# BUCHBESPRECHUNGEN / BOOK REVIEWS

*Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan, eds; Ximena Soley, managing ed.,* **Transformative Constitutionalism in Latin America: the Emergence of a New Ius Commune,** Oxford University Press, Oxford 2017, 415 pp, ISBN: 9780198795919, £95.00

As the editors of this volume state, right at the beginning of the Introduction, this is a refined presentation of an academic project that has developed progressively over more than a decade. After several publications in Spanish, the leaders of *Ius Constitutionale Commune en América Latina* (ICCAL, to use their acronym) take the occasion of producing a publication in English to offer a particularly careful version of it. This come-of-age version includes, in any case, elements that seem to us clearly novel, such as the ubiquitous emphasis that is now placed on the transformative thrust of the project, the inclusion of contributions intended to provide a more balanced appraisal of regional developments in public law, and a strong concern for accurately conveying what ICCAL is meant or is not meant to be, in light of what seem to be the results of several rounds of debate and criticism.

Formally, the result has the air of an elegant Greek temple. The book is organized in three main parts, preceded by an Introduction, each of them divided into six chapters. The structure clearly seeks an equilibrium between three pillars: the "Framework", where we learn what ICCAL is, according to the scholars that have crafted and promoted this notion, and how it is different from other academic endeavors or theoretical constructs; "The Domestic Element", which focuses on developments in the constitutional systems of Latin American States; and "The Inter-American Element", which gathers contributions exploring developments that occur in the American regional human rights system. In our view, this way of posing things is a statement in itself: it is a way of emphasizing that within the *Ius Commune* project, the weight of the national and the international is bound to be equal, and the "interpretive" component almost as important as the "positive" one. This double face undoubtedly distinguishes this book from others featuring developments in Latin American comparative, constitutional or international law. This is a book addressed to inform the world about new scholarly and legal developments in Latin America, but also — and foremost— a deeply self-conscious exercise in dworkinian interpretivism: it is a proposal of how these developments should be articulated and coherently read in light of certain overarching goals and values, and an invitation to model scholarship, political and judicial practice after that normative proposal.

To be responsive to the different dimensions of the book, we will proceed as follows. First, we will provide a cursory description of the chapters and identify their authors. Second, we will expound and critically assess the self-understandings of the editors about the contours of the ICCAL project the book intends to convey, and about its intellectual and practical aspirations, briefly identifying the reasons why, even in this amended version, it

falls short of being fully attractive. We will close with some brief thoughts about the directions the ICCAL project could take in the future.

**Ius Commune, the book**

The Introduction and the first two chapters in Part I (Framework) explore the content, status and functions of ICCAL. The Introduction contends that the concept has both an analytical function (in naming a new legal phenomenon constituted by elements from various legal orders united by common goals) and a normative one (in identifying those common goals with the realization of the central promises of Latin American constitutions: democracy, human rights and rule of law), while also designating a specific scholarly approach where a comparative mindset, an incremental logic, and confidence in judicial rights protection play a key role. The editors portray the background against which the project emerges —Latin America's "long list of ailments"— while exploring contact points and differences between ICCAL and academic approaches like "neoconstitutionalism", "new Latin American constitutionalism" or "internationalization of constitutional law". Armin von Bogdandy's chapter then polishes ICCAL's defining traits as an academic enterprise by elaborating on several critical dimensions: the idea of commonality endorsed by the project, the implications of the "Latin American" label in the context of global legal discourses, and the particular "means" favored by ICCAL representatives: emphasis on rights, skepticism toward grand political programs, concern for institution-building, a particular understanding of judicial responsibilities, a characteristic view of regional institutions and supra-nationalism, the importance of dialogic pluralism. Flávia Piovesan further insists on identity-building with a contribution that synthesizes the "why", the "how" and the "with what goals" of the ICCAL project. The next chapters abandon general characterization to put the spotlight on two core normative ingredients of ICCAL: the protection of fundamental rights and equality. While Pedro Salazar draws on classical works in political philosophy to give grounds to the rights-centered conception of democracy ICCAL builds upon (while elaborating on the role of judicial culture in rights protection), Martín Aldao, Laura Clérico and Liliana Ronconi outline the understanding of equality that in their opinion should guide transformative regional enterprises. The authors defend a thick anti-subordination approach where distribution, recognition and participation control the normative edge of equality, and identify its preliminary fingerprints in Inter-American case law. The two final chapters in this Part engage with ICCAL from abroad. James Fowkes' superb contribution explores South African experiences under the banner of "transformative constitutionalism", illustrating the ambiguities and tensions imbued in the project and portraying how they have played out in academic writing and legal practice, while Pál Sonnevend reports on an experience that, except for the absence of the "transformative" tag and the low salience of inequality, as he notes, shares many parameters with Latin America: the Hungarian experience —where a post-transitional, largely court-led transformative impulse has been swallowed by an onslaught of authoritarian politics.

