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Soft Power
Revista euro-americana de teoría
e historia de la política y del derecho

Vol. 12(1). Enero-Junio 2025
ISSN (online): 2539/2239 ISSN (print): 2389-8232
https://doi.org/10.14718/SoftPower.2025.12.1.9

LEGAL PLURALISM AS AN INSTRUMENT OF ADEQUACY FOR THE ANALYSIS OF TRANSPLANTS AND LATIN AMERICAN LEGAL IDENTITY

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EL PLURALISMO JURÍDICO COMO INSTRUMENTO DE ADECUACIÓN PARA EL ANÁLISIS DE LOS TRASPLANTES Y LA IDENTIDAD JURÍDICA LATINOAMERICANA

Abstract

This article examines the impact of the attempt to adapt Latin American legal identity to the standards of the European legal tradition, questioning whether this pursuit hinders the region's legal and economic development. The hypothesis to be defended is that such a pursuit is indeed detrimental, as the homogeneous legal identity, as often conceived, constitutes a

legal fiction that disregards local cultural and socioeconomic particularities and overlooks the historical process of legal transplants across different systems. The theoretical framework is based on Alan Watson's theory of legal transplants, Jorge Esquirol's critiques of legal identity, and the foundations of legal pluralism as a more contextualized and adaptable alternative. Using a bibliographic review methodology, the study concludes that legal pluralism represents a viable alternative more aligned with Latin American realities, fostering legal and economic development that is more consistent with the region's diversity and complexity.

Keywords
legal identity; legal fiction; legal transplants; legal pluralism.

Resumen
Este artículo examina el impacto de la adaptación de la identidad jurídica latinoamericana a los estándares de la tradición jurídica europea y se pregunta si dicha adaptación obstaculiza el desarrollo jurídico y económico de la región. La hipótesis defendida es que dicha búsqueda es, en efecto, perjudicial, ya que la identidad jurídica homogénea, como suele concebirse, constituye una ficción jurídica que no tiene en cuenta las particularidades culturales y socioeconómicas locales y pasa por alto el proceso histórico de trasplantes jurídicos entre sistemas diferentes. El marco teórico se basa en la teoría de los trasplantes jurídicos de Alan Watson, en las críticas de Jorge Esquirol a la identidad jurídica y en los fundamentos del pluralismo jurídico como alternativa más contextualizada y adaptable. Mediante una metodología de revisión bibliográfica, el estudio concluye que el pluralismo jurídico representa una alternativa viable, más alineada con las realidades latinoamericanas, que promueve un desarrollo jurídico y económico más acorde con la diversidad y complejidad de la región.

Palabras clave
identidad jurídica; ficción jurídica, trasplantes jurídicos; pluralismo jurídico.

Introduction

Latin American legal systems have an identity problem. This identity problem often stems from the inability of Latin American countries to develop their legal models independently of European models or those of developed countries, remaining in a perpetual zone of incomplete development, and even if they were able to follow the foreign example, internally, these models would never be considered authentically Latin American.

This need to fit in and fail, remaining in a perpetual transition zone, unable to develop their own model and forced to follow a foreign one, is very well explored by Jorge L. Esquirol (2008, pp. 79–80) in his investigations into "legal fictions". The European legal identity of Latin American countries is so exploited by local and foreign legal discourses that it has reached the level of a fiction, serving only as a rhetorical instrument for constructing the notion that legal systems fail because they are not following the development commands of public policies drawn up by foreign entities or agencies. Although they may be somewhat right, given the clear failures in several legal systems, they are not intended to serve local interests but only to classify Latin American countries into large, foreign-based legal families.

This is the starting point for this article. Is the concept of legal identity detrimental to the legal development of Latin America? And, if so, is there an alternative?

Based on Esquirol's (2008) conceptual construction, discussed in "The Failed Law of Latin America," both the concept of legal identity and the discourse of legal failure in Latin America are illusory (p. 77). Both have a strong ideological charge, often based on erroneous analytical data and generalizations about the region, as if it could be seen as a single large country, or even that they are merely extensions of former colonies and that, due to this historical connection, the basis for comparison would always be the European country from which much of the region's customs originated.

