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Abstract

Based on governance-related criteria, this article provides the empirical jurimetric verification of the how, where, when and why alternative dispute resolution (ADR) mechanisms provide efficiency enhancing channels to redress grievances in less developed countries. Based on data collected in 16 developing jurisdictions through a representative sample of poor rural households, the analyses contained in this paper identifies criteria within which ADR enjoys a comparative advantage over court-based formal dispute resolution procedures. The piece further addresses comparative and competitive aspects of formal versus informal dispute resolution and provides policy recommendations in order for the state to “assimilate” lessons drawn from the functioning of informal mechanisms. © 2005 Elsevier Inc. All rights reserved.

Keywords: Empirical assessment; Informal dispute resolution; Poverty

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1. Introduction

Democracy functions as a system in which formal and informal institutions serve the purpose of translating social preferences into public policies. Dispute resolution mechanisms are among these institutions. Enhancing the effectiveness of these mechanisms enables the judicial domain to better address social preferences through public policy. An essential part of the process of improving the ability of dispute resolution to perform this function involves ensuring that the institutions responsible for the interpretation and application of laws are able to serve those people who cannot find any other way to redress their grievances and solve their conflicts.

To minimize cultural, socio-economic, geographic and political impediments to access to its services, the judiciary must adopt the most effective substantive and procedural mechanisms for reducing the transaction costs faced by those seeking to resolve their conflicts. If barriers to the judicial system affect the socially marginalized and poorest segments of the population, one can anticipate greater social and political conflict, social interaction becomes more difficult, and disputes become more costly.

It has become clear that a centralized “top-down” approach to law making in developing countries has resulted in a rejection of the formal legal systems by marginalized elements of the population. These people perceive themselves as “divorced” from the formal framework of public institutions. The “divorce” reflects the gap between “law in the books” and “law in action” found in most developing countries. Because of this gap, large segments of the population who lack the information or resources to surmount significant substantive and procedural barriers pursue informal means to redress their grievances. In practice, informal institutions provide an escape valve for certain types of conflicts. Yet many other types of disputes, some involving fundamental rights and the public interest, go unresolved. This state of affairs undermines the legitimacy of the state, hampers economic interactions, and disproportionately burdens the poorest segments of the population.

This paper uses jurimetric analysis to identify the links between access to dispute resolution mechanisms and its impact on the poorest segments of the population of three legal jurisdictions in Colombia. It then assesses the parallels between the economic barriers to access conflict resolution in Colombia with similar data collected in sixteen other countries. We proceed as follows. We first provide a conceptual framework addressing the
interaction between formal and informal institutions dedicated to providing this service. We then review general aspects of the Latin American dispute resolution system to provide a context for our case study. We examine three cases that offer insights on the patterns of demand for formal and informal dispute resolution. These involve survey samples of the rural population in Colombia’s Andean region, where 70% of the nation’s population lives. We select two rural areas within the Department of Boyaca, Pauna and San Pablo de Borbur. These two jurisdictions have experienced relatively low levels of violence and guerilla activity compared to the rest of the Andean region. We compare these two regions to a third rural jurisdiction in Socha (Colombia), where less violence than other regions is experienced but where neither formal nor informal dispute resolution mechanisms function effectively.

We then develop substantial evidence supporting our hypothesis that, in relation to the formal court system, informal dispute resolution mechanisms are a relatively preferred choice to resolve land disputes due to their governance-related advantages such as lower average costs of access and their more positive effect on household wealth amongst the poorest segments of the rural population.

2. Conceptual framework: formal and informal dispute resolution

A conceptual framework addressing the factors explaining the users’ choice for a specific type of dispute resolution mechanism must first identify the expected benefits derived from the use of such mechanism. The benefits derived from a dispute resolution mechanism fall into three distinct, if interrelated, categories, namely: ex ante guidance, unbiased determination of the disputants’ interests, and reinforcement of assigned rights and obligations. The users’ subjective valuation of these benefits and costs of dispute resolution is key to understanding users’ choices. We now discuss each of the benefits in turn.

