Introduction

Latin American countries have many laws and legal institutions similar to those in continental Europe and the United States. The region's legal history is closely tied to developments in the West. Beginning in the 1500s, Spain and Portugal ruled the region for approximately 300 years. After national independence in the early nineteenth century, Latin American leaders looked to other European models and the US constitution. The legal rules of private transactions, criminal justice, court procedures, and administrative actions are all patterned on continental European sources. Legal borrowings from these same countries continue to this day. In addition, early national constitutions were heavily indebted to the 1787 US charter. Constitutional reasoning has also increasingly become influenced of late by Anglo-American legal thought. Many Latin American jurists quite purposefully emphasize these connections, and comparative legal scholars around the world have generally confirmed it. Latin American law is part of the European legal tradition, albeit marked by US constitutional influence.

At the same time, law in Latin America does not operate in the same way as its European or North Atlantic counterparts. Legal systems in the region appear incapable of providing for sufficient economic development and political stability. Instead, they are known for their lax enforcement, operational shortcomings, and extensive corruption. High crime rates, human rights abuses, and impunity seem to be beyond the state's control. Rather than the rule of law, it is the *unrule* of law which reputedly reigns. Indeed, while Latin American legal systems are commonly classified as European, their typical assessment is one of chronic legal failure.

This book is about these two standard ideas – or fictions as I call them. The first is that national law in Latin America is European in some fundamental way. The second is that these same legal systems fail to operate as contemporary law should. The two notions represent the most popular understandings about law in the region. They are both backed by an extensive, if relatively separate, body of academic and professional literature. They are both reflexively reproduced by commentators

and laypersons. And, they both have very concrete effects, in matters with real-life stakes.

At first blush, these images may seem too general to be of any practical significance. Classifications of Latin America in the European legal tradition may seem like a trivial point – a curious fact but operationally irrelevant. Accounts of legal failure, in turn, just seem to state the obvious about Latin America. It is widely known that social systems in the region fail in a myriad of ways. Reports abound of extensive crime, fleeing immigrants, government coups, and authoritarian regimes. That Latin American law fails as well is hardly surprising. In these ways, both narratives – while quite different – easily blend into a common background.

Indeed, both of these fictions have come to define the very expression "Latin American law." That term does not actually refer to any particular body of law like would be the case with constitutional law, contract law, or criminal law. Nor is it limited to some supranational law, like inter-American human rights law. Rather, it generally refers to the sum total of national law in all the Latin American states. Ironically, its European pedigree and systemic failure are its most salient characteristics.

Both of these notions, notwithstanding their generality, also have quite consequential effects. They shape a wide range of political and economic outcomes. They are reflected for example in the foreign policy of other states toward Latin America; the design of international development projects for the region; and questions of foreign judicial and arbitral deference to Latin American legal institutions. These occasions may arise in the context of treaty negotiations between states; international assistance and sovereign loans; action by foreign governments upon the request of their nationals adversely affected by local legal institutions; and sovereign submission to transnational litigation and arbitration. In these instances, national governments, international institutions, and private parties may take action, and incur consequences, on the strength of these notions. The latter, in many cases, shape the positions and demands of the various parties.

Furthermore, in the realm of transnational litigation and arbitration, these fictions also serve as evidence. Judges and arbitrators must evaluate foreign legal systems in several settings. The legal procedures call for it. A fact finder must decide, in certain cases, whether the foreign system meets some requisite standard. Here the conventional fictions of legal Europeanness and legal failure come into play in Latin America related cases. For example, a defendant may seek to dismiss a transnational legal claim, properly filed by a plaintiff in the United States, if it is "adequately" triable in Latin America. Or, a judgment debtor from a Latin American court may resist enforcement in the United States, based on an argument of *systemic partiality* and *lack of due process* in the rendering court. Or, a foreign investor in Latin America may sue its host state for money damages on a denial of justice claim against local legal institutions. These motions, defenses, and claims all require that the judge or arbitrator make a systemic assessment of the national legal system in

question. The mainstream literature on Latin American law provides some of the main evidence for such determinations. Indeed, the fictions of Latin American law are often the only proof.

The problem with these fictions is not their obvious paradox. It is not simply that successful Western legal models paradoxically fail when transplanted to Latin America. There are many conventional explanations for how this can be so. It has been maintained that the foreign models were copied incorrectly. Or, the Latin American context is significantly different. Or, the particular European laws selected were the wrong ones. European legal identity and legal failure are not mutually exclusive. Rather, the more important point is that these two fictions on their own do not stand up to close scrutiny. Yet, they stubbornly persist. They remain dominant, whether separately or in combination, despite their descriptive misleadingness *and their deeply negative effects*.