Much of this perception is linked to an excessive focus on legal transplants from Western countries which, by becoming the rule in the construction of local legal systems in Latin American countries, would end up reducing the agency of local actors in the recombination and transformation of legal systems to meet the specific needs of each Latin American country (Esquirol, 2008, p. 77).

The idea of legal transplants, however, clarifies what may lie at the heart of the problem of legal identity and the failure of Latin American legal systems. The concept of legal transplants was developed by Alan Watson (1993, p. 21), in *Legal Transplants: An Approach to Comparative Law*, to explain a paradox that becomes evident to researchers working with comparative law: law is the result of the identity of a people, possessing a special and authentic characteristic of a specific group of human beings or of a country,

even in the legal systems of nearby countries, but at the same time there is a clear borrowing of legal institutes or even entire legal systems from one people to another, a fact that dates back to the first centuries of written history.

Therefore, in order to try to answer the question posed in this article, we will first address the concept of legal transplantation and its implications for the concept of legal identity, especially the notion that there is a European legal identity against which Latin American legal models can be judged, since even within different European countries, there are similarities between legal institutes and a large part of the European legal models are adaptations of older legal models. Perhaps, we cannot even speak of a European legal identity.

This approach will serve as a basis for analyzing legal identity as a legal fiction and will allow us to identify the impacts of this understanding on the legal development of Latin American countries.

If we understand legal identity as a fiction or rhetorical instrument to impose or suggest reforms in the different Latin American legal systems, we will also be able to understand how this fiction hinders the fulfillment of local needs, which is reflected, to a certain extent, in the difficulty encountered by Latin American countries in developing their own institutes, even if derived or borrowed from European countries.

As a proposal to address the problem and avoid the possible harm caused by the search for a European identity in Latin American countries, legal pluralism will be presented as a political instrument capable of adapting the impacts of legal transplants to local legal and political realities.

The Historical Question of Legal Identity in Latin America

Historically, the influence of colonization on Latin American countries seems unquestionable. Spain and Portugal dominated and colonized Latin America for 300 years, and even after independence, a single and original legal system did not prevail among the jurists of the first republics.

During the colonial period, when Spain and Portugal dominated much of the territories of the new American continent, the European identity spread due to this domination, and much of the origin of law in the Spanish and Portuguese colonies is linked to the traditions of Roman law and canon law (Merryman & Pérez-Perdomo, 2019, p. 4).

Since independence, Latin American countries have built their legal systems based on the presumption of a European legal origin. Even where political independence entailed a formal break with former colonizers, legal development largely continued through the adoption of institutional models drawn from other European legal traditions.

For example, French civil law has influenced many post-colonial countries, which adopted the codification model or a civil code in opposition to the legal systems of their former metropolises, and much of the revolutionary spirit of the independence movement is rooted in the legacy of the French Revolution.

The Napoleonic code, which originated in France in the 1800s, enjoyed great prestige among the liberators and among the American caudillos who, after assuming the role of legislators in the newly independent countries, quickly adopted the Napoleonic code in their new legal system, replacing the old concepts of the colony with legislation derived from the French model. This was the case of Chile, Colombia, and Argentina, which expressly adopted the Napoleonic code in their first laws and in the speeches of their new authorities (Brito, 2004, p. 36).

Part of the French influence on the civil codes of Latin American countries stems from changes in legal structures after independence. Although many independent countries needed to draft and establish new legal institutes and sources of local law, and many of these institutes and sources, especially those of public and constitutional law, were structured in an improvised manner to meet immediate local needs, private law took longer. Many Latin American countries continued to use the sources of private law that existed during the colonial period and gradually adopted new models (Mirow, 2001, p. 294).

One of the major codes influenced by French law was the Chilean Civil Code of 1855, written by Andrés Bello. When it was written, the Napoleonic Code was already widely available for consultation and was undoubtedly the most famous and influential among local jurists, and a good part of the provisions of the Napoleonic Code were transplanted into the Chilean Civil Code of 1855, although at the time of writing the code, the translation of the provisions was not literal, but adapted to harmonize with the local language and ideas (Mirow, 2001, p. 306).