One might think of only common-law judicial systems as providing much ex ante guidance. Such a view, however, rests on too narrow a conception of the guiding function of dispute resolution. Whatever the source of positive law, whether legislative enactment, administrative decree, or judicial opinion, a mechanism that applies that law to a given conflict signals that the law has meaning, in the sense that compliance with its requirements brings benefits, and flouting them brings costs. To the extent that the decisions of dispute resolvers are observable and consistent, they also provide information about the content of that body of law that has consequences. Opinion-writing and the doctrine of stare decisis, the defining characteristics of a common-law system, may increase the quantity and quality of this good, but all dispute-resolution systems generate valuable information in exact relation to the observability and consistency of their actions.

Two aspects of this ex ante guidance function deserve particular attention. First, the principal impact of a system that generates substantial guidance information is the deterrence of disputes. To the extent that violations of legal rules entail costs and that people understand the likely consequences of their actions, fewer violations will occur. To the extent the system provides additional information about the content of legal rules, people will have fewer occasions to dispute their interests. Thus, somewhat paradoxically, one of the benefits a dispute resolution system can provide consists in reducing the demand for its services.
Second, the ex ante guidance that a dispute resolution process generates has the characteristics of a public good. It is both nonrivalrous and nonexclusive. As is generally true of information products, consumption of ex ante dispute resolution information by one user does not interfere with consumption by another (although it may affect the value of that consumption due to network effects). Moreover, the observability of the process by definition requires the non-excludability of this information. These characteristics imply that collective provision of dispute resolution is more efficient than purely private processes, due to free rider problems. It does not follow, however, that the state necessarily must be the agent of collective provision.

2.1. Unbiased determination of the disputant’s interests

It means that dispute resolution mechanisms will not take into account irrelevant considerations outside the applicable law and facts linked to the dispute, such as the wealth status of the litigants, political ties, or in the most extreme case, bribes. In other words, an unbiased determination of the disputants’ interests implies the absence of abuses of procedural and/or substantive discretion among those in charge of providing a conflict resolution service (e.g. judge or mediator).

Unbiased determination is related to, but distinct from, ex ante guidance. A tribunal that keeps its decisions secret and provides no basis for predicting its decisions still could decide disputes based on unbiased, if undisclosed, criteria. Conversely, a tribunal that predictably relies on abuses of substantive or procedural discretion provides useful (if deplorable) ex ante information about its likely behavior.

2.2. Reinforcement

Reinforcement occurs to the extent that the dispute resolution process leads to the investment of resources to reward persons who adhere to rules and norms and to punish those who do not. Unless dispute resolution produces consequences, the value of ex ante guidance and an unbiased determination, and hence the demand for these qualities, will be minimal. Consequences can run the gamut from capital punishment (used in formal dispute resolution systems largely to uphold certain public norms, and in private systems as a low-cost if somewhat crude incentive) to social ostracization and other forms of shaming. The value of reinforcement depends on both the significance of the resources employed and the speed of their deployment.

Each of these benefits comes with accompanying costs. It is useful to think of ex ante guidance as a form of bonding, which makes the future more predictable at the cost of flexibility in the face of new information. In environments where people interact under conditions of uncertainty, they may prefer that disputes be resolved in an unbiased manner. Similarly, too great an insistence on a predictable determination of disputes by judges may preclude the dispute resolver from acting on useful new types of

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information. For example, the old English rule of evidence that forbade interested parties from testifying deprived the court of valuable knowledge about the matter in dispute. Finally, reinforcement of rules is costly, both because of the direct consumption of resources and because of the indirect deterrence of activity that might be confused with law violations.\(^{11}\)

The supply dynamics of dispute resolution is somewhat more complex. Unbiased determination and reinforcement can be structured as nonpublic goods. People who wish to obtain only these services can obtain private dispute resolution, either by pre-commitment in advance of disputes or after a conflict has arisen. But one would expect to find less ex ante contracting for private dispute resolution among poorer populations, especially if the kinds of disputes such groups encounter are infrequent or calamitous. The ability of the poor to organize private dispute resolution after conflicts arise will turn on structural factors such as the homogeneity and durability of the community to which the disputants belong, the existence of niche groups that can provide dispute resolution services (e.g. village elders, religious leaders, school teachers), and the ability of the community to impose symmetrical sanctions on the disputants. These conditions are found within two of the three Colombian legal jurisdictions presented below.