Part II ("The Domestic Element") screens up contemporary Latin American constitutional systems and selects key components that, in the editors' view, mark the emergence of a regional *ius commune*. The contribution by Rainer Grote portrays the Mexican Constitution of 1917 as a first example of transformative constitutionalism in the region, and then focuses on the constitutions of Ecuador and Bolivia, which appear to have emerged, a century later, in just the same spirit. Allan Brewer-Carías addresses, on his part, the institution of *amparo,* the characteristic Latin American rights-protective complain, tracking down commonalities and differences between its different national instantiations and underlining how Inter-American jurisprudence has enforced its common principles and connected national and international law in its context. Diego Valadés and Roberto Gargarella target another Latin American staple in their chapters, viewed by ICCAL, however, with concern: Presidentialism. Valadés reconstructs the "genetics" of hyper-presidentialism by exploring its development in the United States and France, before outlining three different models for Latin American presidentialism: traditional, transitional and democratic. Roberto Gargarella focuses on Presidentialism in the course of a cautionary analysis about the transformative potential of last-wave constitutions, menaced in his view by an overemphasis on rights declarations unaccompanied by the remaking of state structures, and by the superimposition of contrasting models of democracy. Manuel Góngora-Mera writes a chapter on the "block of constitutionality", the doctrinal figure generally used to refer to the articulation of national and international sources of law in Latin American constitutions —a key conveyor of the sort of interaction tracked down by *Ius Commune*— while Mariela Morales Antoniazzi and Pablo Saavedra Alessandri identify the legal grounds of the "Inter-Americanization" of constitutional law, and provide illustrations of its wide impact.

Part III (The Inter-American Element) opens up with three contributions that provide an overview of the Inter-American system. Sabrina Ragone portrays its legal grounds and basic institutional structure. Sergio García Ramírez reconstructs what he calls the specific Inter-American "navigation" style in the global quest for democracy and respect for rights. And Eduardo Ferrer focuses on a doctrine —control of conventionality— that has gained the center stage, intensively theorized by him and portrayed as a crucial trigger of the forms of judicial dialogue that proceed in Latin America, in different modalities and, as he remarks, with different intensities. The last three contributions' main goal is to illustrate the transformative impact of the web of interactions that occur within ICCAL epistemological confines. Thus, Ximena Soley identifies, organizes and comments instances of Inter-American transformative adjudication. Óscar Parra Vera describes on his part how Inter-American doctrine has promoted institutional empowerment and redefinition at the national level. And finally, Lawrence Burgorgue-Larsen draws an effective comparison between the European and the Inter-American Human Rights systems that nicely illustrates the latter's many "added values" —in terms of more generous textual grounds, a more varied and powerful functional menu, and a more creative and dialogical structure of opportunities.