The Chilean Code of 1855 was adopted by El Salvador, Ecuador, Venezuela, Nicaragua, and Honduras. It was a major influence on the civil codes of Uruguay, Mexico, Guatemala, Costa Rica, and Paraguay (Mirow, 2001, p. 291).

In subsequent centuries, the influence of European identity persisted in Latin American countries. The civil law model based on the Napoleonic code was consolidated and, in criminal matters, criminal codes were often complete copies of the Spanish code, such as the penal code of Peru, Venezuela, Mexico, Chile, and Costa Rica (Olmo, 1999, p. 23) and, during the 19th century, the influence of the Italian positivist school spread throughout Latin America (Olmo, 1999, p. 20).

The interest of Latin American countries in the European identity of their criminal law is explained, in part, by the participation of Latin American jurists in the International

Union of Penal Law, which, founded in 1888, had six Latin American countries in 1891: Argentina, Brazil, Costa Rica, Chile, Guatemala, and Venezuela (Olmo, 1999, p. 23). Many of these jurists were representatives of their countries, whose role was to reform criminal codes in accordance with international precepts, incorporating European legal science with North American techniques of criminal procedure (Olmo, 1999, p. 24).

This European mix, with certain North American institutes, is also perceived in Latin American constitutionalism. The constitutional models adopted by the newly independent republics, and later reaffirmed through domestic constitutional reforms, were largely inspired by the English mixed constitution, which sought to organize a society divided into estates through a system balancing the monarch, the few, and the many. This structure took the form of monarchical or presidential systems with bicameral legislatures, incorporating North American institutions such as checks and balances (Gargarella, 2020, pp. 17, 18). However, these constitutional designs rarely materialized in practice due to the region's recurrent constitutional ruptures, including military coups.

In Argentina, even during the Peronist regime, the country adopted North American legal institutes, such as the principle of stare decisis, which obliged lower courts to follow the precedents of the Supreme Court (Miller, 2003, p. 871). Currently, the code of ethics of Argentina's public administration is inspired by and influenced by the ethical standards of the United States executive branch (Miller, 2003, p. 850).

What can be said about this formation of the Latin American legal identity is that, although a single model or a new model did not emerge in the new Latin American republics, the desire to construct a particular identity meant that the first jurists and politicians of the new nations did not look only to Spain or Portugal as the original source of their legal systems, and many turned to Italian and French sources. The codification of the French model was prominent in the region from the mid-19th century onward, and Italian criminology exerted significant influence (Esquirol, 2020, p. 31).

Despite this sui generis characteristic of the post-colonization Latin American legal model, most of the classification of local legal systems keeps them within a European classification, whether within comprehensive categories of Western law or more specific categories as part of the Roman-Germanic family of law (Romano-Germanic Family) or the European legal family (European legal Family). The notion that Latin American law is a beginner in the great family of European law has become established (Esquirol, 2020, p. 32).

However, to say that Latin American private law is based solely on French civil law is a hasty simplification; it would be the same as saying that the law of the United States or England is based on William Blackstone's commentaries or that the law of continental

Europe is based on Justinian's Digest. Although there is some truth in these statements, these simplifications do more harm than good in understanding the law of each of these locations.

What seems to emerge from this construction of Latin American legal identity linked to European identity is a desire within the legal cultures of Latin American countries to identify with European legal systems. In fact, the analysis of national legislatures reveals numerous legal transplants from continental Europe that are little more than copies with minimal adaptations and fail to consider local needs (Esquirol, 2020, p. 33).

Furthermore, this search for identification with European legal culture, exemplified by the recurring citation of European jurists by Latin American jurists (Esquirol, 2020, p. 34), has strong implications for the acceptance of reform projects for local systems by international organizations, opening the door to hasty adherence to reform projects that make it more difficult than easier for the judiciary to meet local needs.

And, at this point, the Latin American legal identity seems to be much more of a legal fiction, an ideological search for identification with a culture supposedly superior to the local one. As a fiction, it ignores local realities and the needs arising from them, as seen in the perception of academic research in law that Latin American law is failing, although a good part of the problems arising from this failure are linked to ideological projections about Latin American law.