There are other reasons, however, for public provision of dispute resolution. As noted above, attaining an effective level of ex ante guidance is more likely where there is some kind of collective production. The association between state power and dispute resolution is conventional today, but other forms have existed throughout history as well as in contemporary contexts.\(^{12}\) An example from history is the dispute resolution bodies associated with trade fairs in medieval Europe. A more modern example involves internal discipline within ethnically homogenous middlemen groups.\(^{13}\) What these non-state collective production mechanisms have in common is some kind of monopoly power that permits the levying of charges that compensate for the provision of the ex ante guidance aspect of dispute resolution. The trade fairs offered superior, if not monopolistic, exchanges; the ethnically homogenous middlemen exercise control over access to the benefits of group membership.

Dispute resolution, whether state or non-state, can also function as a means of extracting rents.\(^{14}\) The corrupt or lazy judge is a caricature encountered throughout history and in many different cultures. The judge who serves some master, whether the national government or class or local interests, also is a familiar figure. These archetypes reflect a


\(^{13}\) Id.

simple lesson from economic science: monopoly power, exempted from either effective internal or external controls, is susceptible to abuse. When the state exercises and protects a monopoly over dispute resolution, the abuses exemplify the kinds of behaviors that the public choice literature has extensively documented. When some non-state body possesses a similar monopoly and has the capacity to suppress competition, rent-seeking also should be expected.

In many developing countries, rent-seeking with regard to the state dispute resolution system plays a factor in explaining poor public governance coupled with the consequent lack of state legitimacy and poor economic performance. Judges may act as toadies to local plutocrats, whether official or informal, or sell their services to the highest bidder. Alternatively, they may collect their rents in the form of shirking, investing no effort in their tasks, allowing disputes to linger unresolved for lengthy periods, or making no effort to follow through on the enforcement of their determinations. These conditions are all present within the three Colombian court jurisdictions sampled for this paper. All these behaviors may reduce social welfare but serve the interests of judges or other organized crime groups.

The configuration, which we suspect is prevalent in many legal jurisdictions within the developing world and which we document in the Colombia case study presented in our next section, involves the absence of any functional state dispute-resolution services. In these instances, the state either may fail to exercise effective control over certain parts of its society (parts that may have either a territorial or a socio-economic dimension), it may price its dispute resolution services at a level that excludes impoverished consumers, or it may provide such inadequate services (tolerating shirking and incompetence that leads to extensive delays and ineffective enforcement) that for practical purposes dispute resolution becomes unavailable. In these circumstances, we predict that informal dispute resolution will arise, organized on the basis of whatever existing social structure can provide this service most efficiently.

3. Case study: empirical analysis of formal versus informal dispute resolution institutions

Most of the legal systems found in Latin America today were designed in the 19th century within the general framework of the Napoleonic model that emphasized parliamentary lawmaking. A top-down and centralized approach to lawmaking thus become the foundation of the legal systems of these countries, including that of Colombia, and remains a defining characteristic of the contemporary legal environment in the region. This institutional legal framework has shown only limited capacity to translate the law

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on the books into “law in action” for purposes of dispute resolution. Excessive procedural formalism and administrative complexity block the filing and resolution of relatively simple cases, such as land title disputes and alimony claims brought by the socially and economically weakest segments of the population. The failure of the public judicial system to satisfy the public’s demand for dispute resolution services is clearly documented.

The claim that Latin America’s judicial sector is ill prepared to foster private-sector development within a market economic system also has been documented. The most basic elements of an effective judicial system are absent. These include: (a) predictable judicial discretion applied to rulings; (b) feasibility of access to the courts on the part of the general population regardless of income level; (c) disposition within a reasonable time; and (d) adequate remedies. Increases in delays, backlogs and uncertainty associated with expected judicial outcomes have hampered access to justice and diminished the quality of court services throughout most of the region. Colombia is no exception to this pernicious pattern.

The links between access to justice and poverty have received only limited attention. Some authors describe how the poorest elements of society face significant institutional disadvantages with respect to access to justice. This paper employs a methodology, based on sampling the poorest segments of Colombia’s rural population, which has the capacity to determine the nature of the links between access to justice and poverty. The same methodology can be used with respect urban and rural areas within other countries.

The rural population of Colombia accounts for 76.5% of those living in poverty. Government statistics indicate that 67% of the land devoted to productive purposes in the Andean rural region, where 71% of Colombians reside, has a size equal to 5 hectares (ha) or less. Furthermore, 68% of those working these small plots are considered “poor” or “extremely

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20 Id.