**Ius Commune, the project**

As we advanced, *Ius Commune* is not merely an overview of regional developments, but a particular reading or interpretation of them, and one that is highly conscious of the continuities between descriptive, interpretive and prescriptive judgments (pp. 5-6, 31-32). To this interpretation, whose specific setting out remains the explicit task of the first three chapters, we now turn.

In this new presentation of ICCAL, two main departing points are crystal clear: a diagnostic about Latin America in which inequality, corruption and weak institutionalization gain the center stage troubles, and a collection of core goals that mark the horizon of the desirable: democracy, the rule of law and the guarantee of rights, with special emphasis on the need to eradicate inequality. Both diagnostic and overarching goals are, however, difficult to disagree with. They are widely shared and could be hardly distinctive of ICCAL over other normative proposals. The distinctiveness must come from the *means* or *methods*: from the particular receipt ICCAL sponsors to bring about positive social change.

In this regard, "representatives of ICCAL" —to use their expression— now seem to offer a proposal that is more nuanced and complex than in the past. It is more nuanced, for starters, because in the context of the volume, it comes accompanied by contributions that give grounds and arguments to criticize it. Thus, while the instrumental emphasis of ICCAL remains clearly placed on the crucial role of rights, courts and regional human rights institutions, the importance of respecting the institutional path (*institucionalismo*), and gradualism —and on the rejection of hyper-presidentialism, nationalism, "populist" democracy and revolutionary change— the volume includes also chapters that endorse far-reaching proposals in the domain of equality (Aldao et al.), critical views of rights-led transformation (Gargarella), and uncondescending accounts of the pitfalls of transformative constitutionalism elsewhere (Fowkes, Sonnevend). And it is more complex, also, because of the ubiquitous "transformative" label that now presides over the entire articulation of the project. There is something genuinely interesting in the tension inherent to a proposal that speaks simultaneously of "ius commune" and of "transformative constitutionalism". While the "common" —what is admitted by all or by the majority— evokes a static element, and will necessarily come down to a sub-set of legal realities where texts (legal, academic, jurisprudential) will occupy the center stage, the "transformative" evokes, by contrast, a dynamic element: it is a normative dimension that expresses a commitment to transcend the common and transform it into something else. The activation of texts and their transformation into living forces is, however —as authors like Mark Tushnet or Robert Post have remarked— an intrinsically political project that cannot be understood nor realized outside particular institutional frameworks.[1] A first crucial question for ICCAL representatives then emerges: to what extent may be ICCAL truly transformative if it does not acknowledge its political (and not

1 Mark Tushnet, "Popular Constitutionalism as Political Law", *Chicago Kent Law Review* (81) 2006, pp. 991-993; Robert Post, "Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics", *California Law Review* (98) 2010, p. 1336 and ff. In a similar vein, Jeremy Waldron,

only legal) character, and the resulting need to justify its superiority over alternative political proposals? If ICCAL vindicates the terrain of the transformative, it then requires a careful political justification that is not provided by mere appeals to the "common".

The impression all along is, however, that ICCAL's representatives resist that path. "While the project aims at fundamental change", we read in pp. 34-35, "its human rights emphasis and specifically legal approach evinces deep skepticism towards grand political programs […]. This skepticism is also quite visible in the understanding of the democratic principle". ICCAL authors, in other words, favor incremental change through a (particular) path and discard others, yet call their strategy "legal" and are "adamant that it is not linked to a specific partisan agenda" (setting aside the non-neutrality associated to the pursuit of certain normative overarching goals) (p. 6). Yet it is clear that, "grand" or "petit," it is a political program that must therefore contend in a position of equality with other options that claim to be, just as the ICCAL does, the best ticket towards the realization of regional constitutional promises. An explicit embrace of the work required at this level would complementarily give ICCAL the chance to prove that talk of "transformation" is more than a voluntaristic gesture.