Alan Watson's Theory of Legal Transplants

The understanding of legal identity as a fiction, including the perception that Latin American countries fail to conform to the legal models of their large European legal family, can be better understood based on the concept of legal transplants, which explores the notion that many of the legal institutions we know do not originate solely from the will of a specific group of people or the spirit or will of a country, but are evolutionary and historical constructions.

This perception undermines the hasty notion that there is a model to follow and that, for Latin America, this model would be the one originating in Europe. The concept of legal transplants can be defined as follows: the transfer of a rule or a system of laws from one country or people to another (Watson, 1993, p. 21).

For Watson (1993, p. 21), the creator of legal transplants, law reveals several paradoxes; the most interesting is that law is part of a people's identity, yet legal transplants have been so common throughout recent history. To use Savigny's expression, positive law as it exists lives the consciousness of a people and we can call it the law of the people (*Volkrecht*), which cannot be understood only as the arbitrary will of its individual

members, but as part of the spirit of the people (*Volksgeist*), of the individuals who live and work together and create positive law not accidentally, but as part of the consciousness of each of these individuals. On the other hand, it is widely accepted that the private law of all modern legal systems in the Western world is, to a greater or lesser extent, derived directly from Roman Civil Law and the English common law model.

The phenomenon of transplantation is not restricted to the modern world. It dates back to the earliest legal writings and, as Watson (1993, p. 22) notes, appears in the legal provisions of Mesopotamia. This does not mean that any and every connection is an example of legal transplantation. Watson (1993, p. 25) warns that the expression "seek and you will find" (from Matthew 7:7) applies to legal transplantations and he uses as an example the connection formulated by part of the historical and anthropological research of Law: the Law of the 12 Tables originated in a Roman delegation that traveled to Greece and examined the Laws of Solon, giving rise to the 12 tables that ignore the controversy regarding the existence of this delegation.

Although most researchers still maintain that there was a strong Greek influence on the code, Watson (1993, p. 27) argues that these arguments are not compelling, warning against treating any similarity or connection as evidence of legal transplantation. There is one further point to consider regarding legal transplants as a metaphor for the movement of rules, norms, and legal institutions from one country to another.

A successful legal transplant—like the transplantation of human organs—will grow into its new body and become part of that body as if the rules or the institution itself had continued to develop its original system. Watson (1993, p. 28) cites the financial compensation for disfigurement caused by others to free men as an example of such a case, which would be a development of the Lex Aquilia Romana when adopted by Western European states.

The Roman Lex Aquilia required monetary compensation for property damage caused by others (e.g., theft or vandalism), including slaves. When adopted by Western European states, it was extended to include damages to free men. Although the application of the analogy in Roman law provided for the possibility of this extension to free men, Roman law prevented the monetary assessment of damages such as scars and deformities, because it was understood, as is stated in Justinian's Digest, that "scars and deformities could not be assessed because the body of a free man does not admit of assessment." However, Dutch jurists of the seventeenth century, who had adopted the Lex Aquilia into their law, recognized an action for damages for disfigurement, although they acknowledged that it was contrary to Roman law (Watson, 1993, p. 28).

For Watson (1993, p. 28), this is the result of a slow development that would have begun in the 14th century and passed by the Spanish jurist Antonio Gomez in the 16th

century, who is the oldest jurist cited by Roman-Dutch writers, who declared it is not possible to financially evaluate the scar of a free man, but it would be possible to do so in the case of women, as long as they were not married, because they would find it difficult to get married due to the scar. The measure of compensation would be, in Gomez's sense, the value of the increase in the dowry necessary to obtain a husband.

The changes continued, and even though it is not possible to trace all the elements of these changes historically, it is possible to find shifts in understanding the possibility of applying the Lex Aquilia in Hugo Grotius. A century before the Dutch jurists, he had already predicted that "pain and disfigurement of the body, although not compensable, can be measured in money, if so demanded" (Watson, 1993, p. 28).

Watson's historical approach is centered on Roman Law and, as informed by Ewald (1995, p. 490), investigated in great depth what can be called the "gradual expansion" of the legal transplants of Roman Law throughout continental Europe. He made clear, through a reading demarcated by different legal institutes, the persistence of these rules—drawn up by a class of Italian aristocrats, many of whom practiced law only as a pastime and who have been dead for more than two thousand years—in the modern structure of today's law.

