO DE LA SUPRANACIONALIDAD 113 (Secretaría General de la Comunidad Andina 2001). However, this author tends to confuse supranationality with multilaterality. MARCEL TANGARIFE, LA SUPRANACIONALIDAD EN EL CONSTITUCIONALISMO LATINOAMERICANO: EL CASO DE LOS PAÍSES MIEMBROS DE LA COMUNIDAD ANDINA 129-30 (Secretaría General de la Comunidad Andina 2001); MARCEL TANGARIFE, *supra* note 66; BAYÁ, *supra* note 67, at 26; EKMEKDJIAN, *supra* note 65, at 71; MOYA DOMÍNGUEZ, *supra* note 65, at 257; SÁCHICA, *supra* note 65, at 8; SUÁREZ MEJÍAS, *supra* note 72, at 80-81 (using the term "aplicación preferente"; SUÁREZ MEJÍAS, *supra* 72, at 80, 81. using the term "aplicación preferente").

69. Andueza, *supra* note 66, at 33-43; FRONTAURA, *supra* note 65 at 78; TANGARIFE, *supra* note 66, at 166; BAYÁ, *supra* note 65, at 68; EKMEKDJIAN. *supra* note

## V. COMPARING LIONS AND ANTS: THE PROBLEM OF SUBSUMPTION

It is clear that the theories of Latin American scholars contribute to shaping a notion of what a full-fledged economic union looks like. Their notion leans on the progress of projects of regional integration in Latin America; notably the Andean Community and to some extent the MERCOSUR. Nevertheless, suggesting that these scholars are making a verbatim comparison of the Andean Community with the European Union would not be accurate. On the contrary, almost all of them recognize the importance of context, and the social differences that would make impracticable any attempt to introduce a strict European pastiche into the Latin American context.

However, these scholars' continuous references to the form the Andean Community will take when it finally reaches its ultimate stage – or the persistent claim that elements such as ceding of sovereignty, supremacy, and direct effect are inherent to any community legal system – reveal that most of these scholars actually champion a preconceived ideal normative order: namely, a notion of Community Law. Be that as it may, the singling out of relevant properties that presumably characterize such a normative order has no theoretical basis. On the contrary, the absence of legal critique on the Andean legal system suggests that this singling out is rather the consequence of an intuitive operation. Alan Watson warned against such a peril of misstating relevant legal facts, suggesting that it could lead to gross misrepresentations, akin to treating lions and ants as anatomically similar and comparable just because it was misrepresented that both are “warmblooded, have six legs and are always *winged*”.<sup>70</sup> The category labeled as Community Law might be just as inaccurate as Watson's example that forces lions to be treated as if they had six legs and wings just for the sake of an unsound comparison.

This presumed ideal order appears to be of a higher rank; it is a heuristic normative category because it subsumes the legal order of both the European Union and the Andean Community. However, for this higher legal order to become applicable, the Andean lawmaker has to materialize it into positive law. According to this view, the challenge for the legislator is to produce the relevant norms that are in harmony with this higher legal order called Community Law, and also with local conditions, whatever they may be. This understanding of Community Law

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65; MOYA DOMÍNGUEZ, *supra* note 65, at 257; SÁCHICA, *supra* note 65, at 8; SUÁREZ MEJÍAS, *supra* note 72, at 80-81 (using the term “aplicabilidad directa”; SUÁREZ MEJÍAS, *supra* note 72, 80-81. using the term “aplicabilidad directa”).

70. WATSON, *supra* note 17, at 12 (criticising Henry Maine's “Ancient Law”).

allows for the sustainment of mainstream argumentation in South American scholarship, at least provisionally.

The problem with such an operation (namely, subsuming two given systems into a superior system,) is that it might be futile if it is not soundly derived from theory, and if it has instead used a “magic carpet” to shuttle between the abstract and the concrete.<sup>71</sup> Only when there is a reasonable understanding of the nature of two given systems or rules are we safe from the temptation of allocating our cases into arbitrarily shaped categories. Applied to the example of lions and ants, only when the scholar knows how many legs a lion actually has, will he or she be in position to allocate them into a logical category.<sup>72</sup> Furthermore, when the compared systems derive from one another, we cannot reasonably understand them if we neglect or ignore the nature of this relationship.<sup>73</sup> To be sure, only when there is a grasp on how the transplanted system mutated in its new environment can there be an understanding as to what common order both systems are to be subsumed, or to which category they belong. When this abstract order becomes intelligible to us, we may assess its divergence with the functionalist problem-solution strategy.

In the case of the literature on Latin American integration, however, many general assumptions on the properties of Andean law were already in place before any inference on the nature of Andean law could actually be drawn from them. It is the case here that the overwhelming majority of the literature assumed and internalized the doctrines of the ACJ as a truism. Instead of critiquing the legal reasoning contained in the rulings, they bolstered the rulings by embracing the new notion of Community Law.

