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RESEARCH ARTICLE

A critical account of Ius Constitutionale Commune in Latin America: An intellectual map of contemporary Latin American constitutionalism

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Abstract

Ius Constitutionale Commune in Latin America (ICCAL) is an academic endeavour that attempts to provide an account of the original Latin American path of transformative constitutionalism, comprising elements from national, transnational and international legal orders, and where the law is placed at the service of the normative trinity of constitutionalism, namely the rule of law, democracy and human rights. In this regard, ICCAL speaks of an Inter-American law that represents a new legal phenomenon, in a region where constitutionalist ideas have allegedly claimed new traction. In this article, I develop two main critiques that can be deemed challenges for an academic project that is still 'under construction', and provide an intellectual map of Latin American constitutionalism that could address these critiques and serve as a roadmap for studying potential Latin American contributions to debates around global constitutionalism.

Keywords: egalitarian-dialogic constitutionalism; Ius Constitutionale Commune in Latin America (ICCAL); Latin American constitutionalism; Latin American neo-constitutionalism; New Latin American Constitutionalism

I. Introduction

In a recent *Global Constitutionalism* editorial commenting on the end of the 'West', it was stated that 'we should give up to the idea of a deep connection between constitutionalist ideas and geographical regions, countries or power constellations'.[1] Allegedly, the commitment to constitutionalism, represented by the triad of human rights, rule of law and democracy, has 'long taken hold outside of the West'.[2] In this scenario, scholars such as Armin von Bogdandy have focused their research towards Latin America, 'the region where the debate on the future of constitutionalism is debated with more intensity and urgency'.[3] Recently, several scholars on both sides of the Atlantic have advocated for a

[1]M Kumm et al, 'The End of "the West" and the Future of Global Constitutionalism' (2017) 6 *Global Constitutionalism* 1, 9.

[2]See (n 1) 3.

[3]A von Bogdandy, 'Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador' (2015) 34 *Revista Derecho del Estado* 1, 6.

concept with the ability to address 'a new legal phenomena' in Latin America: Ius Constitutionale Commune in Latin America (ICCAL).[4] This academic endeavour attempts to give an account of the 'original Latin American path of transformative constitutionalism', comprising 'elements from various legal orders [national, transnational and international] which are united by a common thrust', where the law is placed at the service of the normative trinity of constitutionalism, namely the rule of law, democracy and human rights.[5]

I argue that if we are in the search for new regions or places where constitutionalist ideas have claimed new tract, ICCAL does not seem to offer good cartographical advice. Although it constitutes a valuable effort of highlighting new trends in the constitutional debate of the region, it does not seem to reflect the concrete ways in which Latin American constitutional scholarship has engaged with constitutionalist ideas. Mapping Latin American constitutionalism in these days is challenging, and resorting to scholarly debates offers an interesting entry point for addressing a complex landscape. By studying ICCAL, we are not going to be able to assess the extent to which the 'constitutional conceptions of the Global North can truly be claim to be universal', or where 'exhausted concepts' in the Global North can claim new traction in Latin America.[6] I begin by criticizing the main postulates of ICCAL and present the reader with a more precise intellectual map of Latin American constitutionalism, which could be presented in a continuous series of chronological frustrations with constitutional promises derived in the recent revival of (a more) political constitutionalism. Although ICCAL offers valuable reconstructions of current legal phenomena happening at national and transnational levels, it does not provide clear answers to 'the questions relating to the establishment of and exercise of legitimate public authority across jurisdictions'.[7]

In Part II, I describe ICCAL's different dimensions, the core elements of its research agenda, and two critiques that we can raise against this novel approach. In Part III, I provide the reader with an intellectual map of contemporary Latin American constitutionalism that more precisely reflects the main debates that are taking place in the region, and that allows us to address the critiques presented in Part II. Here, I will explain the similarities and differences between three constitutional currents or schools of thought that share similar normative commitments with ICCAL: Latin American neo-constitutionalism, new Latin American constitutionalism and egalitarian-dialogic constitutionalism. Although each of them addresses the current relationship between law and social change, they differ greatly in how this is articulated – that is, on the particular role played by law and legal actors in social transformation. Moreover, this intellectual mapping also distinguishes the different emphasis of each school of thought within the trinitarian mantra of constitutionalism. These two parts challenge whether Latin American constitutionalism can be presented under a single label, questioning the theoretical and practical value of ICCAL for making a contribution to 'global constitutionalism', an idea that should critically acknowledge the relationship between constitutionalist ideals and geographical regions.

[4]A von Bogdandy and others, 'Ius Constitutionale Commune in Latin America: A Regional Approach to Transformative Constitutionalism' in A von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, Oxford, 2017).

[5]See (n 4) 4.

[6]See (n 4) 8.

[7]See (n 1) 3.

II. Ius Constitutionale Commune in Latin America (ICCAL)

Brief overview

Regardless of their different political, economic and cultural realities, Latin American jurisdictions have many things in common, starting with the language – with Brazil an exception – and their status as former colonies of Spain and Portugal.[8] Immediately after independence, Latin American countries started a gradual consolidation of a regional 'juridical space', resorting to the same legal sources, constituted mainly by the rejection of Spanish (colonial) law and the endorsement of French codification processes or other Western European legal traditions (such as those of Italy or Germany), and later looked to US legal practices to find innovative solutions to problems that were not easily found within the family of civil law traditions.[9] Nowadays, Latin American jurisdictions influence each other, without a single leading domestic jurisdiction and with regional venues such as the Inter-American Human Rights System (IAHRS) triggering common threads that allow several countries to converge on key legal institutions and practices.[10] Although each jurisdiction has its own legal language, the common Latin American legal space allows for the emergence of a regional legal language, through which 'an Argentinian lawyer in a US-based law firm can coordinate the due diligence for projects all over Latin America'.[11]

Considering these starting points, in recent years scholars from both sides of the Atlantic have coined, developed and propagated the concept of ICCAL.[12] Relying on the basic idea that law is a social construct, they consider that legal scholarship can have a crucial impact on how law is created and shaped in Latin America. Although they claim that their project is non-partisan, they acknowledge that their thrust is not neutral or agnostic: they attempt to do legal scholarship with a normative orientation in mind, which is to transform reality through the use of public law, and with a view to impacting reality for the common good. In the words of Alterio and Giménez, ICAAL is 'a deeply self-conscious exercise in Dworkinian interpretivism', which entails a proposal of reading recent legal developments in the region 'in light of certain overarching goals and values, and an invitation to model scholarship, political and judicial practice after that normative proposal'.[13]

There are three different dimensions of the project of ICCAL: first, an analytical dimension, where discourse is used to 'posit a new legal phenomenon', which is 'composed of elements from various legal orders which are united by a common thrust, namely, transformative constitutionalism';[14] second, a clear normative dimension, to the extent that law is placed at the service of the rule of law, democracy and human rights; and lastly, a scholarly approach, which combines different disciplines with a 'comparative

[8]D López-Medina, 'The Latin American and Caribbean Legal Traditions' in U Mattei (ed), *The Cambridge Companion to Comparative Law* (Cambridge University Press, Cambridge, 2012) 351.

[9]See (n 8) 349.

[10]G Aguilar, 'Surgimiento de un Derecho Americano de los Derechos Humanos en América Latina' (2011) 24 *Cuestiones Constitucionales* 3.

[11]See (n 8) 356.

[12]A von Bogdandy, M Morales, and E Ferrer Mac-Gregor (eds), *Ius Constitutionale Commune en América Latina: Textos básicos para su comprensión* (IECEQ-MPIL, 2017).

[13]A Alterio and F Pou Giménez, 'Book Review: *Transformative Constitutionalism in Latin America*' (IACL-AIDC blog, 23 October 2018), <https://blog-iacl-aidc.org/blog/2018/10/21/book-review-transformative-constitutionalism-in-latin-america>.

[14]See (n 4) 4.

mindset' and endorses a 'methodological orientation towards principles', favouring an incremental logic of social change.[15] According to the last of these, ICCAL claims to be sceptical of transformative projects that attempt to radically change basic structures or current institutional arrangements, or that form part of broader political projects of change. In that regard, they carry the burden of a deficient legal scholarship that has been partly responsible for the structural and radical inefficacy of law, which has overwhelmingly worked for the protection of the powerful. Moreover, they claim to endorse a critical approach to law, and a practical vocation towards institutional changes that are required for progressive outcomes.[16]

Conceptually, it is important to clarify what is 'common' for ICCAL, which is not only about the convergence on certain key institutions (e.g. the writ of *amparo* or constitutional clauses of openness towards international human rights law) or doctrines (e.g. conventionality control), but a discourse around law that attempts to impact current legal arrangements. The membership of almost all Latin American countries in the American Convention of Human Rights and the similarities in their domestic rules for the reception of international human rights law create the basis for this discourse to develop. Although several countries do not recognize the jurisdiction of the Inter-American Court of Human Rights (IACtHR) or have not ratified all the regional human rights treaties, or include different forms of reception of international human rights law,[17] the idea of a common legal discourse constitutes the central element of ICCAL.[18] This develops into a common approach to legal reasoning, a repertoire of concepts and terms, and a way of studying law that informs how law is understood in the different places on the continent.[19]

In some interpretations, the commonality is not only about fundamental principles that are present in different national constitutions and in the regional human rights system more broadly, but a synergic and anti-formalistic communicative process of rights protection of a transnational character. Therefore, ICCAL is a kind of 'cosmopolitan constitutionalism' where the 'ideal constitution is one which is open to a conception of global public law in which the boundaries between international (human rights) law and national (constitutional) law are blurred: the internationalization of constitutional law and the constitutionalization of international law at the same time'.[20] Accordingly, rather than strict comparative methodologies for addressing legal texts or understanding legal institutions, ICCAL endorses a 'comparative mindset' oriented towards the protection of human rights, facilitating the 'flexible use by national courts of comparisons and legal

[15]See (n 4) 5.

[16]See (n 4) 5.

[17]K Castilla, 'Qué tan común es lo común del *Ius Constitutionale Commune* Latinoamericano?', (Ventana Jurídica, 21 June 2017), <http://facultad.pucp.edu.pe/derecho/blog/que-tan-comun-es-lo-comun-del-ius-constitutionale-commune-latinoamericano>.

[18]M Morales, 'Interamericanización como mecanismo del Ius Constitutionale Commune en derechos humanos en América Latina' in A von Bogdandy, M Morales, and E Ferrer Mac-Gregor (eds), *Ius Constitutionale Commune en América Latina: textos básicos para su comprensión* (IECEQ-MPIL, 2017).

[19]JM Serna, 'El Concepto del Ius Commune Latinoamericano en Derechos Humanos: Elementos para una agenda de investigación' in A von Bogdandy, M Morales, and E Ferrer Mac-Gregor (eds), *Ius Constitutionale Commune en América Latina: textos básicos para su comprensión* (IECEQ-MPIL, 2017) 212–13.