A theory that has strong radical implications, after all, suggests that law is modified by the internal needs of a system that has been gradually transforming, from the society of Julius Caesar, to that of the medieval popes, passing through the ancient regime of Louis XIV and Bismarck's Germany, until arriving at the welfare states of the 20th century, instead of being modified by external pressures. A vision that transforms all legal theories based on grand fata morgana narratives, a lost dream of legal scholars who do not perceive how law, as a matter of historical study, currently develops (Ewald, 1995, p. 490).

Paradoxically, this does not mean that the study of legal transplants precludes examining law from the perspective of power relations, since the very notion of legal transplant suggests that legal changes or the establishment of an entire legal order result from factors external to the will of the people.

This perspective differs from approaches that treat law merely as a product of the economic and social interests of a particular group, thereby rejecting broader interpretations of law as a simple reflection or "mirror" of society (Ewald, 1995, p. 493). At the same time, it allows law to be understood through the lens of colonization processes (Graziadei, 2009, p. 724), which is particularly relevant in Latin American countries.

The reception of foreign laws, whether through voluntary borrowing or through imposition by colonization or conquest, has long generated reflection on the tensions between local and foreign elements of law. Much of the literature on legal transplants

begins from the accumulation of evidence showing how law is borrowed or transplanted, rather than created through local innovations arising from specific social needs or conditions. This approach can be understood, at least in part, as a reaction to functionalist or positivist conceptions of law, which describe it as a mere "constellation of norms" produced by governing forces in response to social demands and enforced through the application of coercive power (Graziadei, 2009, p. 726).

The literature on legal transplants has also attracted widespread attention from comparative legal theorists because it accommodates pluralistic views of law by allowing a single system to comprise multiple, already established legal models. Although it can be argued, as legal doctrine does, that some models fit into large legal families, such as the well-known distinction between models with a Roman-Germanic foundation or common law legal models centered on precedents, many modern legal systems, even those that do not fit into descriptions as "mixed" systems, have characteristics that suggest that borrowing or transplantation is recurrent, even across barriers that are not so easily permeable (Graziadei, 2009, p. 727).

This pluralist approach to legal transplants not only challenges the functionalist logic of traditional legal theory (Graziadei, 2009, p. 728) but also opens space for anthropological and sociological analyses of law. These perspectives emphasize the complexity of culture, which, as Graziadei observes, is far from a homogeneous whole and instead reflects ongoing tensions and compromises among different cultural constellations (Graziadei, 2009, p. 729). In this context, the various elements of a legal system may be shaped in distinct ways, making it necessary to distinguish which components are relevant in any given analysis of legal transplants.

Legal systems, in this sense, would be much more the result of evolutionary and cumulative processes of legal transplants than an original production, and when dealing with Latin American legal systems, one could not speak of a European legal identity because the European legal identity itself would be composed of a multiplicity of legal transplants that date back to the first Roman legal codes.

This perception also reinforces the idea of legal identity as fiction. If the internal processes of systematization and transformation of a country's law are evolutionary, unfolding through successive legal transplants drawn from diverse legal systems, then legal identity cannot be understood as singular or pure. This is evident, for example, in the codification of private law in the Chilean Civil Code of 1855, which incorporated provisions from the Napoleonic Code while harmonizing them with local language and legal ideas (Mirow, 2001, p. 306). The result was a mixed French–Chilean code rather than a faithful reproduction of a European model. Accordingly, it is not possible to

speak of a purely Chilean, French, European, or even Latin American legal identity. Instead, legal identity emerges as plural, shaped by successive mixtures and borrowings of legal institutions throughout legal history.

Jorge L. Esquirol's Criticism of Legal Identity

The concept of legal fiction, developed by Esquirol (1997, p. 426) more than twenty years after its publication, remains present in North American legal discourse. Political and social movements, whether from the right, concerned with the growth of the private sector, or from the left, concerned with economic redistribution and cultural pluralism, use legal reform as a central point of their proposals for the development of Latin America. However, within their North American political narratives, they ignore Latin American social realities.

A large part of this problem is also attributable to a deficiency in comparative law research, which presents the Latin American model as having a European foundation or European identity (Esquirol, 1997, p. 427). Despite criticizing various legal systems for flaws in their functioning, the research ultimately supports Latin American legalism.