One can only speculate as to the factors that led to the described phenomenon. Arnulf Becker Lorca, for instance, developed an interpretation from the standpoint of the Latin American tradition of international public law, suggesting that contemporary scholars have tended to focus exclusively on the logical comprehensiveness of the international legal system. This led practitioners and scholars to implicitly create a hierarchy of authoritative sources and canons of cumulative progress that re-

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71. Zumbansen used this example of the magic carpet in order to represent the formation of unsound theories. I will use this concept as it appears to be applicable to the Andean scholarship. Peer Zumbansen, *Comparative Law's Coming of Age? Twenty Years after Critical Comparisons*, 6 GERMAN L.J. 1073, 1077 (2005); see also Frankenberg, *supra* note 4, at 440 (critiquing legal functionalism).

72. See WATSON, *supra* note 17, at 12.

73. *Id.*

placed regional distinctiveness and fragmentation.<sup>74</sup> Instead, Lorca strategically sought to underline the Latin American contribution to the discipline, using the region as a point of entry to the consideration of number of topics and problems in Latin America, a strategy which also allows Latin American scholars and practitioners to claim privileged access to an invisible “college of international lawyers.”<sup>75</sup>

While this might be the case, only at this point of the analysis can we begin a legal critique stemming from awareness of the existence of subsumption. It appears undisputed that even legal transplants can mutate upon arrival to the new environment; they do not “travel” unchanged. Quite on the contrary, transplants take on a distinctive character during their journey.<sup>76</sup> Thus, it is only after we have come to understand the changes that the transplant undergoes in its new home that we can draw conclusions regarding their relevant properties and make abstractions in order to shape a higher heuristic order capable of subsuming both the donor legal system and the transplant. The forms which the abstract order will assume will be defined by the properties which each case exhibits.

Neglecting this important step can have negative consequences. If we persist in the belief that it is possible to make an arbitrary abstraction with all the properties that all systems of this kind ought to share from only one known case and we then reproduce it elsewhere with the conviction that by this mere reification both systems ought to converge, we will probably have jettisoned several other properties that may have decisively made the donor prestigious. In the case of European Community law, the legal idea of fundamental freedoms can be postulated as essential to the developments of the doctrines of direct effect and supremacy. But as I argued before, legal functionalism is not concerned with overarching ideas. As a result, when law has been reduced to a function or a task, it will be tough for legal

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74. Becker calls this a universalistic strand; the “dispassionate location in which this type of Latin American international lawyer places himself - in direct contact and dialogue with those regarded as the genuine masters of the discipline - gives the narrative an extremely universalistic tone and leaves little room for regional history. If seen at all, Latin America is glimpsed through the eyes of the international plane.” Arnulf Becker Lorca, *International Law in Latin America or Latin America in International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT’L L.J. 283, 289 (2006).

75. See *id.*, The “particularistic” strand.

76. Alan Watson clarified: “I find it difficult to imagine that anyone would deny that legal borrowing is of enormous importance in legal development. Likewise I find it hard to imagine that anyone would believe that the borrowed rule would operate in exactly the way I did in its other home.” WATSON, *supra* note 17, at 12; see also Rehm, *supra* note 30, at 16.

functionalist to explain any failure of the law to attain its intended goals.

Therefore, assuming it is true that general propositions regarding the existence of a higher legal order ought to be done only on the basis of two or more existing cases, how can critique be exerted on newly reformed systems if there is not yet a notion of a normative higher order? Where do these new transplanted systems – or those systems yet to be transplanted – obtain their authority from if not from a higher legal order? It is true that transplants obtain their substantial authority from their donor.<sup>77</sup> They achieve this<sup>78</sup> either through the power of coercion if the source of propagation is imperial legislation<sup>79</sup> or, if the transplantation has been voluntary, through the donor's prestige. The latter has been the case for the development of the Turkish Civil Code<sup>80</sup> and, of course, the Andean legal system.

Once the comparativist has become aware of the danger of subsumption, he or she will face the challenge of exerting critique on the borrowed rules, institutions, concepts and structures.<sup>81</sup> This will command attention towards alterity and the otherness within the domestic legal system for two reasons. First, all those elements of a “legal formants”<sup>82</sup> of the donor's system, which have been capriciously eliminated during the transplantation process, have probably played an important role in the donor's path to becoming prestigious. Ignoring them tends to make legal critique almost impossible, since dogma/ideas are usually the first casualty of a functional transplantation.<sup>83</sup> Second, acknowledging alterity allows the comparativist to assess mutations, changes, improvements, or the barbarization of the transplanted rules.<sup>84</sup> Subsumption that has not been derived

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77. Regarding their mutual relationship, legal systems are formally closed to each other, but substantially open to foreign influence, see OTTO PFERSMANN, *Le droit comparé comme interprétation et comme théorie du droit*, 53 *Revue internationale de droit comparé*, (2001).