First, both narratives are misleading as a matter of general description. They suffer from a combination of ideological thinking, unconscious projection, and the bias of the political interests they serve. Their foundations are marred by analytical errors, such as generalizing about the region as a whole from events in one country, or ethno-centrism in presuming the Western observer's home country law is the appropriate standard.

As to the Europeanness of the law, Latin America's connections to Europe are indeed strong. However, the preeminence of such identity of the region leaves too much out of the picture. It is rooted in a selective set of narratives. Political histories of Spanish and Portuguese colonialism, textual comparisons of European legal transplants, intellectual histories of European doctrinal influence, legal-sociological accounts of the legal culture, and some others are the main bases. However, modifications of the European models and their interaction with local norms in Latin American societies are equally if not more important. Indeed, some would argue they completely transform the foreign models. The excessive focus on Western transplants, however, masks the agency of local actors that change, recombine, and make it their own. These local actors may, in fact, use the appearance of Europeanness, or mere imitation, as political cover for their own quite different versions of local laws and institutions. In other words, they may claim – or acquiesce to the perception of – their own lack of agency in order to more fully exercise it.

Additionally, law making and law-applying in Latin America are no less affected by legal politics than they are elsewhere. This is quickly revealed by more fine-grained attention to local legal discourse, how it is marshaled, and what interests it serves. This kind of focus demonstrates a much richer political and cultural dynamics at play than the traditional Europeanness paradigm can explain. Again, the fact that local legal discourse takes the outward appearance of arguing over foreign models, doctrines, and interpretations may make their underlying legal politics more difficult to perceive. That does not mean they are not present. They may

simply be misunderstood, from more external perspectives, as abstract discussions about European historical influence or foreign legal scholars, when in fact they consist of a stylized legal debate over concrete policy questions and positions of legal politics. Therefore, when local cultures, competing norms, and legal politics are highlighted instead, it makes for a much more complex picture about law in Latin America than the simple European legal-family classification suggests.

As to chronic legal failure, there is clearly much to support it. There is much to criticize about Latin America including its laws and legal systems. Some kinds of failures, however, have been overstated and instrumentalized. The excesses are partly the result of faulty legal analysis and partly the product of politics. For example, the legal failure diagnosis emerges from a variety of systemic assessments. These have been mostly the product of US legal consultants charged with advising on economic development projects, funded initially by the United States Agency for International Development and the Ford Foundation. Their early diagnoses incorporated many of the conventional beliefs at the time in the academic fields of US legal theory, political science, legal sociology, legal history, and more recently have come to include neoinstitutional economics and legal indicators. In the aggregate, these highlight the absence *in Latin America* of the requisite elements of the rule of law, as these are understood in mainstream legal theory. The resulting assessments purportedly offer an explanation as to why new development policies are hard, if not impossible, to implement effectively through the formal legal systems in Latin America. However, many of the common explanations for the difficulties do not withstand close scrutiny.

The professional tools for systemic legal assessments are more limited than widely acknowledged. There certainly exist all the difficulties attendant empirical measurement. Many of the legal system's most essential features cannot, in fact, be reliably counted. More importantly, however, the criteria commonly used overestimate what legal systems can realistically accomplish. They do not sufficiently account for the interests of local political and geopolitical forces in keeping, and strategically characterizing, as broken the local legal system. And, they ignore the distortions produced by dominant legal ideology between systemic descriptions and the experience of its actual operations. Admittedly, some level of legitimation-fostering distortion is necessary to all legal systems, to make them appear more effective than they actually are. It is a necessary aspect of all "successful" legal systems. All of this gets in the way, however, of more clear-eyed understanding and comparisons. As a result, the typical Latin American legal failure diagnosis rests on some questionable premises. Systemic accounts of this type are usually not sound description. Rather, they function more realistically as tactical arguments in the arena of legal politics. They advance specific political and economic positions in particular contexts. Their multiple valances make them continuingly useful to those that marshal them. Indeed, that is why these fictions persist. They are usefully instrumental in various settings.

As to their more general geopolitical consequences, as a whole, these fictions have profoundly negative effects. Across the board, they undercut the soft power of Latin American officials in the realm of legal geopolitics. This is an arena not limited to diplomatic negotiations in the halls of international institutions. It extends to other settings of transnational struggle over competing legal rules, institutional arrangements, and dispute resolution. As already noted, these may encompass foreign aid conditionality, international development programs, and bilateral treaty negotiations. Relative negotiating power in these realms is, without a doubt, related to a particular nation's economic and military might. A cynical observer might even say that that such power is its exclusive determinant. In the context of geopolitics framed as legal matters, however, it is not singularly a function of raw sovereign power. At least, it does not seem that way. The upper hand redounds, in significant part, to the representatives of legal systems with greater quality and prestige. Again, this is not to discount the global *realpolitik* even on matters of law such as competing normative models, institutional design, and specific national law. Their relative hegemony also responds to the logic of material state power. However, transnational struggle over legal preferences draws on discourse about technical, and specifically legal, quality.