At the same time, the traditional program of liberal democracy for Latin America casts a shadow of "illiberality" over Latin American societies that ignores the reality that Latin American societies are not European, despite local jurists pretending that they are, hence the idea of European identity as a legal fiction (Esquirol, 1997, p. 470).

This legal fiction of European identity is central to the construction of a background, both political and legal, that positions Latin American law as a "failed law" (Esquirol, 2008, p. 76). A related fiction serves to facilitate legal reform by projecting an image of pervasive deficiencies in Latin American legal systems, suggesting that they are incapable of addressing local problems without adopting models grounded in European or North American liberal democracy (Esquirol, 2008, p. 76).

This failure, however, is not necessarily false; there are other studies that point out the failures of Latin American law, but the meaning of this failure differs from that projected by the fictional narrative of "failed law". The fiction is not centered on the operational breakdown of each of the distinct problems of Latin American countries, but points out a generalized failure that could not be overcome by localized reforms, but only by the general reform of the entire model, serving as a narrative to facilitate reform projects (Esquirol, 2008, p. 76).

This approach creates a problem for the reading of legal transplants, especially if the focus is on the functionality of foreign legal institutes applied to Latin American

regional models, whose focus may end up overshadowing the agency of local actors in the change, recombination, and transformation of the transplanted rules, norms, and legal institutes (Esquirol, 2020, p. 3).

On the other hand, it can serve as a legitimizing instrument by validating what Esquirol (2020, p. 13) calls "legal consciousness," which distinguishes law from mere politics, suggesting a connection not only among Latin American countries but also between these countries and an internationally organized legal structure.

From the perspective of Latin American legal identity, this dynamic produces a clear paradox. On the one hand, the transplantation of legal instruments and institutions from the North American model, often without regard to local legal realities, reinforces the fiction of a European identity or, alternatively, the narrative of a "bankrupt" legal system in need of reform. This process sustains the idea that Latin American law lacks autonomous foundations and must be corrected through external models.

On the other hand, the same process simultaneously legitimizes existing Latin American law. By transforming domestic legal frameworks or presenting them as aligned with universally accepted models, these transplants confer an appearance of conformity with legal standards traditionally regarded as valid by both foreign and Latin American jurists. A paradox that requires further explanation.

As Esquirol (2020, p. 1) informs us, Latin American countries have many laws and legal institutions similar to those found in Continental Europe and the United States, and, especially after the independence movements of the 19th century, many Latin American leaders looked to European models and the American Constitution to build new models.

The rules of private transactions, criminal justice, court procedures, and administrative actions all draw on European sources, and legal borrowings from Europe continue to this day. Latin American national constitutions were heavily influenced by the 1787 American Charter, and constitutional rationality has become increasingly shaped by Anglo-American legal thought, with many Latin American jurists deliberately emphasizing these connections (Esquirol, 2020, p. 1).

On the other hand, the law in Latin America does not work in the same way as in Europe and the North Atlantic. The legal systems here seem to be incapable of providing political stability and economic development and are known for their ineffectiveness, corruption, high crime rates, human rights abuses, and impunity, which seems to be beyond state control.

Esquirol (2020, p. 1) calls this an inversion of the Rule of Law into an Unrule of Law, based on two premises that are the focus of his diagnosis of legal fictions: a) national law in Latin America is European in a fundamental way; and b) this same legal system fails to operate as contemporary law should.

The problem with these two considerations is not their obvious paradox. It is not as simple as assuming that successful Western legal models fail when transplanted to Latin America. Beyond the possible conventional explanations of this paradox, the most important point is that this paradox stubbornly persists, and this persistence is linked, to a certain extent, to a flawed description of the problem, because they suffer from a combination of ideological rationalization, unconscious projection, and political bias according to the interests they serve (Esquirol, 2020, p. 3).

We can take as an example of this problem the paradox identified by Esquirol (2003, p. 66), which prevents the approximation of the horizons of Latin American and European legal identity, that a large part of Latin American law and conventional discourse (mainstream) ignores the "social" character of law, although most of the Latin American law is organized at the national level.