[20]A Rodiles, 'The Great Promise of Comparative Public Law for Latin America: Towards Ius Commune Americanum?', in A Roberts et al (eds), *Comparative International Law* (Oxford, Oxford University Press, 2018) 509.

transplants'.[21] Overall, ICCAL claims to make a contribution to the debates around global constitutionalism, especially through its description of recent legal phenomena and discussion of the legitimate authority of Inter-American human rights law.[22]

Moreover, although ICCAL entails a rejection of the traditional schools of Latin American constitutionalism, it is not a claim to create new values and principles that would produce an entirely 'new type of constitutionalism', but a vindication of universal values in a certain historical context.[23] Considering the fact there is no Latin American institutional integration with a centralized decision-making process as it exists in Europe, ICCAL attempts to find a common discourse through which to overcome the 'implementation gap' with the constitutional commitments of the third wave, focused in exclusion, poverty, and diversity. Although ICCAL's scholars endorse a form of constitutional pluralism, with different sites of production and reception of law that are (and must be) engaged in multi-level dialogues, they consider that regional standards, as they are produced and developed by the IACtHR, constitute the core of common Inter-American standards.[24]

ICCAL's agenda entails a commitment to 'address the profound structural deficiencies' in Latin America through the means of law and by the need to tackle the 'unacceptable living conditions for broad parts of the population'.[25] Although ICCAL's scholars 'hold different ideas on economic policy, property protection and redistribution', they 'agree that exclusion must be overcome'.[26] In almost every presentation of ICCAL, the fact that Latin America is the most unequal continent in the world, and that almost one in three Latin Americans is living below the threshold of poverty, or under threat of falling below it, constitutes an unavoidable starting point for any legal analysis.

Main critiques

In this section, I address two main critiques that have already been raised against ICCAL: to its common elements and to its endorsement of transformative constitutionalism. Although there may be others, it is these that can be addressed better by a more precise intellectual map of Latin American constitutionalism. The two critiques are closely related: are there enough common elements to suggest that Latin American constitutionalism is transformative? Even if we can agree on common grounds, such as a sub-set of legal sources or practices, can we rely on a non-political account of transformative

[21]See (n 20) 509.

[22]However, in a recent paper, von Bogdandy and Ureña, who generally write on behalf of ICCAL, have said that they 'do not see transformative constitutionalism in Latin America as the iteration of global or international constitutionalism'. A von Bogdandy and R Ureña, 'International Transformative Constitutionalism in Latin America' (2020) 114 *American Journal of International Law* 403, 408. Regardless of this statement, I understand that ICCAL examines questions closely related to the agenda of global constitutionalism, which entails analysing different approaches to questions of constitutional character, such as 'the establishment and exercise of legitimate public authority across jurisdictions'. See (n 1) 3.

[23]A von Bogdandy, 'Ius Constitutionale Commune en América Latina. Aclaración conceptual' in A von Bogdandy, M Morales, and E Ferrer Mac-Gregor (eds), *Ius Constitutionale Commune en América Latina: textos básicos para su comprensión* (IECEQ-MPIL, 2017) 140.

[24]See (n 18) 436. L Burgorgue-Larsen, 'La Corte Interamericana de Derechos Humanos como tribunal constitucional', in A von Bogdandy, M Morales, and E Ferrer Mac-Gregor (eds), *Ius Constitutionale Commune en América Latina: textos básicos para su comprensión* (IECEQ-MPIL, 2017).

[25]See (n 4) 6.

[26]See (n 4) 6.

constitutionalism that merely appeals to widely shared goals rather than acknowledging the character of institutional and political processes? As I will explain in Part III, there are different intellectual currents that understand these questions in a different way.

What is common?

Probably one of the most important challenges for ICCAL's scholars is to determine what commonality they observe in the region to propose the existence of an *ius commune*. Here, I would like to critically address this issue and question whether the elements of commonality presented before are thick enough to provide a common ground. Overall, ICCAL constructs a common inter-American discourse that emerges from legal practices in different regimes, with a special focus on higher/constitutional courts, and on the jurisprudence of the IACtHR, which attempts to instil a legally driven project of social change that allows us to deviate from the letter of the law if human or fundamental rights are at stake.[27] This discourse is allegedly grounded in the idea of a regional judicial dialogue that develops dynamically and horizontally between regional and national courts, so ICCAL 'becomes most palpable in the interaction of domestic authorities with the Inter-American Court'.[28] In this scenario, how can a common discourse around law and legal reasoning emerge in Latin American constitutional scholarship?

The importance of Latin America for constitutional academia may seem at odds with this region's poor record regarding basic standards of rule of law. Maybe 'the law of the Global South, or rather its inefficiency and lack of originality, can be of interest to sociologists, anthropologists and law professors interested in issues of social justice and the reforms needed to achieve it'.[29] Nevertheless, recent attention to Latin American constitutionalism is not entirely unjustified. For Waldron,

> [A] constitutionalist is one who takes constitutions very seriously and who is not disposed to allow deviations from them even when other important values are involved. 'Constitutionalism' therefore refers to the sort of ideology that makes this attitude seem sensible. So I suppose this includes the claim that a society´s constitution matters, that it is not just decoration.[30]

Following Waldron, what matters here is what it means for Latin American constitutions to take their commitments seriously, rather than strict compliance with constitutional legal frameworks. In that regard, Latin American constitutional scholarship, including

[27]J Fröhlich, 'Traces of Constitutional Reasoning in Latin America and the Caribbean – Regional Cosmopolitanism Without Backlash?' (ICONnect Blog, 30 July 2020), <http://www.iconnectblog.com/2020/07/traces-of-constitutional-reasoning-in-latin-america-and-the-caribbean-regional-cosmopolitanism-without-backlash>; JC Herrera, 'La idea de un derecho común en América Latina a la luz de sus críticas teóricas' (MPIL Research Paper Series No. 2020-25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3652404.

[28]A von Bogdandy, 'Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism' (2015) 109 *American Journal of International Law Unbound* 109.

[29]D Bonilla, 'Introduction: toward a constitutionalism of the Global South' in D Bonilla (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, Cambridge, 2014) 6.

[30]J Waldron, 'Constitutionalism: A Skeptical View', <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1002&context=hartlecture>

ICCAL's postulates, constitutes an exception to the idea 'that constitutional scholarship only flourishes when the law in question binds the authorities'.[31]

Constitutional projects of the 'third wave', such as ICCAL, have endorsed different forms of 'aspirational constitutionalism' – that is, 'the idea that the destiny of our societies depends in large part on having good constitutions'.[32] In contrast with the traditional debate of the nineteenth century, focused on the legacies of the colonial era, nation-building processes, and material or economic interests, the contemporary debate is based on a productive and instrumental relationship between law and social change, on how law could become the cornerstone of social progress. It highlights the constitutive and instrumental dimensions of law, rather than the mere institutionalization of expectations and interactions in the social sphere, law also configures our imagination about what is socially and politically possible and provides strategic resources for those advocating social change.[33] Accordingly, one may plausibly claim that the main constitutional dispute is now concentrated on how to solve the challenges and persistent problems that still pervade the region, with a view to a more promising future, something that ICCAL claims as a basis for its development. Moreover, even if the material basis of constitutions has been somehow displaced from constitutional discourse, the emphasis of the modern debate is on how to break the cycle of material inequality 'bequeathed' by a history of segregation and political exclusion; the material basis has, rather, shifted to aspirations, isolating the constitutional debate from political economy.[34] All in all, constitutional law is considered as the darling of progressive thinking in the region and it has been coupled with several adjectives -'inclusive', 'transformative', 'egalitarian', 'new', and 'aspirational'- becoming the favourite idiom of emancipatory projects.[35]

Considering what I said in the former paragraphs, one of the fundamental critiques I raise here is that although ICCAL claims to build on 'insights developed by Latin American scholarship', it seems to neglect the different currents or trends that are present in the scholarly debates of the region.[36] Although these trends observe some common elements, they are different enough, for example, to provide a distinct account of how even convergence on key institutions (e.g., openness clauses) derive in different ways of shaping the IACtHR authority on the ground.[37] A more careful and detailed study of Latin American legal scholarship shows us different sites of academic debate that have become important sources and catalysers for schools of thought that have developed different versions of Latin American constitutionalism. At points, it seems that ICCAL becomes bounded within the historical origins of the academic platform constituted by the exchanges between the Max Planck Institute for Comparative Constitutional Law and

[31]A von Bogdandy, 'The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe' (2009) 7 *International Journal of Constitutional Law* 360, 370.

[32]M García Villegas, 'Law as Hope' (*Eurozine*, 24 February 2004), <http://www.eurozine.com/law-as-hope>.

[33]R Gargarella, *Latin American Constitutionalism 1810-2010: The Engine Room of the Constitution* (Oxford University Press, Oxford, 2014).

[34]See (n 32).

[35]Within the emergence of 'adjectival constitutionalism', that is, 'the study of constitutionalisms with some modifier', the Latin American constitutional debate is fundamental. M Tushnet, 'Varieties of Constitutionalism' (2016) 14 *International Journal of Constitutional Law* 1.

[36]See (n 4) 15.

[37]A Huneeus. 'Constitutional Lawyers and the Authority of the Inter-American Court' (2016) 79 *Law and Contemporary Problems* 179.

the Institute for Legal Research in the National Autonomous University of Mexico, among other Latin American institutions.[38] In other words, it seems more an academic network of cooperation that, due to the relatively low number of Latin American legal scholars, can easily be grouped under a single platform.[39] For Alejandro Rodiles, ICCAL constitutes an example of 'law as profession', 'a project of influential Latin American constitutionalists (scholars and judges) who, as globalization advances, have come to embrace the internationalization of their field, as well as European international lawyers with a … constitutionalist and comparatist mindset'.[40] As a project still in formation, ICCAL's theoretical premises may be affected by the increasingly diverse academic literature on Latin American constitutionalism.

Moreover, the scholars who write on behalf of ICCAL, or who participate in the edited collective works, seem to ignore critical voices, or the different ways in which constitutional processes, values or principles beyond the state have generated different forms of resistance or backlash.[41] Even if ICCAL claims to give a name to 'a new legal phenomena', to the fact that Latin America seems to share common standards of law, it is not clear how robust this 'normative reconstruction' of the law as it is might be. Indeed, if one focuses on the allegedly horizontal dialogue between the IACtHR and national courts, there are good reasons to challenge this idealized picture of a pluralistic dialogue: 'instead of a reciprocal communicative process through which similarities across nations are identified via the comparative method, a unidirectional and hegemonic discourse at the service of the San José Court can be observed'.[42] Additionally, if one studies how domestic constituencies negotiate the authority of the IACtHR on the ground, there are different examples of resistance or backlash, which complicate the picture further.[43] Certainly, as ICCAL claims, legal scholarship serves to construct reality, through concepts and legal constructs, in order to shape it and transform it in a certain way.[44] However, we miss a more precise way of mapping the intellectual currents that could serve as insights for ICCAL. A common discourse endorsed by a bunch of legal scholars who are seeking to address historical and structural problems of Latin American societies through legal means does not seem thick enough to construct a normative theory of constitutionalism.