22 Id. at pp. 178–179.

23 This paper, which is part of a larger seventeen-country study, continues this perspective and defines access to justice as the capacity of a citizen or a legal person, backed by its legally and factually justified motivations, to obtain conflict resolution services either through public or private mechanisms. For more details on the seventeen country study, refer to Buscaglia (2000) supra note 15. On access to justice and ADR, refer to Spain, Larry. (1994). Alternative dispute resolution for the poor: is it an alternative? North Dakota Law Review, 70, 234–241;

poor” according to these statistics. Yet one finds that this rural segment accounts for just 1.6% of the total number of claims seeking to resolve civil disputes through formal court services. Forty-four percent of these civil disputes involve land-title-related issues and 35% involves family-related cases. It seems clear that a latent demand for dispute resolution services exists, to which the public sector does not adequately respond.

As part of our investigation, two similar surveys of 4500 rural households each were conducted in three municipal jurisdictions (Pauna, San Pablo de Borbur, and Socha) in the Department of Boyaca, the first in 1998 and the second one in 2000. The results of these two similar surveys were later compared for the purposes of our analysis contained below. Each of the geographic jurisdictions sampled in both occasions is similar from a socio-economic standpoint (i.e. income levels, patterns of trade and economic activity, age distribution, gender composition, etc.) Moreover, the level of organized violence (kidnappings, assassinations and drug trafficking) are similar in each jurisdiction and fall below the national average for Colombia.

The problem of measuring poverty is extremely complex due to many inter-disciplinary-related factors within the sociological, political, psychological, ethnic, and economic domains among others. Moreover, poverty is not a homogenous concept and each of the different types of vulnerabilities of social groups must be studied and addressed in a different fashion. Our focus here is on the poorest segments of the rural population attached to imperfectly titled land used for productive purposes. We classify poverty in terms of a household’s net worth. Net worth is measured in an objective manner by calculating, as part of the survey, the value of households’ land value net of liabilities. The net worth calculations also take into account gains and loses for both parties in the sampled disputes.

Through our two 1998 and 2000 surveys, we compare the net worth of these households (i.e. households within the bottom 20% of the regional socio-economic range) before and after their access to formal and/or informal conflict resolution mechanisms in cases dealing with land title disputes. As noted above, these are the most common types of cases affecting the poor in the region covered by our sample. We then seek evidence of how and why dispute resolution mechanisms affect the average household’s net worth thus building a link to poverty levels.

In each of the 4500 households, the survey focuses on the female and male members separately, making the size of the sample equal to 7956 individuals. This represents between 3 and 5% of each jurisdiction’s total population, randomly selected and

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27 A local Colombian interdisciplinary team conducted the two surveys, with support from the Universidad del Rosario. The first survey was conducted during the period August 1998 to March 1999 and the second survey was conducted during the period August 2000 to January 2001.
30 A recent study showed that 79.4% of the small plots suffer from some kind of title-related survey defect. Instituto Geografico Agustin Codazzi (GAC). (2000). Subdireccion de Geografia, Division de Estudios Geograficos Basicos.
Within our sample, 3.7% of those interviewed showed proof that they had attempted to access formal court-provided civil dispute resolution mechanisms (compared to 4.9% of the same segment of the population in urban areas nationwide), while just 0.2% of the sampled households (9 out of 4500) reported that they had obtained some kind of final resolution to their land dispute through the court system. We also found that 91% of those seeking court services during the period 1998–1999 were within the upper range of net worth, while just 9% of court users were in the lowest 10% range of measurable net worth within the region.

In contrast to the weak demand for court services, 8% of those interviewed in 1998 and 7.5% of those interviewed in 2000 provided specific information about their use of community-based informal dispute resolution mechanisms (mostly neighborhood councils and complaint panels) while all reported that they had obtained some kind of final resolution to their land title dispute. The numbers in this and the previous paragraph indicate a significant gap in usage and effectiveness between the formal and informal dispute resolution mechanisms that needs to be addressed.