In this sense, the search for fit within the European legal identity and the insistence on the postulates of individual rights, which underpin European law when transplanted to Latin American law, ignore the enriching possibility of drawing on country-specific ideas and community practices in the consolidation of law in Latin America.

Although Europe's connection to Latin America is indeed strong, the prevalence of this identity in the region leaves much to be desired. It is rooted in a select plurality of narratives: a) the Spanish and Portuguese history of colonialism; b) the textual comparison of European legal transplants; c) the histories of the intellectual influence of European doctrine; d) legal and sociological findings of the region's legal culture, among others (Esquirol, 2020, p. 101).

These narratives ignore the equivalence of importance of modifications to European models, and their interactions with local norms in Latin America are equally important.

An example of these enriching local interactions is the Bolivian Constitution of 2009, which established a progressive fusion of European law with local and Indigenous worldviews and required a reclassification of the legal system. However, maintaining an identity-based criterion may continue to ignore the already neglected dimensions of Latin American legal systems, and even if the old European classification were to be erased, it would be the same as exchanging one identity classification for another identity, which would not challenge the instrumental function of the identity classification in the first place (Esquirol, 2020, p. 27).

Legal Pluralism as an Alternative

Once the problem of legal fictions has been outlined and the peculiarities of their implementation, stemming from inefficient legal transplants in Latin American countries,

have been explained, it is necessary to present a possible alternative: legal pluralism. A long time ago, it ceased to be merely an analytical and descriptive concept of normative orders and legal institutions within a political organization and became a true political concept (Kyed, 2011, p. 1).

In this context, the political concept of legal pluralism is understood as the recognition of non-state, informal or even customary practices and norms capable of achieving justice and security for developed countries or those in recent processes of redemocratization (Kyed, 2011, p. 2), but also as a critique of legalistic and state-centric models of intervention and reform (Kyed, 2011, p. 3).

An approach that seems to fit perfectly with the problem presented in this article is the instrumental use of European and foreign legal identity in Latin America, especially when we consider the ideologically justified reform projects or interventions by foreign organizations in Latin American legal systems.

The response of pluralist models is currently centered on accepting governance and justice mechanisms that operate within the formal scope of the State or within the boundaries between the State and society, in what could be called non-state justice systems, which are reform mechanisms focused on improving the legal performance of different legal institutions (Faudez, 2011, p. 19).

The improvement of institutions, however, is not centered on the application of foreign legal mechanisms or on conforming the legal structure of Latin American countries to European models. By contrast, pluralist models aim to account for a deep understanding of local state structures, political processes, and local communities (Faudez, 2011, p. 18).

This in-depth understanding of local interests and particularities has already served to diagnose the shortcomings of different Latin American countries, such as Bolivia, in reconciling non-state legal systems with the constitutional models in force, which, although recognizing Indigenous rights, manipulate them to fit into the traditional legal and state paradigm (Faudez, 2011, p. 24).

This problem, in part, stems from the Bolivian Constitution of 2009. Despite recognizing the rights of Indigenous and peasant communities and establishing as a foundation of the Bolivian people the respect for legal pluralism and cultural diversity, it did not have direct reflections in the legislative production of the Bolivian people, having not consolidated in the legislation in force mechanisms for resolving jurisdictional conflicts between Indigenous institutions and state legal institutions (Faudez, 2011, pp. 28-29).

In Bolivia, in more recent times, the context of egalitarian legal pluralism was used to seek equality in the hierarchies of the Original Peasant Indigenous Jurisdiction (*Juris-*

diccíon Indígena Originaria Campesina – JIOC) against Bolivian legislation that subordinated it to the Ordinary Jurisdiction (*Jurisdicción Ordinaria* – JO) in criminal matters, and there was a strong contradiction between the understanding of the subject matter of both jurisdictions, with the Ordinary Jurisdiction defending its jurisdiction to judge criminal matters (Paz, 2021, p. 202).

Despite the difficulties in accepting non-state jurisdiction models by classical legal institutions, the emergence and recognition of these non-state jurisdiction modalities is in line with the classical project of legal pluralism, centered on the existence of one or more realities and multiple forms of action within a context of social and cultural diversity, each involving particularities and varieties in the perception of phenomena, whether legal or social (Wolkmer, 2018, p. 104).