[38]In that regard, ICCAL could be analysed through the perspective of the political economy of legal knowledge or the geopolitics of constitutionalism in Latin America. Daniel Bonilla, 'The Political Economy of Legal Knowledge' in D Bonilla and C Crawford (eds), *Constitutionalism in the Americas* (Edward Elgar, Cheltenham, 2018); J Esquirol, 'The Geopolitics of Constitutionalism in the Americas' in D Bonilla and C Crawford (eds), *Constitutionalism in the Americas* (Edward Elgar, Cheltenham, 2018).

[39]See (n 23) 138.

[40]See (n 20) 508.

[41]J Contesse, 'Resisting Inter-American Human Rights Law' (2019) 44 *Yale Journal of International Law* 1; D Werneck, 'Book Review: *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*' (2019) 17 *International Journal of Constitutional Law* 368.

[42]See (n 20) 509.

[43]As stated by Carvalho and Villagrán, 'To highlight communality regarding the ideas of rights, democracy and the rule of law, ICCAL sets aside disagreement among courts and judges on concrete cases.' F Carvalho and A Villagrán, 'A Human Rights Tale of Competing Narratives' (2017) 1602 *Direito e Práxis* 1609, 1616.

[44]P Salazar, 'La disputa por los derechos y el Ius Constitutionale Commune' in A von Bogdandy, M Morales and E Ferrer Mac-Gregor (eds), *Ius Constitutionale Commune en América Latina: textos básicos para su comprensión* (IECEQ-MPIL, 2017) 116.

What is transformative?

Another problem that emerges from different authors who write in the name of ICCAL is the absence of a critical account of the conception of 'transformative constitutionalism' that they claim to endorse. At times, it seems that the adjective 'transformative' constitutes the outcome of more independent and assertive courts, as illustrated in the successful trials for past human rights violations of dictatorships in Argentina or Chile.[45] In other words, it seems that to enforce the law even against the executive or legislative's will constitutes a sign of 'transformative constitutionalism'. Nevertheless, if structural problems in current Latin American societies depend mainly on state omissions, how should we build indicators of transformative success? Moreover, as Werneck puts it, 'treating changes in existing legal rules and principles as meaningful victories for actual social change has been a recurring pitfall for both activists and legal scholars working in this field'.[46]

As a seminal article claims, the transformative approach of ICCAL entails an emphasis on addressing the structural problem of social exclusion.[47] However, as some critics argue, the aim of inclusion suggests a commitment to work within current institutional arrangements to the extent that all what we need to do is to 'include' those who are 'excluded'.[48] Indeed, the aim of inclusion does not attempt to change or radically transform the institutional arrangements, but merely to expand the coverage. Additionally, several accounts of progressive courts in the region point to the structural transformation triggered by courts, which has been carried out through building alliances with legislators and judges, or by creating dialogues with those parts of the administration that seem friendlier for transformative aims.[49] The focus should therefore be on processes of change rather than on specific cases or landmark decisions,[50] which entail several actors within a transnational network.[51]

ICCAL's different ideas about what transformative constitutionalism really means suggest addressing debates around the origin of this term in South Africa, which could be fundamental for importing the concept to a different context. While ICCAL is 'heavily connected to a regional dialogue at the centre of which lies an active regional court', the blueprint offered by South Africa's transformative constitutionalism is connected to the

[45]See (n 4) 11.

[46]See Werneck (n 41) 371.

[47]See (n 4) 6.

[48]A Somek, *The Preoccupation with Rights and the Embrace of Inclusion: A Critique* (University of Iowa, Legal Studies Research Paper 13-11, 2013), <https://ssrn.com/abstract=2205299>.

[49]A Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493. This account has also been addressed by some representatives of ICCAL, who endorse a more critical approach.O Parra-Vera, 'The Impact of Inter-American Judgments by Institutional Empowerment' in A von Bogdandy *et al* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, Oxford, 2017).

[50]See Fröhlich (n 27).

[51]See, for example, the case of ombudsmen, national human rights institutions or even human rights non-autonomous agencies that collaborate with domestic or regional courts in the implementation of international human rights standards.T Peagram, 'National Human Rights Institutions in Latin America' in R Goodman and T Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, Cambridge, 2012).

country's specific historical struggles against apartheid.[52] Although there may be historical similarities between South Africa and Latin America, this needs to be critically addressed in a more thorough way, as transformative constitutionalism has become a contested concept in comparative constitutional law.[53] Conceptually, a first question that emerges is whether the term 'transformative' merely 'describes' newly created constitutional texts that include extensive positive rights (e.g. social rights), the drafting of aspirational goals and strong public duties of enforcement, or rather 'prescribes' what the pertinent constitutional arrangement 'should' be doing to meet those commitments.[54] In the case of ICCAL, this duality is not clarified in any of its main works.

This provides space for addressing one of the main South African debates regarding the tensions or possible articulations between transformative constitutionalism and legal liberalism.[55] A first tension relies on the idea that transformative constitutionalism requires the permanent presence of an unlimited constituent power that, in Negri's interpretation,[56] could never be framed within the limits and forms of the constituted power: the constituent power is in a state of continual political activity, 'the horizon of the revolution, not terminated by always continued, by the love of time', and contrasts with 'the grammars of the constituted power [that] often tend towards the reduction of the constituent power, thus diminishing the range of the political'.[57] The picture of a limitless constituent power that is always in danger of becoming 'awake' and destroying what has been consolidated through institutional articulation seems disturbing for the liberal mindset, which requires identifying and translating popular sovereignty in an 'instituted' voice of the people.[58]

The previously described tension is closely related to another problem: whether transformative constitutionalism can be framed as a liberal constitutional project and keep its promise of transformative change. In other words, it is about the possibility of this project to emerge as a liberal project without its conservative tone – that is, where most social institutions (except from those included in the basic liberal consensus) 'are susceptible to redefinition through the democratic process'.[59] The basic question, then, is whether 'transformative constitutionalism' entails a real break with the liberal tradition of constitutionalism, as expressed in the separation of powers, the distinction between law and politics, and the idea that politics should be constrained by clear legal limits. If newly shaped aspirational constitutions want to achieve their goals, is there any legal necessity to

[52]J Fowkes, 'Transformative Constitutionalism and the Global South: The View from South Africa' in A von Bogdandy and others (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, Oxford, 2017) 98.

[53]M Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *The American Journal of Comparative Law* 527, 531.

[54]See (n 52) 100.

[55]K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; T Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?' (2009) 20 *Stellenbosch Law Review* 258.

[56]A Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, Minneapolis, MN, 1999).

[57]U Baxi, 'Preliminary Notes on Transformative Constitutionalism', in O Vilhena, U Baxi, and F Viljoens (eds), *Transformative Constitutionalism* (Pretoria Law School University Press, Pretoria, 2013) 19, 22.

[58]See (n 56) 19.

[59]T Roux, 'A Brief Response to Professor Baxi' in O Vilhena, U Baxi, and F Viljoens (eds), *Transformative Constitutionalism* (Pretoria Law School University Press, Pretoria, 2013) 51.

adopt a 'transformative conception of adjudicative process and method'?[60] According to Karl Klare, if one accepts the plausibility of a 'postliberal' reading of an aspirational and transformative constitution like the one of South Africa, there is only one correct method of legal reasoning, which requires a transparent political engagement and a particular *ethos* towards the content of the postliberal constitutional text.[61] For Theunis Roux, in contrast, there is no disagreement between the strong democratic and aspirational commitments of the South African Constitution and the central tenets of the liberal tradition.[62] If we could provide reasons to read the aspirational constitutional provisions as legally compelling, then liberalism would not be disregarded from the outset. Thus, it could be possible to use Dworkin's or Hart's interpretive methods to support a reading of the constitution in a 'transformative way'.[63]

The use of transformative constitutionalism by ICCAL's works do not seem to reach beyond the general aspirational commitments of recent constitutional transformations in Latin America.[64] These commitments 'are widely shared and could be hardly distinctive of ICCAL over other normative proposals' present in the region, so its 'distinctiveness must come from the means or methods: from the particular receipt ICCAL sponsors to bring about positive social change'.[65] For Pedro Salazar, ICCAL entails a certain 'ideological commitment' from those in charge of interpreting and applying the constitutional commitments to concrete conflicts, but there is no clarity on the ideology to which judges should commit themselves.[66] Should ICCAL judges expand the sources of legal reasoning towards the social and political consequences of their judgements? Should they embrace and openly political legal reasoning, as they are considered an important part of recent constitutional transformations that have emerged from radical breaks with the past? For James Fowkes, we need to reduce the risks of 'transformative constitutionalism' becoming an empty concept, which is about preservation and change, restraint and intervention, but without any conceptual guidance on when to swing between the poles.[67]

Moreover, ICCAL's endorsement of transformative constitutionalism seems to neglect the different roles that law plays in pursuing 'the trinitarian mantra of the constitutionalist faith'.[68] Although ICCAL endorses a legally driven project of social transformation, there are almost no clues as to the precise roles law and legal discourses must play in that transformation towards the promotion of the rule of law, human rights and democracy. As von Bogdandy and colleagues state in a recent work, 'we understand the law that ICCAL bundles as opportunity structures which may be used to advance a transformative agenda'.[69] However, at the same time their conception of law as a social construct should commit them to an approach that goes beyond merely instrumental notions of law as a means to an end, and motivate them to, for example, address the ways in which the law and legal discourses are also being shaped in the process of being used as instruments to

[60]See Klare (n 55) 156.
[61]See Klare (n 55) 156.
[62]See Roux (n 55) 271.
[63]See Roux (n 55) 271.
[64]A critique shared by Carvalho and Villagrán. See (n 43) 1616.
[65]See (n 16).
[66]See (n 44) 44.
[67]See (n 52) 105.
[68]M Kumm, A Lang, J Tully and A Wiener, 'How Large is the World of Global Constitutionalism?' (2014) 3 *Global Constitutionalism* 1, 3.
[69]See (n 4) 5.

advance substantive interests. Furthermore, even if ICCAL scholars acknowledge the contested nature of the 'normative trinity' and the possible range of institutional articulations, they do not explain how law is going to put this triad into work, apart from a general reliance on courts. As a project that honours the normative triad of human rights, rule of law and democracy, ICCAL's 'public law focus' tends to narrow its analysis to institutions, and mostly to courts.[70] Although Armin von Bogdandy notices a certain scepticism with judges leading social transformations, and highlights an awareness of the independent role of ombudsmen, electoral commissions or other agencies, most of the intellectual work done by ICCAL's scholars reflects on domestic or regional courts, suggesting that the 'future of Latin American constitutional law is in the hand of judges'.[71]

In this scenario, according to Alterio and Giménez, a fundamental question would be, 'To what extent may be ICCAL truly transformative if it does not acknowledge its political (and not only legal) character, and the resulting need to justify its superiority over alternative political proposals?'[72] Although ICCAL suggests that law plays a crucial role in fostering democracy, its 'institutional bias' renders the 'paradox of participation' unaddressed.[73] There is no way out of the 'implementation gap' without the law having a say on the problems of embodied agency – that is, on why those most in need of protection from the law do not see it as a cause for progressive change or transformation of their social reality, and why they show no interest in transforming the content of law through democratic means.[74] Moreover, without a deep understanding of how political processes and dynamics negotiate the authority of legal sources (e.g. international human rights law), it is difficult to put ICCAL in the work of fostering democracy. According to some critics, although ICCAL acknowledges the importance of 'politics as a constraining factor on the Court's capacity to promote change', it does not engage with political dynamics at national and regional levels that, in recent years, 'might signal resistance to the IACtHR-led process of integration toward an *ius commune*'.[75] In this regard, if ICCAL wants to be 'the best ticket towards the realization of regional constitutional promises', it should start abandoning its foundational commitment with political non-partisanship.[76]

III. An intellectual map of Latin American constitutionalism

If we want to know just how global the concept of global constitutionalism is, and inquire whether and how constitutionalism is produced and travels in Latin America, we need to map different versions of constitutionalist ideas. For example, if we want to analyse the authority of the IACtHR, which has been labelled as an 'Inter-American constitutional

[70]See (n 20).