Similar tensions affect other aspects of the reformulation. Because of the criticisms ICCAL has received in the past for its favoring an elitist and "over-intellectualized" model of constitutionalism, a judge-centered modality of politics largely removed from popular democratic debate, and a biased conception of the "common",[2] representatives of ICCAL now strive to show openness in at least three different directions: indigenous people, social movements and excluded minorities. As is well known, *Ius Commune* is promoted in a context where pluri-national Latin American states have recognized ample margins of self-determination to certain groups in the construction of constitutional meaning.[3] Indigenous peoples are recognized as sovereign political subjects entitled to shape their destiny, and this makes systemic legal articulation challenging not only within national frontiers, but also at the supranational level. Yet while ICCAL representatives emphasize Inter-American accomplishments in terms of indigenous rights protection, and Armin von Bogdandy —in stressing the importance of "dialogic pluralism" as both a means and an end within the representative texts of the movement— remarks that "real inclusion demands that [indigenous

"Constitutionalism: A Skeptical View", *New York University Public Law and Legal Theory Working Papers* 248 (2012), p. 20.

2 For a very specific critical assessment of ICCAL as a legal project see, for instance, Alejandro Rodiles, "The Great Promise of Comparative Public Law for Latin America: Toward *Ius Commune Americanum?"* in Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier and Mila Versteeg (Eds.), *Comparative International Law,* Oxford 2018, p. 501. For an example of a broader discussion on some of the core institutional solutions favored by ICCAL representatives, see, for instance, the contributions at the AJIL Symposium "The Constitutionalization of International Law in Latin America", AJIL Unbound 109 (2015).

3 Raquel Yrigoyen Fajardo, "The Panorama of Pluralist Constitutionalisms: from Multiculturalism to Decolonization", in César Rodríguez Garavito (Ed.), *Law in Latin America: A New Map*, Abingdon 2015, p. 157.

peoples] participate with their own normative orders" (p. 45), we find scarce grounds in the book to believe that the project allows for more than subordinate inclusion. The same occurs with the treatment of social movements and with calls for the ending of exclusion: the project now *affirms* the crucial role of social movements (pp. 63-64) and the urgency of overcoming exclusion (pp. 6-7, 33-34, 50), but one wonders whether the ICCAL door will remain open whenever actions addressed to overcome exclusion or upturns of social activism do not fully respect the gradual, impeccably institutional methods endorsed by the project.

**Ius Commune, the prospects**

The doubt remains, in short, as to whether the transformative and pluralistic ethos now affirmed by *Ius Constitutionale Commune* has genuinely transformed and pluralized its internal fabric or it is rather an intelligent —and no doubt *bona fide*— but merely superficial effort at "internalization" or "co-optation" of the criticisms (at some point, by the way, the effort to sharpen the anatomy of ICCAL when seen in its best light, to deactivate criticisms, acquires an air of over-branding that ends up weakening the credibility of the synthesis — "ICCAL as the sum of all that is good"— and risks scaring customers away).

Yet it would be grossly unwise to throw the baby with the bath's water. While for sure the ICCAL project will continue to face difficulties to convince many people of it being a fully attractive proposal of social transformation, no doubt the new presentation is far more sensitive and far more open to elements that had not been central in the past. What one might request, therefore, to ICCAL representatives, is a deepening in the implications of the enlarged picture. What is to be derived, for example, of the new emphasis on diversity, if we convene that the former insistence on the crucial role of judicial dialogue is way insufficient to carry out the responsibility? What are the practical implications of the new emphasis on social movements? Can the openness to understandings of equality that require participation, redistribution and recognition lead ICCAL to advocate a radical redesign of appointment rules in apex Courts, for instance, so as to make them more acceptable under the new understanding of gender and cultural fairness? Which actors should the group invite to the forums where these debates will take place? In what ways should the institutional alliances of the group be supplemented? The agenda for the future seems therefore intense, and it will be interesting to see how things have played out when holding in our hands the ICCAL book of 2027.

Ana Micaela Alterio/Francisca Pou Giménez, *Mexiko City*