The informal dispute resolution mechanisms in our three sampled jurisdictions are known as Complaint Boards or Panels. The Complaint Board or Panel is composed in each case of three “prominent local residents” selected by a Neighborhood Council (*Parroquias Vecinales*). They enjoy a high level of popular legitimacy and firmly stick to socially accepted uses and customs. Although the decision of a Board is not legally binding, they do receive tacit support from municipal authorities. For example, Property Registries within the municipal governments of these three regions expressly refer to the Boards’ findings to substantiate their own rulings. This behavior indicates the local governments’ recognition of the Boards’ legitimacy. Board decisions are not appealed, and informal social control

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31 The samples were designed to allow for a 1.5% margin of error and estimates with a 95% confidence level.
33 For Chart 1, the survey question reads as follows: Do you and/or your family experienced any geographic, cultural, informational, economic, or any other barrier impeding your access to the following public services: water, electricity, gas, health, housing, education, trash removal, private property registries, police, prosecutors and the courts. The survey question linked to Chart 2 follows the survey question for Chart 1 and reads as follows. Please identify the obstacles you face in accessing the courts from the list below (the list is contained in Chart 2). Chart 3 is generated from the replies to the same survey question used for Chart 1.
mechanisms usually effectively provide their enforcement, thus generating the much needed reinforcement effect benefit explained in the previous section.\textsuperscript{35}

Based on the two surveys described above, we generated a large number of indicators measuring access to public institutions. Chart 1 measures the proportion of the rural population within the three departments that report having no access to the most basic levels of public health, education, and justice (specific survey questions are quoted in footnotes below).\textsuperscript{36} We also can observe that in these three regions the level of public dissatisfaction with state services is well above the national average.

Chart 1 indicates that between 71 and 88\% of the sampled households in the three jurisdictions report that they lack access to the formal systems of police, prosecutors, and the courts. Lack of access to public services includes water, electricity, gas, health, housing, education, trash removal, and private property registries. Chart 2 shows the most important obstacles to this access.

Chart 2 shows a clear pattern of uncertainty among those households classified as court users due to lack of legal information (as reported by 66\% of respondents). Economic factors impeding access to justice also appear in our survey. Forty-two percent of court users consider the costs of representation to be an obstacle, and 21\% consider it the main obstacle. Moreover, the fear of abuse of authority on the part of the most unprotected segments of the population also appears. Nineteen percent of the households report this as an obstacle, although only 5\% see it as the main obstacle. Finally, 31\% report a perception of corrupt practices as an impediment to justice, with 21\% considering this the main obstacle to access to justice.

If one disaggregates the numbers even further, it is also possible to find a clear gender gap among those households that fall within the bottom 20\% of net worth, calculated regionally.

An interesting aspect of these observations is that the reasons given for lack of access (lack of information about initial procedures, high costs, delays, fear of authority-corruption, and long distances to courts) show no significant difference according to sex. Yet, as Chart 3 demonstrates, the gender gap with respect to access to justice seems substantial. These findings provide ample reasons for the observed rural households’ choice of approaching informal dispute resolution mechanisms with a relative and significant higher frequency in cases of title-related land disputes.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
 & Serious Obstacle & Main Obstacle \\
\hline
Information on rights and obligations & 66\% & 24\% \\
Information on the initiation of proceedings & 44 & 22 \\
Corrupt practices & 31 & 21 \\
Direct costs (lawyers and court fees) & 42 & 11 \\
Delay & 39 & 15 \\
Fear of abuse of authority & 19 & 5 \\
Geographical access & 9 & 2 \\
\hline
\end{tabular}
\caption{Obstacles to court access (Survey 2000).}\textsuperscript{34}
\end{table}

\textsuperscript{34} Id.
\textsuperscript{35} Id. at p. 23.
\textsuperscript{36} Id. at p. 41.
4. Impact of dispute resolution on rural households’ net worth

As seen above, the judicial system in the surveyed regions has done an inadequate job of providing its dispute resolution service to the population, resulting in a turn to informal mechanisms. A gradual decline in the public capacity to handle disputes may have a negative impact on the net worth of already poor households. Our survey generated data providing a comparison of the net worth of households that have sought either formal or informal dispute resolution services both in 1998–1999 (before conflict resolution) and in 2000–2001 (after conflict resolution). We focus on those 526 households to determine, through the use of a log regression model, the change in their net worth resulting from the clarification of their title to small plots of land of 5 ha or less. We tend to conclude that increases in net worth are mainly due to the increases in real estate values linked to higher levels of investment after land tenure is formalized.