[71]H Fix-Fierro, 'Epílogo', in A von Bogdandy et al (eds), *Ius Constitutionale Commune en América Latina: Rasgos, potencialidades y desafíos* (UNAM, Ciudad de México, 2014) 502; L García Jaramillo, 'Variaciones en torno a la "interamericanización" del derecho. A propósito del Ius Constitutionale Commune' (2016) 36 *Araucaria* 511, 516-8.

[72]See (n 16).

[73]K Olson, *Reflexive Democracy* (MIT Press, Cambridge MA, 2006) 112.

[74]This problem is present, for example, in Salazar's account of ICCAL. Pedro Salazar, 'El nuevo constitucionalismo latinoamericano (una perspectiva crítica)', in L Gonzalez D and Valades (coords), *El constitucionalismo contemporáneo: Homenaje a Jorge Carpizo* (UNAM, Ciudad de México, 2013).

[75]See Werneck (n 41) 372.

[76]See (n 16).

court',[77] we need to understand the ways in which constitutional scholarship has produced versions of Latin American constitutionalism that entail different stances on this court's legitimate authority on the ground. In this part, I will only map current versions of Latin American constitutionalism that endorse a progressive conception of constitutionalism, and that consider constitutional law as a progressive cause for changing realities.[78] In other words, I intend to briefly describe schools of thought that add 'innovative legal material for comparison' and that offer 'fresh theoretical perspectives, alternative ways of thinking and necessary irritations of disciplinary orthodoxies',[79] defying ICCAL's 'universalistic legal approach of coping with Latin American problems'.[80] Moreover, I will focus here on the 'fifth period' of Latin American constitutionalism, which goes from the end of the twentieth century to the present day, a period with historical records of stability and democratic transitions,[81] where 'countries have increasingly sought their own solutions to their own challenges', generating a diversity of constitutional experiments.[82] These constitutional experiments do not preclude us from outlining common strands of constitutional ideas and setting the debate around three main schools of Latin American constitutionalism: Latin American neo-constitutionalism (hereafter, LANC); new Latin American constitutionalism (hereafter, NLAC); and egalitarian-dialogic constitutionalism (hereafter, EDC). In this way, this part attempts to make a contribution to our 'intellectual maps of constitutionalism', which 'tend to marginalize the experience of the developing world'.[83]

Consistent with ICCAL's emphasis on the importance of legal scholarship, I will consider that legal cultures are not only generated 'within the formal state justice systems', but are also 'produced within a huge range of nonformal, subnational, and transnational spheres, spheres that are invariably interconnected'.[84] One of these latter spheres is the emergent Latin American legal academia, where constitutional cultures are intensely developed, and which acts as an 'intervening variable in the process of producing legal stasis or change'.[85] For von Bogdandy:

[77]A Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50 *Texas International Law Journal* 46.

[78]In this regard, I will exclude the study of currents such as conservative constitutionalism, which endorses a version of constitutional law as granting executive powers for a defence of a particular conception of the good or as a blockade against interventions in the social and economic structures. R Gargarella, 'Towards a Typology of Latin American Constitutionalism, 1810–60' (2004) 39 *Latin American Research Review* 141, 143. Accordingly, I will also exclude the study of the more recent emergence of right-wing populist constitutionalism. See J González-Jácome, 'From Abusive Constitutionalism to a Multilayered Understanding of Constitutionalism: Lessons from Latin America' (2017) 15 *International Journal of Constitutional Law* 447.

[79]P Dann, M Riegner and M Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in P Dann, M Riegner and M Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford, Oxford University Press, 2020) 4.

[80]See (n 43) 1616.

[81]See (n 33).

[82]M Mirow, *Latin American Constitutions: The Constitution of Cádiz and its Legacy in Spanish America* (Cambridge University Press, Cambridge, 2016) 240.

[83]M Schor, 'An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia' (2009) 16 *Indiana Journal of Global Legal Studies* 173, 174.

[84]J Couso, A Huneeus and R Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press, Cambridge, 2013) 7.

[85]L Friedman, 'The Concept of Legal Culture: A Reply', in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth: Dartmouth Publishing, 1997) 34.

> Legal scholarship develops and often even devises fundamental concepts and structures, elucidates and legitimates the current law in light of general principles, inspires and criticizes legal developments, and shapes the next generation of jurists. Many legal scholars, often on the basis of scholarly reputation, also act directly as legal practitioners, namely, as legal experts, advisers, as counselors, or, in consummation of an academic career, as judges. A thorough understanding of a legal order hardly is conceivable without a familiarity with its legal scholarship.[86]

A more precise intellectual map of constitutional scholarship in Latin America would enable us to understand the problems of predicting the outcome of recent 'constitutional engineering', as institutional design is 'mediated by non-institutional variables' or by the 'importance of informal institutions'.[87] Legal scholars in Latin America have become crucial to the development of a new constitutional legal culture, in some cases as actors before national or international legal venues, in providing resources or being resonance boxes for legal mobilization processes or, in some cases, even becoming adjudicators themselves.[88] Moreover, this intellectual map of Latin American constitutionalism allows us to better address the main critiques against ICCAL. Indeed, this map builds better on what may be regarded as common, and on what could be the meaning of 'transformative constitutionalism' – that is, on the precise roles that law and legal discourse play in articulating the normative triad of constitutionalism.

In this part, I will provide a description of contemporary constitutional trends in Latin America, explaining their origins, aims and institutional implications. This description will not attempt to look for the 'best practice' or the 'most effective' solution to a legal problem across the different jurisdictions, or to causally explain the current constitutional arrangements.[89] By contrast, and assuming that 'there are other forms of deep knowledge beyond description and classification, and alongside causal explanations', I will attempt to implement an 'hermeneutic procedure of comparative law that is not oriented towards isolatable relations of cause and effect, but rather towards an understanding that arises from a synthesis of a multiplicity of elements in their manifold relationships'.[90] With this method in mind, I will map three constitutional currents that endorse a progressive account of constitutional law in order to present the reader a much complex story than the one told by ICCAL – which, in the words of Carvalho and Villagrán, seems to be reaching the status of 'the story that everyone reads'.[91]

The three constitutional currents presented here share with ICCAL some common features that should be highlighted before outlining their differences. Apart from their common origin during the 'third wave' of democracies, they share a diagnosis:

[86]See (n 31) 366.

[87]A Pérez-Liñán and N Castañeda, 'Institutionalism', in P Kingston and D Yashar (eds), *Routledge Handbook of Latin American Politics* (Routledge, London, 2012) 402–04.

[88]C Rodríguez-Garavito, 'Navegando la globalización: un mapamundi para el estudio y la práctica del derecho en América Latina', in C Rodríguez-Garavito (ed), *El Derecho en América Latina* (Siglo XXI, Buenos Aires, 2011) 71.

[89]R Hirschl, *Comparative Matters* (Oxford University Press, Oxford, 2014).

[90]A von Bogdandy, 'Comparative Constitutional Law as Social Science? A Hegelian Reaction to Ran Hirschl's Comparative Matters' (MPIL Research Paper Series, 2016), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773738>.

[91]See (n 43) 1613.

dissatisfaction with the performance of democratic regimes in achieving socio-economic equality, social inclusion and democratic consolidation.[92] Another relevant point is their transformative ethos, as each current reserves a special place for constitutional law in the project of social transformation – a promise to perform better than alternative projects in bringing change. Finally, we should recall the basic idea that constitutionalism has always emerged from a certain trauma, an obsession with tackling certain problems that seem to require an urgent resolution.[93] In the case of Latin America, each current promises to end social exclusion and marginalization, and bring about better performances in socio-economic terms. Although each has a different stance on the neoliberal impacts on the region, they have all critically assessed the impacts of the economic system on fundamental rights.

Latin American neo-constitutionalism

Neo-constitutionalism has its origins in the post-war period, when human rights became the language of justice and social progress, and courts its best allies. It has been dominant in parts of Europe and Latin America, and is now considered both a constitutional model and a theory of legal analysis and interpretation.[94] Originally, it was considered as a reaction against the failure of positivism in protecting rights, but later it adapted itself to 'inclusive positivism', once it realised that most of the values, principles and fundamental rights were incorporated formally in the constitutional rule of recognition.[95] However, the methodological commitments of neo-constitutionalism are closer to a clear rejection of positivist approaches to the study of law.[96] From its different sources, we can draw its normative and institutional prescriptions, which are somehow straightforward: constitutional texts should be rigid (difficult to amend), have the force of law and be interpreted and applied by independent judges who should remain isolated from external or internal pressures. Judges have to approach the constitutional text with specific rules of interpretation tuned to the moral content of the object under interpretation, and (generally) have the last word on what that constitution means.[97] Within a strict division between law and politics, the neo-constitutional literature emphasises the incorporation of (international) human rights standards into the constitutional catalogue of rights, which should then be used as the standards of political legitimacy for every infra-constitutional provision. Then, the technique of balancing allows legal reasoning to apply constitutional rights and principles to every legal conflict, as they are considered 'optimization requirements' that,

[92]R Uprimny, 'The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges' (2011) 89 *Texas Law Review* 1587.

[93]See (n 33).

[94]P Commanducci, 'Modelos e Interpretación de la Constitución', in M Carbonell (ed), *Teoría del Neoconstitucionalismo* (Trotta, Madrid, 2007) 52–53. The term makes sense only within Italo-Ibero-Latin American academic circles. J Fabra, 'Una nota sobre el neoconstitucionalismo', in J Fabra and L García Jaramillo (eds), *Filosofía del Derecho Constitucional: Cuestiones Fundamentales* (UNAM, Ciudad de México, 2015) 522.

[95]J Etcheberry, 'El ocaso del positivismo jurídico incluyente' (2015) 67 *Persona y Derecho* 411, 413–14.

[96]P Commanduci, 'Formas de Neoconstitucionalismo: un análisis metateórico', in M Carbonell, *Neoconstitucionalismo(s)* (Trotta, Madrid, 2009) 87.