Legal pluralism in the Latin American context shows that national states recognize that traditional ways of resolving conflicts are not the only or exclusive ways to understand the legal phenomenon. In this sense, it is a gateway to understanding law beyond the static and pure concept of a European legal identity, which does not minimize, exclude or deny the monopoly of the rule of law produced by the State, but recognizes the existence of other forms of regulation, generated by political bodies and social organizations that have a certain degree of autonomy and their own identity (Wolkmer, 2018, p. 104).

The rise of these new ways of understanding law, centered on legal pluralism, also provided tools for perceiving the "social" or the "common good," a problem that has long plagued Latin America. As pointed out by Esquirol (2003, p. 66), Latin American legal discourse has never managed to make the "social" part of the practical routine of conventional legal discourse, although, paradoxically, a good part of Latin American legal norms are produced and regulated at the national level (Esquirol, 2003, p. 67).

Latin American legal pluralism, in its various meanings, has filled this gap, presenting localized visions and regionalities that consider local needs and peculiarities to shape the "common good" or the "social" dimension of the national legal discourse. One such example is the concept of good living (*buen vivir*), present in the Constitutions of Ecuador, in 2008, and Bolivia, in 2009, which emerges as a structuring concept that creates a cultural and political connection between local communities and traditional legal institutions (Wolkmer & Wolkmer, 2022, p. 74).

One of the central points of the pluralist approach, when compared with the traditional legal vision, is the possibility of challenging the paradigm through legal reform to identify possible alternatives for understanding the law from local community views, since, often, by being understood as the only possible alternative, it weakens legal and political development according to local needs.

Legal pluralism, from a political point of view, provides an alternative to competing with established legal authority, creates the need to articulate distinct discourses, contributes to the progress and overlapping of distinct jurisdictions, challenges conventional meanings of justice and law, reflects on power relations and local socioeconomic situations and, above all, allows changes that come from the inside out (Kyed, 2011, pp. 16-17).

Here is the central point of connection between legal pluralism and the legal fiction of identity. If we understand that many legal institutions are transplanted from other legal systems, as is the case of European legal systems brought to Latin America, and that many of the problems found in local systems are caused by inefficient transplants that ignore local peculiarities and particularities, legal pluralism is the possibility of changes that start from within, serving as a perfect instrument of reform to adapt these transplants to the circumstances of the transplanted country, nourishing traditional legal institutions with local particularities.

Conclusions

The concept of legal identity has been an obstacle for Latin America. The need to fit into a broad, traditional European legal family, whether the well-known civil-law models or the Roman-Germanic legal families, has impeded the development of Latin American legal systems that account for local needs and particularities.

Within legal discourse and practices, the quest to fit into these large global families, in addition to harming local political and legal development, has also conditioned Latin American countries to a subordinate status, as neophytes or beginners who are learning how to behave in a large scheme of the global world-system and, consequently, subject Latin American countries to economic and legal development policies from the outside in.

This eternal search for European legal identity has been so exploited that it has become a true legal fiction, used instrumentally only to justify legal reforms in Latin American countries that have only fueled the false perception that Latin American legal systems are doomed to fail.

This fiction is further revealed by comparative law and legal transplants, which indicate that there is no possibility of a pure legal identity or even a classification within a single, large legal family in traditional legal systems or their Latin American implementations. Every legal system is in continuous evolution, modifying its internal structure by borrowing or transplanting legal institutes from other systems, which has happened and continues to happen in both Europe and Latin America.

The concept of legal transplants, fueled by the political and legal vision of critical legal pluralism, can also provide elements for understanding an alternative that allows

legal institutes transplanted from traditional European models to be modified and adapted, from the inside out, to meet local and regional needs, including with legal discourses that fit into Latin American political and social contexts.

This perception opens a new approach to understanding law in Latin America. No longer focused on ideological and instrumentalized discourses about the flaws of legal systems but oriented towards the search for possible alternatives within plural and local community contexts, which view Latin America from its own interests.

In this context, it is possible to state that Latin America can only gain if it embraces the flexibility of a pluralistic legal identity that enables adaptation and economic, political, legal, and social growth.

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