The quality – or perceived quality – of national legal systems thus plays a role in global politics. It influences national decisions – and external pressure – to adopt certain legal transplants and institutional designs. It may factor in decisions on the appropriate forum in which to try a lawsuit, or what foreign court judgments are enforceable in another jurisdiction, just to name some of the stakes. In this way, the global standing of national legal systems becomes relevant.

In turn, the relative standing of national legal orders is built on authoritative assessments and evaluations by legal professionals – whether explicitly or not. In this way, classifications and taxonomies of the characteristics of national law of the world's states become pertinent to global governance. In the case of Latin America, the hegemonic images of Europeanness and legal failure quickly come to the fore. They play a direct role in global legal standing, and thus the likely deference paid to national institutions of Latin American states.

In this connection, it is notable that neither Latin American fiction has a singular valence, per se. That is, they do not cut just one way. Both can serve to either upgrade or downgrade local law – depending on how and in which context they are used. For the most part, however, the designation of Europeanness reinforces the legal system. It stands for the soundness of the national laws and legal institutions in the region. The Latin American versions are just like Europe, as this reasoning goes. As such, Latin American law is of a piece with the law of civilized developed states. Nonetheless, the fiction of legal Europeanness can also serve to delegitimate national law in Latin America in certain contexts. It may serve to point out the extraordinary gap between law and society, the control of elites over law, the mindless copying of Latin American law making. The written law may be

European, but local society is not. As such, it can easily become an element of the legal failure narrative, if not completely subsumed within it.

Legal failure can also cut either way. It can serve as a radical critique, which is most commonly the case. The noted defects are such, however, that no type of legal reform can undo them. The limitations emphasized are intrinsic to all systems of law, in the global North and the global South. This is because they are ideals whose operationalization is humanly unattainable. They require operations that simply cannot be technically performed. Perceptibly successful legal systems would require performing feats such as objectivity in legal interpretation, the neutrality of legal rules, the determinateness of legal outcomes, 360° judicial independence, an unremarkable gap between law and society, the efficiency of legal rules and institutions, and a few other elements, characteristic of so-called liberal legal systems or the rule of law. These requirements cannot be satisfactorily achieved by any kind of mechanical law reform. There is no law-and-development project, legal transplant, or institutional redesign that can achieve these results, to the satisfaction of any determined critic. The unachievement of the rule of law's defining elements are, paradoxically, endemic limitations of what we know as Western law, in no way confined to Latin America.

As such, systemic critiques that draw on the unaccomplishment of these liberal legal goals are always available to those who wish to brandish them. Their salience in any given context is largely instrumental and rhetorical. They serve as an all-purpose, practically irrebuttable catalyst for reform, as political leverage to make changes in the legal system. They can, as such, serve as the basis for either revolutionary change – in extreme cases given the right political conditions – or simply to argue for reform. Denunciations of legal failure can usher in a new piece of legislation, institutional form, or economic policy implemented through law. Indeed, it is a common discursive strategy to advocate for legal reform in Latin America. Of course, such simple reform will not ultimately change the underlying and pervasive diagnoses of failure. That diagnosis will subsequently become available again for yet another round of legal-failure driven arguments for reform.

The legal failure narrative may, nonetheless, be marshaled in a different way. It can be surprisingly turned into a defense of the existing legal system. After a period of legal reforms, the legal failure diagnosis that preceded it may be highlighted to show an improvement. The changes made would then demonstrate governmental attention to and investment in the legal system. If subsequent success cannot be definitively shown – which will surely be the case – the existence of the mere reform effort may nonetheless improve perceptions of the legal system in question. At a minimum, the failures cum incipient reforms can be pointed to as a sign of change.

In short, even though these hegemonic fictions do not cut just one way, they do have an overall predominant effect. On balance, they mostly work to undermine Latin America's global legal standing. They unjustifiably downgrade Latin American law. This is the case despite their outward appearance as merely uncontroversial

background descriptions. This is not a strictly quantifiable claim. Rather, it is the palpable sense based on the many reported experiences of legal scholars, diplomats, and lawyers in the region. It is also correlated to the bulk of academic writing, statistical indicators, and popular perception. Highlighting the ideas of Europeanness and legal failure typically downgrades the policies and objectives associated with those national laws. Their general appraisal in any concrete setting then occurs less likely on the merits. Rather, they may be more easily dismissed out of hand because they hail from either a derivative or failing legal system, or both.