The results shown on Chart 4 are not based on a one-shot survey. A local Colombian interdisciplinary team conducted two surveys, during period 2000–2001. The results of this survey were later compared to a previous similar survey results generated by the same team during the period 1998–1999. Net worth was measured in an objective manner by calculating, as part of the survey, the value of family assets net of liabilities. We used the original sample, which comprises households having the lowest 20% of net worth in the region, in Pauna and San Pablo Borbur. We based the measurement of household net worth on the market value of household land, as reported in the survey according to objective factors.

We then assessed the impact of land disputes on the value of land. We then compared the average annual percentage change in net worth resulting from the receipt of clear title to land through either the formal or informal system. The results are not based on the users’ perceptional valuation or evaluation of matters surveyed but on frequencies of actual occurrences or on market land values.

<table>
<thead>
<tr>
<th></th>
<th>Civil Courts (Indep. Var. 1)</th>
<th>Complaint Board (Indep. Var. 1)</th>
<th>Socha</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lowest 15-20 percent</td>
<td>3.4 [3.24]</td>
<td>5.2 [3.10]</td>
<td>0.2 [3.79]</td>
</tr>
<tr>
<td>Lowest 5-10 percent</td>
<td>-2.9 [-2.93]</td>
<td>9.1 [1.50]</td>
<td>-0.3 [-3.28]</td>
</tr>
<tr>
<td>Lowest 1-5 percent</td>
<td>-7.8 [-6.43]</td>
<td>10.7 [4.21]</td>
<td>0.1 [2.15]</td>
</tr>
</tbody>
</table>

In order to perform the above tasks, we run a logarithmic regression, one for each of the four income strata within our sample. The regression model’s main hypothesis aims at determining the impact of clarifying land titling on households’ net worth. Two independent variables measure for each household access to conflict resolution through either informal or/and formal mechanisms (independent variables 1 and 2, respectively). A separate independent variable (#3) takes into account the variations in the average market land values within each of the three regions considered. As stated before, the households’ net worth is measured through the percentage change in the market value of the property of those landowners accessing formal and informal dispute resolution mechanisms (dependent variable). A separate log regression was run for the region of Socha where no informal mechanisms could be found at the time of the surveys. Chart 4 therefore shows the log regression coefficients attached to independent variables 1 and 2 that represent percentage changes in net worth. The results shown in Chart 4 also show that the first two independent variables (measuring the utilization of formal and informal dispute resolution mechanisms) have a significant impact on the net worth of the sampled households ($t$ coefficients are in italics within brackets).

From Chart 4, it is possible to compare the impact of civil court litigation (formal mechanism) and Complaint Boards (informal mechanism) on households’ net worth before and after conflict resolution. At first glance, one can observe that the effect of formal civil court proceedings on the poorest segment of household net worth is negative. The poorest households are the least able to bear the delays of the formal court system and sometimes must sell disputed portions of land at discounted prices. In addition, the poorest households are least likely to have access to any meaningful legal assistance. In Chart 4 we see that the poorest segments of our sample have net worth decreases of $-2.9$ and $-7.8$ for the bottom 5–10 and 1–5% segments of households’ net worth respectively. On the other hand, the use of informal mechanisms has a positive impact on households’ net worth that amount to 9.1 and 10.7% increases for the same bottom 5–10 and 1–5% segments of households’ net worth, respectively. For example, this means that a 1% increase in the use of court services among the poorest segment of our sample brings about a 7.8% decrease in their households’ net worth. On the other hand, a 1% increase in the use of informal mechanisms (i.e. Complaint Boards) by the same poorest segment of our households comes with a 10.7% increase in households’ net worth. We also see that the bottom segment of the sample (households within the bottom 1–5% segment of net worth) benefited the most from informal dispute resolution (10.7% increase in their net worth for the bottom poor compared with a 5.2% increase in net worth for the wealthier 15–20 bottom segment net worth households.

The Socha rural region lacks functioning formal or informal mechanisms for its citizens to resolve these types of civil disputes. As a result, the sample of households from Socha does not indicate any significant change in net worth during the same 2-year period.