[97]L Prieto Sanchis, 'Notas sobre la Interpretacion Constitucional' (1991) 9 *Revista del Centro de Estudios Constitucionales* 175, 176.

through the weigh formula, have an answer for every set of circumstances.[98] That explains the progressive constitutionalization of all areas of law, and the direct or indirect application of the constitution in all public or private relationships. Despite maintaining the basic liberal arrangements for the organization and separation of powers, it imbued both law-making and application processes with standards and principles of substantive constitutional law, opening up the channels for moral interpretation.[99]

The importation of neo-constitutionalism into Latin America has shaped new understandings of its main premises, so we should ask here about the distinctiveness of LANC. Although some authors have labelled ICCAL as the consolidation of LANC, or as a particular variant of it, we first need to describe the particular facets of the latter in order to understand this statement.[100] In Latin America, neo-constitutionalism has been associated with long and detailed constitutions, which could be explained by the legacy of processes of codification, and currently there is an inflationary trend of incorporating more fundamental rights and detailed regulations in constitutions' catalogues.[101] It has also been associated with new adjudicative practices, which were supported by a 'growth industry' of judicial reforms that has gradually changed constitutional practices.[102] For LANC, the combination of more constitutional rights and stronger courts would increase the chances of social progress, specifically in the hands of 'new more consequentialist, socially conscious and self-consciously progressive judges'.[103]

In less than 20 years, the transnational scholarly debate turned very quickly from discussions around sovereignty and non-intervention to a more cosmopolitan, integrated and rights-oriented legal realm.[104] Indeed, there was a rediscovery of the open texture of legal texts, in which an active role of legal subjects was a determinant in the production of legitimate aims. Moreover, such new legal readings shifted the focus from the previously dominant statutory (textual) interpretation that was bequeathed by codification. This 'turn to legal interpretation' entailed the endorsement of 'new interpretive theories' that 'are marshalled against the conventional practices of national courts and traditional commentators, which are in turn dismissed as pure legal formalism'.[105] The new

[98]Constitutions irradiate their normative force to every part of the legal system, so there is no need to wait for the legal production of the legislature or the administration, and there is no space for 'political question doctrines'. If constitutional rights are 'optimization requirements' that have a precise answer to a legal conflict (a rule, applicable to the case), then only judges have the final word. R Alexy, *A Theory of Constitutional Rights* (Oxford University Press, New York, 2002) 47.

[99]A Alterio, 'Corrientes del Constitucionalismo Contemporáneo a Debate' (2014) 8 *Problema, Anuario de Filosofía y Teoría del Derecho* 227, 234.

[100]According to Rodiles, 'It is not quite clear when the discourse of Latin American neo-constitutionalism merged with that of ICCLA. In a way, one could say that as the discourse of neo-constitutionalism gained ground across the region, the consolidation of an *ius commune* in human rights and constitutional principles became the new aspiration of neo-constitutionalists.' See (n 20) 506. See also Herrera (n 27).

[101]J Melton and others, 'To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes' (The Constitution Unit UCL, 2015), <http://constitutionnet.org/vl/item/codify-or-not-codify-lessons-consolidating-united-kingdoms-constitutional-statutes>.

[102]L Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (Penn State University Press, University Park, PA, 2007).

[103]D Brinks, '"A Tale of Two Cities": The Judiciary and the Rule of Law in Latin America' in P Kingston and D Yashar (eds), *The Routledge Handbook of Latin American Politics* (Routledge, London, 2012) 66.

[104]See (n 37).

[105]J Esquirol, 'The Turn to Legal Interpretation' (2011) 26 *American University International Law Review* 1031, 1033.

conception of legal interpretation was seen 'as a key to open the closed gates of legal formalism', which were partially responsible for the conservatism of legal practice.[106]

The predominance of this new conception of legal interpretation came with extended access to justice mechanisms, where individuals sought in courts what was not available through ordinary means of policy reform.[107] In a continent with frequent representativeness crises, and manifold administrative shortcomings or weaknesses, courts applying open-textured constitutions with broad catalogues of human rights were seen as the main avenue for social progress.[108] Throughout the continent, constitutional clauses were to be applied under the pro-personae principle in order to offer the best available protection for fundamental rights, an interpretive method that took the job of fitting a whole codified legislation – in many countries, a legacy from the nineteenth century – that was seen as detached from the social reality and as an unjust structure. Furthermore, if principles are ethical-political products of moral argumentation rather than legal rules with deontic structures, then nothing prevented judges from creating new constitutional principles that were not included in texts, if it was a requirement of justice or dignity in certain circumstances.[109] This new practice of adjudication promoted the exercise of strong powers of judicial review, including both the constitution and international human rights treaties as standards of review. During recent years, this practice has reached its peak with the doctrines of the 'bloc of constitutionality' (the idea of extended constitutions, which incorporate international human rights as standards of review)[110] and 'conventionality control' (the idea that judges, as state officials, are bound to apply the ACHR and its jurisprudence in the exercise of their adjudicatory powers).[111]

The idea that there is a big gap between the 'laws on the books and laws on the ground' raises challenges that must be overcome by any legally driven project of social change. However, by placing the moral language of constitutions at the heart of social progress, LANC endorsed the image of 'failed law' in Latin America, suggesting that technical regulations and institutional coordination are somehow too far-fetched.[112] The legitimacy crisis of legislatures and bureaucracies has resulted in judges becoming the main social actors in the project of changing reality through a flexible managerial approach,

[106]D López-Medina, 'Por qué hablar de una teoría impura del derecho para América Latina?' in D Bonilla (ed), *Teorías del Derecho y Transplantes Jurídicos* (Siglo del Hombre, Bogotá, 2009) 46.

[107]This has been the case even when public trust in courts is still very low and may be explained better by changes in constitutional opportunity and support structures. C Smulovitz, 'Judicialization in Argentina: Legal Culture or Opportunities and Support Structures?' in J Couso, A Huneeus and R Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press, Cambridge, 2010).

[108]D Brinks and W Forbath, 'The Role of Courts and Constitutions in the New Politics of Welfare in Latin America' in R Peerenboom and T Ginsburg (eds), *Law and Development of Middle-Income Countries* (Cambridge University Press, Cambridge, 2014).

[109]L Streck, *Verdade o Consenso* (Saraiva, Rio de Janeiro, 2014) 470.

[110]R Uprimny, *Bloque de Constitucionalidad, Derechos Humanos, y Proceso Penal (*Consejo Superior de la Judicatura, Bogotá, 2006) 29–33.

[111]J Contesse, 'Inter-American Constitutionalism: The Interaction Between Human Rights and Progressive Constitutional Law in Latin America', in C Rodríguez-Garavito (ed), *Law and Society in Latin America* (Routledge, London, 2014).

[112]See (n 12).

which allows judges to consult the best available technical expertise to find ad hoc solutions.[113] The idea of a top-down, elite-based project that could highlight the failure of legislative politics and administrative activity in delivering public goods has turned into a common picture in many constitutional jurisdictions in the region. Therefore, the change that neo-constitutional trends brought to Latin America was not only about entrusting judges with powers to enforce fundamental rights, but also about assuming a distrust of legislatures and their institutionalization in different legal devices.[114]

In Latin America, the idea of courts rather than executive or legislative powers addressing pressing social issues has become a common currency of constitutional law. The Colombian Constitutional Court has been seen as the model agent for social change.[115] For their part, the Supreme Court of Brazil, the Supreme Court of the Nation in Mexico, the Constitutional Chamber of the Supreme Court of Costa Rica and the Argentinian Supreme Court are sometimes seen as the main followers of this new practice of progressive neo-constitutional adjudication.[116] Moreover, because of the legitimacy crisis of legislatures and the critiques of the hyper-presidentialist regimes that dominate across the region, judges are seen as the last hope for those who are excluded from access to political or social channels to make their demands.[117] Overall, despite their impact on the ground, these courts see themselves as contributors to the consolidation of democracy over time, fosterers of a constitutional culture and developers of stronger civil societies.[118]

As discussed above, LANC is a radical interpretation of the basic neo-constitutional idea that constitutions should emphasise their substantive (moral) over their procedural (political) dimension. In this scenario, constitutional courts became the main actors in delineating the powers allocated to the legislative, the executive and ordinary judges, with an overarching view of protecting fundamental rights; to sum up, we could say that, far from the state arrangements, the law came closer to the citizen.[119] The perspective of rights as 'trumps' or as 'the sphere of the undecidable' was advanced in the region to the detriment of the majoritarian understanding of democracy.[120]

[113]For Fernando Atria, neo-constitutional scholarship has ended up undermining the normativity of law and its ability to guide human behaviour, triggering a retreat to a pre-modern law, where the moral adjudication of judges has the power to decide what law means after the facts are considered. F Atria, *La Forma del Derecho* (Marcial Pons, Madrid, 2016) 56.

[114]See (n 99) 262–63. For these same reasons, some authors also speak of a neoliberal variation of LANC, where the emphasis of judicial review is placed within the so-called 'economic constitution', comprising economic freedoms and strong protections to private property. J Couso, 'The "Economic Constitutions" of Latin America: Between Free Markets and Aocioeconomic Rights', in R Dixon and T Ginsburg (eds), *Comparative Constitutional Law in Latin America* (Edward Elgar, Cheltenham, 2017).

[115]K Merhof, 'Building a Bridge Between Reality and the Constitution: The Establishment and Development of the Colombian Constitutional Court' (2015) 13 *International Journal of Constitutional Law* 714, 721.

[116]Although neo-constitutional adjudication has not always been progressive. See (n 103) 68.

[117]R Gargarella, P Domingo and T Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Routledge, London, 2006).

[118]See (n 103) 69.

[119]R Arango, 'Fundamentos del Ius Constitutionale Commune en América Latina: Derechos Fundamentales, Democracia y Justicia Constitucional', in A Bogdandy and M Morales (eds) *Ius Constitutionale Commune en América Latina. Rasgos, Potencialidades y Desafíos* (UNAM 2015) 27; see (n 111) 241–46.

[120]See (n 99) 240.

'New' Latin American constitutionalism

This term describes recent processes of constitution-making in Bolivia (2009), Ecuador (2008) and Venezuela (1999), and the interest it has aroused in research in the Ibero-American academic world. Although some authors include the Constitution of Colombia (1991) and other constitutional processes, there are structural differences with the latter processes.[121] We should therefore start by asking what 'new' means when applied to Latin American constitutionalism. According to its more prominent scholars, the newness lies in the radical democratic origins of constitutions, and the idea that, for the first time, Latin America can elaborate a constitutional project of its own.[122] Moreover, some claim it is the first transformative project, because the liberal constitutional projects have always been designed and operated to protect the *status quo* (thus, the adjective postliberal).[123] Its novelty also relies on the fact that it is the only current form of constitutionalism that explicitly stands against capitalism, articulating in constitutional terms the explicit endorsement of a certain political economy.[124]

The most striking feature of NLAC is the priority of the 'popular', relocating the people at the forefront of constitutional law.[125] NLAC, then, is the constitutional consolidation of new forms of populism; for its critics, it is a doctrine where a single source of power (the populist leader) appeals directly to the masses, through referenda or other participatory means, in order to maintain its legitimacy.[126] Although it shares with LANC the pervasiveness of constitutional law even at the margins of legal regimes, the priority is placed on the democratic rather than the legal dimension of constitutions.[127] It claims a specific extra-constitutional origin in constituent assemblies that have a ground-breaking character in the history of Latin American constitutionalism.[128] That leads NLAC to define the constitution as the expression of the will of the constituent power rather than a framework to limit and correct politics. Nevertheless, the 'people' do not only appear at certain special moments, challenging dualism and representative democracy, and occupy a special place in constitutional interpretation.[129] According to recent classifications, the frequent invocation of 'the people' entails a reference to constituent power as a challenge to constituted politics,

[121]I agree with Pedro Salazar, for whom the 'family resemblance' should be thick enough to make the common patterns relevant. See (n 74) 349.