These comparative legal fictions may also be marshaled for tactical advantage in private controversies. They can serve the particular interests of individual parties. This occurs whenever comparative legal information is required in an adjudicative setting. The Latin American fictions provide the ready evidence. As a result, they are the most authoritative in contexts where the burden of proof depends on majority opinion, such as requirements of a preponderance of the evidence. These fictions serve as the most conventional information on legal systems in the region. Private litigants may thus deploy one or another of these accounts to prevail on a particular issue. Neither can satisfactorily address the underlying legal question raised. Instead, they serve as an obfuscating haze behind which these high-stakes decisions are made. Nonetheless, this is the evidence upon which they are commonly based.

As such, private parties greatly benefit from their tactical use, in US courts and international arbitral tribunals. In Chapter 4 of this book, I identify three settings within different types of legal processes where the question of national legal quality is paramount. In cases pertaining to Latin America, the legal fictions quickly surface. Again, their impact is not one directional. They can be marshaled either to upgrade or downgrade the adequacy of law in Latin America. Overall, however, the legal failure narrative mostly undermines national legal institutions. Europeanness mostly works the other way. It generally legitimates the normality of the law and institutions in place. However, given the untenability of either of these accounts as reliable appraisals of law in the region, decisions based on them stand on quite shaky ground.

In the pages ahead, I critique the Latin American legal fictions, particularly as they circulate in the global North. By relying on the term "fiction," I do not mean to suggest that there is – as its opposite – objective fact that needs no interpretation. The contrast to these fictions – at least the way that I mean them – is not objective truth. It is, admittedly, an alternative interpretation. From the perspective of critics, this alternative interpretation may be likened to simply just a different fiction. Certainly, any general description is inherently a construction of its creator, either more or less persuasive. The significant difference with my critique here – as opposed to the classic Latin American legal fictions – is that it is not hegemonic. It has not crystallized into unquestioned convention nor does it claim to offer some unquestionable empirical evidence. Moreover, it does not – at least for

now – facilitate the kinds of political and economic positions that the prevailing Latin American fictions do.

Thus, my argument is not against all fictions or all generalizations, in all cases. In large part, interpretive fictions are our normal experience of the world around us. The point is, rather, that these particular fictions on Latin American law, at this point in time, are unjustifiably misleading and unnecessarily damaging. They curtail the more equal participation of Latin American states in global governance. They undermine the rule of law in Latin American countries. And, they can be easily manipulated for tactical gain in transnational litigation and international arbitration. No less important, they establish the obligatory starting points in the academic field of Latin American legal studies. They are, in this way, automatically reproduced and, in many cases, unwittingly reinforced.

The hegemony of these fictions – meaning their relatively unquestioned acceptance – leads me to refer to them as a type of ideology. They are so ingrained that they are repeatedly reproduced despite the available contrary evidence. This is the main sense that I attribute to the term ideology. It is not intended to mean a false belief that masks objective truth. It is just an entrenched notion, quite impervious to change despite its obvious artificiality. For these reasons, I refer to legal Europeanness and legal failure as fictions, narratives, and ideologies interchangeably – depending on their context in the discussion that follows.

My approach here is, notably, not to trace the earliest origins of these ideas. This is not a search for the first time these fictions appeared in known history. Rather, the emphasis is on where they have had the most traction. Stressing *these* ideas about Latin America at particular times, instead of other ideas, has consequences. Some of them are political and economic in nature. Sometimes, they validate the positions assumed by Latin American legal institutions, courts, and legislators. Other times, they delegitimate them. On balance, they mostly place Latin American countries at a geopolitical disadvantage. In private party litigation and arbitration, it is not so one-way. The fictions may just as likely be aligned to legitimate Latin American legal systems and extend comity. The individual stakes of specific cases must thus be examined separately. A few examples are laid out in detail in Chapter 4.

In sum, the book challenges the validity of the dominant representations of Latin American law. It criticizes their constitutive elements. And, it condemns their mostly harmful consequences. Once these fictions are better understood, it may be possible to analyze and debate legal developments in Latin America in a more realistic way. To that end, the argument here is addressed to legal comparativists, law-and-development professionals, social scientists interested in law, and observers of Latin America in general. But, it is also relevant to ordinary Latin Americans in relation to the operation of their own legal systems. It reveals the interests that these fictions serve. As already noted, they each work to facilitate legal changes, albeit in different ways. They both provide evidence on the quality of Latin American legal systems in judicial and arbitral decision-making. And, they both come with

substantial societal and global political costs. Costs that, more so than not, diminish the system of legality *in Latin America*.