78. Regarding their mutual relationship, legal systems are formally closed to each other, but substantially open to foreign influence. See Otto Pfersmann, *Le Droit Comparé Comme Interprétation et Comme Théorie du Droit*, 53 *Revue Internationale de Droit Comparé* 275 (2001).

79. WATSON, *Legal Transplants and European Private Law*.

80. Sacco, *supra* note 41; Watson, *supra* note 17.

81. As suggested by Watson on Pierre Legrand's critique on the impossibility of legal transplants. Watson, *supra* note 17.

82. Sacco, *supra* note 41.

83. In the case of the European Community, the dogmatic of the fundamental freedoms is a good example of what is left behind by the transplant. See Saldías, *supra* note 38, at 27.

84. Alan Watson suggested that through history, comparative law could discover the nature of the relationship between legal systems, and the reason for similarities and differences: “When one comes to trace the growth of these similarities and differences [. . .] one finds oneself better able to understand the particular

from theory renders the assessment of the transplant's otherness impossible, as it is simply ignored.

Further, ignoring the otherness of foreign elements necessarily entails the fiction of treating them as an inherent product of the domestic system. Once foreign solutions have been received, the domestic system treats the borrowed rule as native by neglecting its chain of authority and closing itself off from any foreign authority. In other words, if the transplanted rule is to have validity in its new home, then it is only because the domestic system has autonomously commanded it to enjoy validity. Again, the problem of this formal closure of domestic systems is that any pretended critique that persistently neglects alterity can only be attempted by assuming a higher legal order, a prescriptive utopia, or, as Otto Pfersmann has called it, a *droit comparé*.<sup>85</sup> We have now returned to the Andean problem and the subsumption into the prescriptive utopia that I call "Comparative Community Law."

Nonetheless, it remains a fact that no scholar writing on Andean law has thus far challenged the appropriateness or the plausibility of this interpretation of the Andean Community's legal system as an element of a higher legal system called Community Law, to which the European Community's legal system allegedly also belongs. Furthermore, no transplant approach has yet been taken in order to deconstruct the ideal order forged by the Andean Court, and motivated by bold legal functionalism. On the contrary, every attempt to exert legal critique seems to rely on the exercise of matching the factual progress of legal developments of Andean law with abstract assumptions called Community Law, although – to state it with Peer Zumbansen words with the help of a "magic carpet."<sup>86</sup>

## VI. CONCLUSION

The strategy that has taken the lead in the legal profession and in contemporary legal reforms is functionalism in its activist mode. Yet, it has not been fully considered whether major law reforms are often driven by the prestige of an advanced legal system from which several rules, institutions and practices are to be borrowed. A reflexive transplantation should not lose sight of

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factors which shape legal growth and change. Indeed this may be the easiest approach to an appreciation of how law normally evolves. This seems a proper field of study for Comparative Law" WATSON, *supra* note 17, at 6-7.

85. PFERSMANN, *supra* note 82; see also Ian Stewart commenting on Pfersmann's concept of 'constitutive ontology' and 'prescriptive utopia', IAIN STEWART, *Critical Approaches in Comparative Law*, OXFORD U COMPARATIVE L. F. 4 (2002).

86. See Zumbansen, *supra* note 76.

the elements of alterity that come with such an operation. This becomes even more important if we keep in mind that recourse to transplantations is often made when the domestic environment lacks the necessary conditions to realize a satisfying solution of its own. When this has been the case with a given transplantation, it is important not to assume that institutions have just grown and developed naturally as if they would mirror the domestic context. This has been the shortcoming of Andean scholarship, assuming that a European-fashioned supranationality would be a native Andean product, blessed with the inevitable success of the European common market.

At the same time, however, it is also wrong to export one's rules with the false promise of success, while neglecting the inevitable transformations or developments that transplanted systems will undergo. Avoiding misconceptions is only possible through legal critique, and the experience of the Andean legal system has proven that functionalism, especially in its activist-transformative mode, is not up to the task. The incentives to escape legal critique by feigning a higher legal order, to which the origins of the borrowed elements are traced back so that otherness can be concealed, are extremely high.

Andean legal scholarship never genuinely criticized its legal order. One can only speculate as to the reasons for this lack of criticism and the upgrading of Andean law to Community Law. It remains to be seen whether it was feigned scientific neutrality in the hands of the Andean jurists, or whether it was Latin American scholarship on international public law which influenced their understanding of Community Law. As Arnulf Becker suggested, it is tempting to belong to an "invisible college of international lawyers." In this case, it appears that they were instead compelled to become "companions of fate."