[122]R Viciano and R Martínez, 'La Constitución democrática, entre el neoconstitucionalismo y el nuevo constitucionalismo' (2013) 48 *El Otro Derecho* 63.

[123]J Wolff, 'Towards Post-Liberal Democracy in Latin America? A Conceptual Framework Applied to Bolivia' (2008) 45 *Journal of Latin American Studies* 31, 33.

[124]G Pisarello, 'El nuevo constitucionalismo latinoamericano y la constitución venezolana de 1999: balance de una década' (2009) <https://dialnet.unirioja.es/servlet/articulo?codigo=6621838>.

[125]A Medici, 'Nuevo constitucionalismo latinoamericano y giro decolonial: Seis proposiciones para comprenderlo desde un pensamiento situado y crítico' (2013) 48 *El Otro Derecho* 15, 21.

[126]S Edwards, *Populismo o Mercados* (Norma, Bogotá, 2009).

[127]R Viciano and R Martínez, '¿Se puede hablar del nuevo constitucionalismo latinoamericano como corriente doctrinal sistematizada?' (2011), http://www.juridicas.unam.mx/wccl/ponencias/13/245.pdf.

[128]R Martínez and R Viciano, 'Fundamentos Teoricos y Practicos del Nuevo Constitucionalismo Latinoamericano', in R Viciano (ed), *Estudios sobre el nuevo constitucionalismo latinoamericano* (Tirant Lo Blanch, 2012) 310.

[129]NLAC avoids being associated with the kind of ideas proposed by Bruce Ackerman, which have been raised in Latin America to justify systems of constitutional control. B Ackerman and C Rosenkrantz, 'Tres Modelos de Democracia Constitucional' (1991) 29 *Cuadernos y Debates* 15.

and hence a particular variety of 'populist constitutionalism'.[130] However, it is quite different from several strands of popular constitutionalism, or constitutional debate as it is known in the United States.[131]

Regarding constitutional arrangements, NLAC distances itself from the classical separation of powers not only because it gives predominance to the executive power in dealing with the most important daily issues of politics, but because it creates a fourth power ('citizens' power', 'social control and transparency power' or a 'participation and social control function') that is in charge of supervising the way constituted authorities carry out the constituent power's will.[132] Mechanisms of direct democracy, then, are crafted in order to prevent the constituted authorities from deviating from the constituent power's will.[133] The constituent power has a permanent presence and always retains the power to make the constitution anew. In this way, the rules of constitutional change are crafted in order to prevent,[134] or even exclude, the participation of constituted powers.[135] Along with LANC, it supports a 'rigid' constitution, with super-majoritarian rules of change and strong powers of judicial review. This architecture suggests that the intention of these constitutions is to freeze the constituent power over time, and keep alive the revolutionary spirit that originally animated it, as a threat against the potential abuses of constituted authorities.[136] In that sense, at least regarding the power to interpret the constitutional text, it is committed to a kind of 'originalism'.[137] For some scholars, NLAC should recognise the openly political character of post-liberal methods of constitutional interpretation and leave behind the artificial boundaries between law and politics.[138] In that regard, NLAC has taken seriously the counter-majoritarian objection to judicial review, and promoted the direct election of the members of constitutional courts, the possibility of rejecting nominations for these courts and the opening up of the indictment of justices to the general public.[139]

The constitutions of NLAC are filled with principles, and rules are required mainly when they are needed to articulate the will of the constituent power.[140] Moreover, these

[130]P Blokker, B Bugaric and G Halmai, 'Introduction: Populist Constitutionalism: Varieties, Complexities, and Contradictions' (2019) 20 *German Law Journal* 291, 293.

[131]M Alterio and R Niembro (eds), *Constitucionalismo Popular en América Latina* (Porrúa, Ciudad de México, 2013).

[132]Constitution of Venezuela, Title V, Ch V; Constitution of Ecuador, ch V, title IV; Constitution of Bolivia, arts 241–42.

[133]See (n 128) 323.

[134]Constitution of Ecuador, art 441.

[135]Constitution of Bolivia, art 411; Constitution of Venezuela, arts 342–46.

[136]See (n 128) 332.

[137]No scholar has used the term 'originalism' to defend the constitutional methods of interpretation used by the mixed systems of constitutional review of NLAC. In some cases, originalism is implied using the proceedings of the constituent assembly to defend a certain point. In Bolivia, it is the main rule of constitutional interpretation, according to the Law of the Plurinational Constitutional Court (art 6). In Venezuela, following the constitutional endorsement of the Bolivarian doctrine (Constitution of Venezuela, art 1), the Supreme Tribunal of Justice refers to the writings of Bolivar to shed light on constitutional clauses, adding uncertainty to the outcome of the interpretive process. *Expediente nº16-0343*, Tribunal Supremo de Justicia (Venezuela), 11 April 2016, s I.2.

[138]A Oquendo, 'The Politicization of Human Rights' (2016) 50 *NYU Journal of International Law and Politics* 1.

[139]A Noguera, 'El neoconstitucionalismo andino: ¿una superación de la contradicción entre democracia y justicia constitucional?' (2011) 90 *Revista Vasca de Administración Pública* 167, 191–94.

[140]For example, the highly specific rules for a referendum on constitutional reforms in the Constitution of Venezuela.

constitutions are comparatively more extended than the average: between 350 and 444 articles.[141] The extension may be explained as a product of the will of the constituent power, composed by the many, who needed to express their different aims, and in that sense restrain the powers of constituted authorities (specially, the legislative) while favouring greater powers of constitutional review.[142] NLAC's constitutions include lengthy and detailed catalogues of rights, compared with other constitutions in the region, in some cases articulating the institutional protection that will be afforded to each right, considering its individual or collective dimension.[143]

Although the constitutional structure of NLAC sounded radical to progressive legal scholars, the operation of democratic mechanisms of control has not been used in order to democratise the 'engine room' of constitutions.[144] Indeed, processes of concentration and centralization of power have eroded the declared commitment to public participation.[145] Moreover, the hyper-presidentialist arrangements of NLAC have blurred 'the legal and political dividing line between the presidency as an institution and the persona of its holder'.[146] Furthermore, the incorporation of fundamental rights and mechanisms of direct democracy has not implied a radical redistribution of economic power,[147] or the improvement of environmental standards.[148] Indeed, other centre-of-left political projects in the region have achieved better and more sustainable socio-economic outcomes under liberal constitutional frameworks.[149] However, the assessment of social policies and their effectiveness in tackling socio-economic problems is still an object of debate. It is still not clear whether constitutional forms of neo-populism are necessary to achieve more egalitarian outcomes. In practical terms, the concentration of power in the hands of the executive power, infringements of judicial independence and the restriction of civil liberties have been at the forefront of the agenda of NLAC, attracting criticism even from its more prominent scholars.[150]

Egalitarian-dialogic constitutionalism

As a current that is increasingly taking root in Latin American constitutionalism, the main sources of egalitarian-dialogic constitutionalism can be found in the work of a

[141] Along with the Constitution of Colombia (380 articles), these are the most extended constitutions in the region.

[142] See (n 128) 323.

[143] C Storini, 'Derechos y Garantías en el Nuevo Constitucionalismo Latinoamericano' (XV Encuentro de Latinoamericanistas Españoles, Madrid, November 2012), <https://halshs.archives-ouvertes.fr/halshs-00874673/document>.

[144] See (n 33) 156, 172–77, 192–95.

[145] R Huber and C Schimpf, 'Friend or Foe? Testing the Influence of Populism on Democratic Quality in Latin America' (2016) 64 *Political Studies* 872.

[146] F Panizza, *Contemporary Latin America: Development and Democracy Beyond the Washington Consensus* (Zed Books, London, 2009) 223.

[147] The 'boom of commodities' has explained, in greater part, the increasing power of social policies in tackling poverty and inequality. N Birdsall, N Lustig and D McLeod, 'Declining Inequality in Latin America' in P Kingstone and D Yashar (eds), *Routledge Handbook of Latin American Politics* (Routledge, London, 2012) 163–71.

[148] R Lallander, 'Entre el ecocentrismo y el pragmatismo ambiental: Consideraciones inductivas sobre desarrollo, extractivismo y los derechos de la naturaleza en Bolivia y Ecuador' (2015) 6 *Revista Chilena de Derecho y Ciencia Política* 109.

[149] See (n 147).

[150] R Viciano and R Martínez, 'Una Constituyente sin Legitimidad' (Diario El País, 26 May 2017), <https://elpais.com/elpais/2017/05/24/opinion/1495650765_391247.html>.

progressive scholarship that is sceptical about both the premises of LANC and the operation of NLAC on the ground. Chronologically, it can be understood as the result of continued frustrations with the special place that constitutional law occupies in progressive narratives. A slow and gradual process of learning by testing with different constitutional ideas has resulted, at least for some incipient scholarship, in a heightened concern with constitutions as distributions of power for the protection of political equality. In that regard, EDC can be associated with currents of political constitutionalism.[151] This term is coined from the writings of Roberto Gargarella, a combination of his active support for political equality and the need to enhance dialogues and political deliberation at all levels of constitutional arrangements, although with many remaining challenges for Latin American democracies.[152]

At the risk of over-simplification, I claim that, like Gargarella, a group of scholars such as Helena Alviar, Domingo Lovera and Jorge Contesse share similar sensitivities, which start from a strong critique of the performance of self-declared progressive constitutional democracies in bringing about real and sustainable social change for the region.[153] These scholars maintain that, under certain conditions, judicial review and activist courts – both national and international – could protect human rights while triggering democratic deliberation and promoting social justice, considering the poor standards of representative democracy that are somehow stagnated and the blockades for disadvantaged groups to access the political chambers.[154] They support novel forms of legal mobilization, and have developed their ideas on judicial review based on the practice of social movements, human rights clinics and non-governmental organizations.[155] In that sense, they first elaborated, albeit indirectly, on moderate versions of neo-constitutionalism and the potential contribution of courts to public deliberation, political equality and democratic consolidation.[156] However, they gradually realised how the perils of judicial elitism and conservatism may downplay the ultimate aims of progressive legal thinking in Latin America. As domestic and regional courts have been judicially assertive, going beyond (and against) the 'neoliberal' original framework under which they were originally fostered, they have 'become a politically prized booty and now enjoy less degrees of freedom than their younger selves'.[157] Furthermore, judicial activism has also become a tool for conservative and neoliberal interests, which have used courts to prevent changes

[151]R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007).

