

7. Legal Hybridity in Latin American Law

Are Latin American countries a legal family ?



Part II – Comparative Law Across Legal Traditions

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Are Latin American countries a legal family ?

Talking about Latin America ...

- ▶ for Europeans often implies qualifying Latin America as a minor-rank member of the civil law family. In European transnationalism Latin American legal systems figure as junior members within the civilian legal family and are thus understood as simple receivers or imitators of European legal production;
- ▶ for Americans often implies stressing the need to get Latin American countries out of the inefficient shadow of French law, and therefore grounding the supremacy of US law and the opportunity of legal reform with liberal models to boost development and democracy.

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‘Ibero-America’ is more appropriate, since it excludes systems that are American and ‘Latin’, but not Iberian (French Guyana, Louisiana, Quebec)

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What is 'Latin America' ?

'Latin America' refers to Iberian colonies, and excludes countries which were under the influence of English, French, and Dutch colonizers, esp. in the Caribbean: "the English Caribbean followed a Burkean understanding of institutional history, denying any significant break in the law between the pre-colonial and the independent periods, between old and the law. [...] The French and Dutch Caribbean, mostly still under colonial rules, developed the law directly with and through their metropolises" **[DLM 349]**.

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“Iberian Latin American law [...] is imperial within its own domain [...] The non-Hispanic Caribbean functions as an internal periphery in political and legal terms” **[DLM 350]**.

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What is 'Latin America' ?

'Latin America' was a concept born out as a “geopolitical and intellectual artefact that sought to affirm the leadership of France among the Southern countries of Europe and their formed overseas colonies” [DLM 347], especially in opposition to 'Saxon' Americas. The mistrust for Saxon Americans faded away by the end of the XIX century. When the French prestige started to lose its brightness, US law took its place [DLM 357].

According to this account, the building blocks of Latin American legal superstructure are (a layer of original Castilian law, superimposed upon which were) style, methodology, ideology and codes from post-revolutionary France.

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What is wrong with the idea of a ‘Euro-Latin American legal space’?

“The contemporary ‘Latin American’ tradition was forged during the XIXth century, when [...] the law and institutions of new Latin American republics linked themselves to this web of juridical books, doctrines, ideologies, and histories to form, in time, what we might call the ‘Euro-Latin American legal space’” [DLM 353].
The idea of an ‘Euro-Latin American legal space’ ...

- (1) obscures Latin America legal originality and the circulation of models within Latin American countries;
- (2) underestimates the Americanization process in which many Latin American countries embarked in the XXth century.

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“the real point of contact that the common law and civil law traditions began to have in the region” [DLM 358].

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Is there a 'Latin American' law ?

The notion of 'Latin America' rarely does justice to the region.

It often conveys (self-)narratives about the 'problem of law' in Latin America, solidifying a perception of Latin American law as a failed law, Latin American doctrine as highly legalistic, the legal system as ineffective and concretely marginalized by social – often illegal – practices of corruption, bribery, clientelism, abuse of power and so on.

These (self-)narratives “strengthen the position of whoever advances the criticism by undermining the credibility of local institutions and opening ways for legal or other types of intervention” [DLM 361], and reinforce in Latin American lawyers the idea that foreign law is “some sort of super law that performs the functions that it is supposed to carry out very well” [DLM 365]

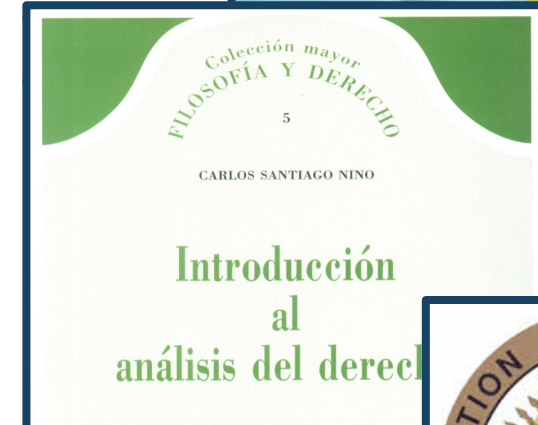


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Countering narratives about 'Latin American' law

Latin American law is:

- ▶ imitative and backward; **FALSE**
- ▶ legally formalistic; **FALSE**
- ▶ failed because practically ineffective. State law is practically irrelevant across the region and normative choices are made primarily by the people through other, informal, and social means. **FALSE**



People's normative choices are everywhere mostly driven by unofficial social means