I. COMPARATIVE LEGAL IDEAS

A study of foreign legal systems, like this one on Latin America, automatically suggests an exercise in comparative law. And, in large part, this is. However, the objective here is not to describe specific legal rules or their operation in any one country, much less in all countries of the region. Latin America is comprised of some twenty nations. Any meaningful analysis of their laws must surely be country specific, if not more detailed. Moreover, legal forms and their operation vary across countries. Even identical laws differ when interpreted in different places. National legal institutions function in quite particular ways. And, the legal politics in specific countries respond to diverse political and economic interests that play out locally in different ways. All of this is surely the case. Thus, my approach here does not claim to be an exhaustive study of all the law in all of Latin America. How could it be? It is also not a refutation, once and for all, that Latin American law is neither European nor failed, based on some new incontrovertible empirical evidence. Rather, it is a critique of the constituent elements of the two dominant characterizations – the fictions – continuingly in place.

Comparative legal knowledge circulates at this level of general ideas, and not only micro-level facts about legislation or societies. Indeed, the academic discipline of comparative law has a long history of producing classifications based on broad generalizations. Its practitioners frequently classify the world's legal systems based on one or two organizing ideas. For example, openly recognized judicial-law making usually counts as a mark of a "common law" system. Comprehensive codification of private law normally signifies a "civilian" legal system. And, both are considered "Western" law because of the prevalence of market economies and liberal legal principles. Alternatively, classifications may stress the difference between developed and underdeveloped legal systems. They may highlight the role of faith or political economy in the law. They may rank the relative quality of specific laws or their performance. This type of comparative legal knowledge also does concrete work in the world. It is not only the substantive legal rules that matter. Rather, dominant ideas at the level of framing and classification also have significant effects. Classifications, legal families, and other groupings become more than simple heuristic frameworks. They are not just an academic convention or pedagogical device. Rather, they can have practical local and international consequences, and they can be mobilized in a number of ways with real-life stakes. I will repeatedly refer back to these thoughts as I proceed.

As regards Latin America, traditional comparativists have commonly approached the various systems of national law in regional terms. They generalize about law in the region as if it could be described and understood as pretty much the same

throughout all of the region. Indeed, both traditional comparative law scholars and legal development specialists have usually understood it this way. Their typical observations describe features of one national law as characteristic or representative of the region as a whole. As such, all of Latin America comes to be seen as European: not just Argentina and Costa Rica but also Peru and Bolivia. Leave aside for now that the Europeanness of Argentina and Costa Rica is also an instrumental construction. Additionally, for legal developmentalists, all of Latin America suffers from failed law: not just Ecuador and Nicaragua but also Chile and Mexico. Again, leave aside that legal failure in Ecuador and Nicaragua is also instrumental.

The critiques in this book, in consequence, operate at this same regional level. This is not because national law in Latin America is best understood as a regional phenomenon, rather it is because the dominant characterizations of these national legal systems have in the past been regional in scope. Thus, the critiques here track those purportedly regional characteristics. I challenge the constituent elements of this "Latin American law" and show the effects of such dominant constructions.

Overgeneralization from one country to the region as a whole is, quite obviously, part of the problem. Yet, it is not the singular error. The difficulties extend well beyond that. For example, belief that empirical data can definitively provide systemic assessments is another illusion. Even if comprehensive information could be fully counted, it would not uncontroversially produce value-neutral assessment or classification. In any case, the various faulty analyses and instrumental perspectives that make up the dominant fictions of Latin American law are described in more detail ahead.

A. *Legal Consciousness*

The discussion here highlights the relevance of legal consciousness to our understanding of law. This term refers to the notion that what individuals *think* about the law is important. It is not just the legal rules, the institutions, and the procedures that matter. It is what meaning legal actors make of these materials. There is not only one way to make sense of legal texts. It may be different from how it is conceptualized elsewhere, even different from parent or donor jurisdictions of legal transplants. The mental constructs, principal ideas, and modes of reasoning are key to the operation of the legal system. And, these elements are not universal even if local legal actors use the same outward language or legal forms as somewhere else. This realm – thus referred to as legal consciousness – is certainly most relevant in the minds of legal scholars and official legal actors. But, it also transcends to the larger community as a whole. How legal concepts are elaborated and marshaled extends to the entire society.

A quick way to explain legal consciousness is by reference to probably the most famous case in US legal history. The US Supreme Court decision in the 1905 case of *Lochner* v. *New York* struck down an operating hours regulation for bakeries, based