[152]See (n 33).

[153]H Alviar 'Distribution of Resources Led by Courts: A Few Words of Caution', in H Alviar, K Klare and L Williams (eds), *Social and Economic Rights in Theory and Practice* (Routledge, London, 2015); N Angel-Cabo and D Lovera, 'Latin American Social Constitutionalism: Courts and Popular Participation' in H Alviar, K Klare and L Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, New York, 2015); see Contesse (n 41).

[154]D Lovera, 'A quién pertenece la Constitución en Chile? Cortes, Democracia y Participación' (2010) 11 *Revista Jurídica de la Universidad de Palermo* 119.

[155]C Rodríguez-Garavito and D Rodríguez-Franco, *Radical Deprivation on Trial* (Cambridge University Press, Cambridge, 2015); J Contesse and D Lovera, 'Acceso a tratamiento médico para personas viviendo con VIH/Sida: Éxitos sin Victoria' (2008) 8 *Sur* 149.

[156]See (n 154); D Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard Journal of International Law* 319.

[157]S Botero, 'Agents of Neoliberalism? High Courts and Rights in Latin America', <https://www.sas.upenn.edu/andrea-mitchell-center/sites/www.sas.upenn.edu.dcc/files/uploads/Botero%20-%20Courts%20(Penn%20DCC%20Conference).pdf>.

achieved through majoritarian politics.[158] Reacting to that, and to novel mobilization strategies beyond courts, scholars from EDC started to reclaim the priority of the people in creating, crafting and interpreting constitutional arrangements.[159] That is why they looked for support in popular constitutionalism, and began to welcome the democratic innovations of NLAC.[160] After some years of witnessing the operation of these novel legal institutions on the ground, they again realized how progressive social projects may be curtailed by the concentration of power, corruption and the restraint of individual liberties.[161] However, if I am not misinterpreting representatives of EDC, they still endorse some form of transformative constitutionalism for Latin America, although within a critical reassessment of the liberal framework bequeathed by 200 years of constitutional history.[162]

Within the current debate, EDC stands for an update of the double commitment of foundational Latin American constitutionalism with the principles of collective self-determination and individual autonomy. However, it remains sceptical about the current achievements:

> On the one hand, Latin American constitutions maintain a concentrated organization of power, pay little attention to the deliberative bodies, and seem to still be too hostile to popular political participation. On the other hand, these Constitutions have extended their statements of rights, over the years, in an unprecedented way, although without providing those rights with a proper institutional support.[163]

In contrast with ICCAL scholars, who claim that a modern version of Latin American constitutionalism is distinct from the traditional schools of the nineteenth century, I claim that EDC may be seen as a revival of the republican tradition.[164] First, and contrary to some depictions of the republican thought in the nineteenth century, EDC's restoration of individual autonomy to the forefront pays due to respect to a proper reconstruction of the Latin American republican tradition.[165] Likewise, because EDC rescues the central value

[158]MA Peñas, and JM Morán, 'Conservative Litigation Against Sexual and Reproductive Health Policies in Argentina' (2014) 22 *Reproductive Health Matters* 82.

[159]F Muñoz, *Hegemonía y Nueva Constitución* (Ediciones UACh, Valdivia, 2015).

[160]See Jácome (n 78) 457.

[161]J Couso, 'Las democracias radicales y el "nuevo constitucionalismo latinoamericano"' in *Derechos Humanos: Posibilidades Teóricas y Desafíos Prácticos* (Libraria/SELA, Buenos Aires, 2014).

[162]See (n 92) 1599–1604.

[163]See (n 33) 206.

[164]See (n 3) 6.

[165]Von Bogdandy argues that ICCAL defines its identity by the 'rejection of the three traditional constitutional ideologies of Latin America, namely, conservatism, radicalism and liberalism'. See (n 3) 6. However, EDC could be seen as the revival of the republican/radical tradition in the context of current challenges. A proper reconstruction of the republican ideals honours the double commitment defended by EDC. For example, Bilbao, one of the main thinkers of the radical tradition in the nineteenth century, was not only worried with political and moral majoritarianism, but was also concerned with classic civil liberties and individual autonomy. F Bilbao, *El Gobierno de la Libertad*, <http://www.franciscobilbao.cl/1909/article-81871.html>. Although his critiques against representative democracy place him under an extreme radical tradition, I think a proper reconstruction of his thoughts could well place him as a defender of both collective self-government and individual autonomy. See (n 38) 8. The same could be said about the intellectual contributions of the Colombian Manuel Murillo Toro, or the Ecuadorian Juan Montalvo. F MacDonald Spindler, 'Lamennais and Montalvo: A European Influence Upon Latin American Political Thought' (1976) 37 *Journal of the History of Ideas* 137.

of political equality, expressed through the ideals of majoritarian rule and participatory democracy, it avoids the defence of a constitutional arrangement just because it brings moral and social progress. Even EDC's justification of judicial review relies explicitly on the protection of political equality and its contribution to the expansion of political participation and the consolidation of democracy.[166] Second, EDC rescues the notion of political community from liberal constitutional frameworks, highlighting what is shared in common by the members of a certain polity, rather than being based on their separate individuality. In that sense, EDC revives the republican tradition's ideal of public virtues: it encourages all forms of mobilization, expressed in its preoccupation for social protest (social mobilization),[167] political quotas (political mobilization)[168] and collective remedies (legal mobilization).[169] All these forms of mobilization are considered forms of participation, different ways to exercise and promote an active citizenry.

Although the double commitment mentioned before (collective self-determination and individual autonomy) could hardly generate an abstract objection, EDC is concerned with the question of what constitutional arrangements are best equipped to realise these goals in practice. At the end of his *Latin American Constitutionalism*, Gargarella gives us some clues to understand the implications of his conception of constitutional law, but he lacks 'a more concrete agenda to put forward'.[170] The main challenge for the research programme of EDC is the translation of this double commitment in institutions able to address the current problems of Latin American societies. In what follows, I will attempt to answer two questions that I think constitute the research agenda of EDC: What are the main features of EDC? And, more importantly, how can the institutional implications of EDC be materialised?

The central feature of EDC is defined by an attempt to provide a 'third way' that can overcome the deficiencies of both LANC and NLAC. Although it shares with them a positive view of the relationship between law and social change, it puts forward a theory of law and legal reasoning that is inscribed in a broader theory of democracy attuned to Latin American problems. Although EDC considers political equality as the main driver of social transformation, it acknowledges the difficulty of promoting 'an egalitarian reform in an inegalitarian society, whose members lack the moral disposition necessary for making the reform their own', and endorses constitutional reforms that go beyond mere institutional engineering, towards symbolic and ethical commitments with social goals.[171] The transformative ethos of EDC is explicit in the sense that discrimination, poverty and socio-economic inequalities are the main constitutional evils to be addressed (structural problems that commit all state action), and political equality is the best remedy against those evils.[172]

Nevertheless, the most important innovation of EDC is a particular placing of law at the centre of social progress. It is characterised by a republican conception of law as a

[166]See Angel-Cabo and Lovera (n 153).

[167]R Gargarella, *El Derecho a la Protesta: El Primer Derecho* (Ad-Hoc, Buenos Aires, 2005)

[168]L Pautassi, 'Igualdad en la desigualdad? Alcances y límites de las acciones afirmativas' (2007) 4 *Revista Conectas* 6.

[169]G Maurino, E Nino and M Sigal, *Las Acciones Colectivas* (Lexis Nexis, Buenos Aires, 2006).

[170]D Wei and P Privatto, 'Book Review: *Latin American Constitutionalism'* (2014) 12 *International Journal of Constitutional Law* 256, 260.

[171]See (n 33) 205.

[172]E Nino, 'La discriminación menos comentada', in R Gargarella (ed), *La Constitución en 2020: 48 propuestas para una sociedad igualitaria* (Siglo XXI, Buenos Aires, 2011) 49.

medium of social integration, as it is based in lifeworld discourses, but also as an effective mechanism of social coordination in complex and functionally differentiated societies, where the grounds of social integration do not rely on mere authority or divine sources.[173] In other words, law cannot just be posited; rather, as a social system, it needs to contribute its own conditions of legitimacy. This Habermasian idea, as applied to Latin America, becomes crucial to understanding the relationship between constitutional law, legitimacy and the rule of law.[174] EDC, then, is concerned with the political and institutional conditions under which law is created and applied: a concern with deliberative politics, a theory of legislation that in Latin America must address the particular problems and challenges of presidential forms of government; and a theory of adjudication and judicial review, where the distinction between law and morals, and law and politics, is maintained to the service of democracy.[175] If laws are created under democratic conditions that pay due respect to the principle of political equality, with a fluid communication between political public spheres and institutional sites of legal production, then there is an increased commitment to the positive character of law that shapes how legal conflicts will be adjudicated. Habermasian ideas are visible in the writings of Argentinian Carlos Santiago Nino, who turned to political theory in order to argue that legal norms produced by inclusive democratic procedures have a presumption of validity, procedures capable of generating impartial decisions on issues that affect everyone.[176] If those conditions are not met, adjudicatory processes must assume a dynamic role in the protection of deliberative politics, attempting to reduce the influence of other kinds of power asymmetries.[177] The relationship between a theory of deliberative democracy and methodological positivism is understood in a dynamic way, where the division of legal labour (the creation and application of law) does not imply complete isolation between law and morals on the one hand, and law and politics on the other. In this regard, EDC's conception of law accommodates a revitalised version of (ethical or ideological) positivism, endorsed by scholars such as Fernando Atria.[178] Thus, EDC acknowledges that law has internal resources, both in the stages of creation and application, although with different degrees and articulations, to put forward justice concerns; and also the radical indeterminacy of law, which generates the need to refer to legal procedures of adjudication to give a final word on a particular issue.

[173]J Habermas, *Between Facts and Norms* (Polity Press, Cambridge, 1996) 38–41.

[174]Habermas's theory of democracy and its relationship with law has been applied in Latin America to discussions around transitional justice and freedom of expression, among other issues. R Gargarella, 'La democracia frente a los crímenes masivos: una reflexión a la luz del caso Gelman' (2015) 2 *Revista Latinoamericana de Derecho Internacional* 1; C Mauersberger, *Advocacy Coalitions and Democratizing Media Reforms in Latin America* (Springer, London, 2016). For a defence of the critical appropriation of the Habermasian tradition in Latin America against challenges of Eurocentrism, seeR Morrow, 'Defending Habermas Against Eurocentrism: Latin America and Mignolo's Decolonial Challenge', in T Bailey (ed), *Deprovincializing Habermas: Global Perspectives* (Routledge, London, 2013).

[175]D López Medina, 'La "Cultura de la Legalidad" como discurso académico y práctica política: un reporte desde América Latina', in I Wences et al (eds), *Cultura de la Legalidad en Iberoamérica: Desafíos y Experiencias* (FLACSO, Ciudad de México, 2014) 72–75.