A closer examination of our qualitative and quantitative data also shows that the impact of dispute resolution mechanisms goes far beyond the usually considered redistributive effects of land disputes. The higher levels of positive changes in households’ net worth among those landowners resolving conflicts through informal mechanisms demonstrate how banishing

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37 All independent variables within the log regression are significant at a 1% level and have been tested to meet all regression requirements, such as testing for lack of multicollinearity and heteroscedasticity.

Chart 5. Comparative analysis of average total costs of access to dispute resol. Mechanisms (as a percent of stakes)
Colombia Survey 2000.

<table>
<thead>
<tr>
<th>Segment</th>
<th>Civil Courts</th>
<th>Comp. Board</th>
<th>Socha</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lowest 1–5 percent</td>
<td>27.6</td>
<td>9</td>
<td>30.4*</td>
</tr>
<tr>
<td>Lowest 5–10 percent</td>
<td>25.7</td>
<td>7</td>
<td>26.2*</td>
</tr>
<tr>
<td>Lowest 10–15 percent</td>
<td>16.1</td>
<td>9.1</td>
<td>18.1*</td>
</tr>
<tr>
<td>Lowest 15–20 percent</td>
<td>11.9</td>
<td>10.7</td>
<td>13.7</td>
</tr>
</tbody>
</table>

Chart 5 further assesses and compares the average total costs faced by users of formal and informal dispute resolution mechanisms. The costs of accessing and obtaining a final resolution from the formal judicial system faced by the poorest segment of the sample (in this case, those households within the lowest 1–5% segment of net worth) equal an average total cost of 27.6% of the market value of the land disputed that is at stake. The average cost decreases for those better off, thus representing a regressive charge on those who have access to the formal system. On the other hand, the informal Complaint Board generates lower average costs (9% of the market value of the land at stake) for those poorest segments of our sample. Yet, the Socha jurisdiction shows the highest average total costs of access and dispute resolution for the two poorest segments of our sample (30.4 and 26.2% of stakes). This is explained by Socha’s lack of informal dispute resolution mechanisms coupled with its highly dysfunctional court system that has the worst court performance within our three jurisdictions with procedural times for land disputes lasting an average of 3.5 years.

Graph 1 applies the same average total cost analysis to a sample of developing countries’ dispute resolution mechanisms. On the vertical axis, we calculate a simple index measuring the number and diversity of available dispute resolution mechanisms applied to land disputes within a sample of rural jurisdictions in seventeen countries, including Colombia. We observe that countries with greater number and diversity of dispute resolution mechanisms

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38 Average total costs include direct costs linked to user charges (e.g. court fees), attorney fees, fees paid to technical professionals (e.g. surveyors), administrative fees, reported bribes, and other direct costs linked to procedural delays. One of our referees observes that “for every complainant that benefits, someone else loses out. Perhaps the point is that the losers are not among the poorest groups, so that the welfare loss is to be given less weight.” Our net worth calculations, however, include the net worth of both parties in the samples land disputes and demonstrate the regressive nature of both direct costs of the formal dispute resolution process and that system’s impact on household wealth.

39 In earlier work on dispute resolution by business executives pioneered in the late 1960s and early 1970s by Macaulay, Beale, and Dugdale, the use of informal remedies in business disputes was found to be not only the most common approach but also the least costly. Refer to Buscaglia, Edgardo. (1997). Introduction to law and economics of development. In Edgardo Buscaglia, William Ratliff, and Robert Cooter (Eds.), Law and economics of development (pp. 34–39). New Jersey: JAI Press.

40 The data covering number and diversity of dispute resolution mechanisms covering seventeen countries is part of a project conducted at the International Law and Economic Development Center (University of Virginia School of Law). Other variables, such as average total costs of access and resolution of land disputes, abuses of judicial discretion, and procedural times were all derived as part of a jurimetric study in progress. Supra note 15 at pp. 39–45.
applied to land title disputes (e.g. Honduras and Bolivia) are ranked with a higher index in terms of possessing a greater number of available dispute resolution mechanisms for land disputes. Conducting similar calculation of average costs linked to the resolution of land disputes in each of these countries, one can observe that countries with a greater number of dispute resolution mechanisms also experience lower average total costs of conflict resolution than other countries (such as Mozambique, Benin, and South Africa) where dispute resolution alternatives are scarcer in cases of land disputes. Graph 1 thus provides an international jurimetric analysis confirming the positive impact on users’ costs of a greater availability of dispute resolution mechanisms. Our international average total cost analysis in Graph 1 also provides a parallel with the results of the Colombian survey shown on Chart 5 above where lower average total costs of dispute resolution are also experienced within those jurisdictions where a greater number of informal dispute resolution mechanisms are present.