[176]Although the Habermasian influence in Nino was never fully articulated by him, there is a clear connection between his moral constructivism and the discourse principle as the foundation of legitimate law. CS Nino, *La validez del Derecho* (Astrea, 1985); R Gargarella, 'El punto de encuentro entre la teoría penal y la teoría democrática de Carlos Nino' (2015) 35 *Análisis Filosófico* 189.

[177]R Gargarella (ed), *Por una Justicia Dialógica* (Siglo XXI, Buenos Aires, 2014).

[178]See (n 113).

Lastly, EDC's research programme needs to highlight its commitment to institutional reform in light of the ultimate objective of achieving political equality. Indeed, the main argument of Gargarella's historical account points to how the incorporation of progressive and substantive clauses in Latin American constitutions has not altered the liberal-conservative arrangement regarding the distribution of powers, which has remained highly centralised on the executive.[179] The idea of entering into the 'engine room' is cogniscant of the dangers of ambitious projects of social engineering that may suffer from hyperrationality – that is, the belief that reason has sufficient ability to foresee all the consequences of legal reforms without any concern for the processes required to achieve the aims of those reforms.[180] While recognising the limits of legally driven projects of social change, EDC stresses the institutional choices that are inscribed in constitutional decisions, which ascribe to different institutions the role of pursuing certain goals in particular social contexts.[181] In a way, it revives the interest for the doctrine of separation of powers, updating it as a concern for the ability of law in coordinating institutional efforts towards democratically chosen collective goals.

In this regard, EDC assumes that different state entities have a certain institutional role in addressing constitutional problems or duties, and should be accountable to affected constituencies. The overarching ideal is to promote the virtues of deliberation and protect the value of collecting information from different sources, correcting initial preferences, addressing expert opinion and incorporating previously excluded voices in the public debate.[182] Then, the dialogical dimension of EDC is articulated as a methodological commitment to a kind of comparative institutional analysis that has a strong normative stance: the protection of political equality.[183] Indeed, even if abstract considerations favour institutional choices for deliberation and dialogue in democratically elected bodies, EDC is concerned with addressing alternative institutional capacities that may assume a dynamic role in the long-term project of consolidating democracy and political equality. Moreover, EDC is concerned with extra-institutional spaces that may also play their part in fostering these ideals, like the emergent literature on social protest and popular constitutionalism in Latin America.[184]

Accordingly, and beyond the state level, EDC entails reimagining and reforming an Inter-American Human Rights System that, 'rather than treating states as entities to be

[179]Arguably, EDC's commitment to radical democracy suggests a strong critique of 'hyper-presidentialism'. Although this would entail a different research, there is a strong debate regarding the particular features of Latin American presidentialism that impede the realization of political equality. M Alegre, 'Democracia sin Presidentes', in M Alegre and R Gargarella (eds) *El Derecho a la Igualdad: Aportes para un constitucionalismo igualitario* (Abeledo Perrot, Buenos Aires, 2007).

[180]J Elster, *Reason and Rationality* (Princeton University Press, Princeton, NJ, 2009).

[181]Comparative institutional analyses are starting to be a topic of interest for Latin American legal academia. D Wei, 'Courts as Healthcare Policy-makers: The Problem, the Responses to the Problem and Problems in the Responses' (FGV, Research Paper Series 75, 2013), <http://bibliotecadigital.fgv.br/dspace/handle/10438/11198>

[182]Unlike LANC and NLAC, EDC rejects dualism, which unduly splits the exercise of ordinary political citizenship with certain extraordinary moments where the people emerge, and supports constitutional structures that grant every act of ordinary law-making with the highest democratic deliberative pedigree. See (n 167).

[183]J Croon, 'Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination – or – Alternative Tales on Equality Reasoning' (2013) 19 *European Law Journal* 153.

[184]D Lovera, 'Tres son Multitud? Constitucionalismo Popular, Cortes y Protesta', in M Alterio and R Niembro (eds), *Constitucionalismo Popular en América Latina* (Porrúa, Ciudad de México, 2013).

kept under strict surveillance and mistrust', could consider domestic contexts and encourage member states to participate at higher levels through adequate horizontal dialogues.[185] In this regard, EDC prioritizes forms of 'weak conventionality control', where the implementation of international human rights standards is based on the respect of the sources of international law, on the promotion of political forms of compliance beyond purely judicial mechanisms and on the awareness of domestic distributions of powers between different institutional sites of decision-making.[186] This, of course, does not imply abandoning the commitment with transformative aims, but rather encourages a reflection on the better ways to achieve these aims from international sites of norm-making and adjudication.

Overall, EDC is concerned with the role of law in developing the foundations of what O'Donnell called a 'democratic rule of law'.[187] In this way, EDC articulates a particular relationship between law and social change, and between law and democratic consolidation, emphasising a particular dimension of the trinitarian mantra of constitutionalism. As a full and working democracy is yet to be consolidated in the region, the role of law becomes central to fostering the quality of democracy. Accordingly, law and legal institutions may contribute 'to the endogenous formation of preferences conducive to social change' and to the generation of the political practices that are required for the entrenchment of the rule of law and constitutionalism in the region.[188] In that way, it is claimed, EDC can address the paradox of participation – that is, the problem of how to trigger participatory parity as the driver for social change when those most in need of it are neither willing to take part, nor interested in participating.[189] EDC is looking for a middle path between an instrumental conception of constitutional law (the idea that law can directly transform social reality) and an extreme realist or sociological account (the idea that what really matters for democracy is not law, but societal attitudes). Therefore, the relationship between law and democracy is mutually reinforcing, and the historical problem of ineffective constitutions will not be solved just by a naked devolution of power from elites to rules.[190] It is not only more regulation, but laws that could promote their own legitimacy and effectiveness. EDC, then, supports a conception of constitutionalism that could itself be the driver of transformation, democratization and therefore legitimation.

IV. Concluding remarks

ICCAL claims to be a contribution to debates around global constitutionalism by developing a conceptual and normative framework for Latin American constitutionalism – in other words, a theoretical approach with certain basis on current processes of constitutionalization beyond the state, and with a normative aim of transforming and

[185]See (n 43) 1608.

[186]J Contesse, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights' (2017) 15 *International Journal of Constitutional Law* 414; P Contreras, 'Control de Convencionalidad, Deferencia Internacional y Discreción Nacional en la Jurisprudencia de la Corte Interamericana de Derechos Humanos' (2014) 20 *Revista Ius et Praxis* 235.

[187]G O'Donnell, 'Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 32.

[188]See (n 33) 202.

[189]See (n 73) 112; L McNay, *The Misguided Search for the Political* (Polity Press, Cambridge, 2014) 38.

[190]M Schor, 'Constitutionalism Through the Looking Glass of Latin America' (2006) 41 *Texas International Law Journal* 1, 7.

addressing the persistent problems bequeathed by a complex constitutional history. In this regard, ICCAL attempts to develop an 'academic artefact' to speak of an Inter-American law that represents a new legal phenomenon. In this article, I have developed two main critiques that can be deemed as challenges for an academic project that is still 'under construction'. A proper reconstruction of what ICCAL's works claim to be in common shows a more diverse picture, either if this commonality is constructed from academic debates or from the description of certain practices, such as the existence of an allegedly horizontal dialogue between the IACtHR and its domestic counterparts. However, even if we can agree that there are common elements in the legal systems or within legal discourses of the region, ICCAL scholars need to clarify what they mean by transformative constitutionalism, acknowledging the political character of its institutional implications. In Part III, I provided an intellectual map of Latin American constitutionalism that could address these critiques and serve as a roadmap for studying potential Latin American contributions to debates around global constitutionalism.

Along with ICCAL, the schools of thought presented in Part III have emerged from desires embedded in allegedly aspirational, transformative or social constitutions of the recent era. Although the way of mapping these debates was based on academic sources, many of the main features of each constitutional current have interesting conceptual and institutional implications for constitutional arrangements. Moreover, within the normative triad of global constitutionalism, these schools of thought can be distinguished by the particular emphasis placed on the rule of law, human rights or democracy: while NLAC is associated with a renewed democratic commitment and LANC claims to be the champion of human rights in the context of imperfect democracies, EDC attempts to construct a novel approach to the rule of law in the region.

LANC and NLAC have been presented as different modes of articulating the relationship between law and social change, but both of them have been criticized for their insufficient democratic premises or for the real impact of constitutional innovations on the ground. Overall, after more than two decades living under a new era of Latin American constitutionalism, there is still a long road towards democratic consolidation and social progress. This constitutional experimentation has evolved in interesting times, where the region is debating, with 'urgency and intensity', old and new constitutional ideas under expanding challenges. Indeed, some scholars have even moved from LANC to NLAC, and finally have endorsed some of the main elements of EDC – a current that is still information. The dynamic debates of Latin American constitutional scholarship have often been frustrated by its actual impacts, generating rapid delusions with its transformative original promises.

Although EDC still needs to build its own path, it is important to conclude with a few comments that may serve as future research questions. As presented here, EDC labels itself as a kind of 'third way' to overcome the deficiencies exhibited before, a kind of 'synthesis of a multiplicity of elements in their manifold relationships', the result of constant frustrations with progressive constitutional projects that derived in a revived concern with political constitutionalism. Through discussion around several axes of debate, and considering the innovations of the other schools, EDC considers that the constitution is mainly a configuration of power, or the space to embed the radical commitments with the realization of democracy and the protection of human rights. Along with NLAC, it also expresses its reliance on external legitimacy, assuming that constituent assemblies are a regulative ideal of utmost importance. Regarding the organic distribution of powers and functions, EDC is committed, with institutional choices oriented towards the protection of political equality and its endorsement of forms of

public dialogues, including those dialogues with international orders. Moreover, EDC is committed with the priority of the political process, and the constitutional institutionalization of the conditions of legitimacy of that same process. Finally, EDC is characterized by a commitment with a republican conception of law that accommodates a revitalized version of positivism as a legal theory. As a current still under construction, it has yet to attract more scholarly attention, particularly regarding the interest in developing a democratic theory of administration, and a renewal of the debate around executive–legislative relations with a normative commitment to political egalitarianism. Nevertheless, it is the latest answer to the challenges of a region that, even more than before, is plagued by a dynamic constitutional scholarship. Hence, in contrast with ICCAL, EDC could present itself as a more grounded account of transformative constitutionalism for Latin America.

For debates around global constitutionalism, the intellectual map of Latin American constitutionalism presented here better captures the different conceptions of constitutionalism that are currently being discussed in the region, which wander around the concept of transformative constitutionalism. In that regard, they can provide a more precise insight into what could be the contribution of this part of the world to the consolidation of processes, ideas, institutions and principles of constitutional character. Insofar as different versions are being developed within Latin American legal scholarship, we need to pay attention to their differences and to the diverse implications for questions of constitutional character, 'questions relating to the establishment of and exercise of legitimate public authority across jurisdictions'.[191]

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[191]See (n 1) 3.

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