Graph 1

In accordance with the replies provided to our surveys, it is important to point out that the relatively more frequent selection of the informal mechanisms to resolve land disputes (and the consequent relative rejection of the formal court system) is not linked to the aim of avoiding the predictability of the formal dispute resolution system (as one would expect in an developed institutional environment) but, as described in our next section and based on Chart 2, it is more linked to the lower average total costs of the informal mechanisms. According to our Colombia data supported by Buscaglia’s (2000) international data shown in Graph 1, the more frequent users’ choice for alternative dispute resolution mechanisms is mainly explained by several comparative advantages of the informal system in relation to the court system, such as the greater simplification of its procedural aspects, lower attorney and other professionals’ fees, lower costs associated to acquiring information, greater procedural transparency, and less corruption than the one experienced within the formal court domain.

One should recognize the limitations of informal mechanisms, especially with respect to the types of cases susceptible to this procedure. It is also true that these informal mechanisms have a role in resolving disputes that are low value and that seldom raise important legal issues that ought to be socially resolved in a definitive manner. For example, courts in Latin American have used conciliation procedures for family cases, especially those involving
divorce and alimony, and labor disputes. But when a case implicates matters where the public interest is at stake and where, consequently, ex ante guidance is required (e.g. civil and political liberties cases), it becomes more difficult for an informal mechanism to supply a “public good” composed of much needed jurisprudence and doctrine.

5. Institutional aspects of formal and informal systems

Previous studies have indicated that complaint boards represent a socially popular and useful mechanism in institutionally isolated regions where the state has little or no presence. Because of their composition, they enjoy a high level of popular legitimacy. These informal mechanisms have demonstrated their potential to expand the market for dispute resolution and to enable disputants to seek solutions that better reflect regional social norms and practices. For example, the Colombian Boards provide a flexible process of negotiation for the conflicting parties. The disputants begin to address each other’s point of view and identify common interests at stake. At the same time, a Board member often will propose a range of possible solutions to their conflict. If after an interval between four and ten days the parties do not reach an agreement, then they can select a third party to determine the facts of the case to reach a final decision. This decision can be either binding or not, depending on what the parties agree to in advance. A binding decision avoids further proceedings and reduces conflict-related costs, while a non-binding decision has the advantage of providing a model that might guide the parties closer to an agreement. One could describe this process as a “mediation–arbitration combo” where a panel comprising prestigious volunteers chosen from neighborhood councils provides informal conflict resolution services to community members. In many cases, these informal mechanisms supplement the formal system of justices.

This type of conflict resolution mechanism has become increasingly popular in Colombia’s rural areas. There are accounts of the FARC guerillas adopting them to gain legitimacy with the population. Our survey shows that 61% of the sampled households perceive that informal systems offer ways to surmount the delays and uncertainty associated with the formal judicial system. In some cases, the disadvantages of litigation may provide compelling reasons for choosing the informal mechanism.

A review of our survey results finds confirmation of the observations made elsewhere in the literature regarding alternative methods of dispute resolutions. The results of our objective data analysis (e.g. based on net worth and average costs) is compatible with the opinion survey results in indicating several governance-related advantages of informal mechanisms vis a vis the formal courts, such as:

(1) A relatively wider access of marginalized groups to informal frameworks that permits a solution to their conflicts to emerge through a participatory consensual approach (81% of respondents agree with the results of our objective sample data analysis).

41 Spain (1994); Houseman (1993).
42 Id. at p. 1.
(2) Lower direct average total costs paid by users of dispute resolution services in terms of users’ fees, attorney and other professional fees (56% of surveyed respondents agree with the results of our objective sample data analysis).

(3) The provision of more simplified procedures (51% of surveyed respondents agree with the results of our objective sample data analysis).

(4) The provision of enhanced options to the public to resolve disputes (79% of surveyed respondents agree with the results of our objective sample data analysis).

(5) As shown in Chart 2, surveyed court users experience a clear pattern of uncertainty due to lack of legal information (as reported by 66% of respondents while 50% of households involved in land disputes have experienced either abuse of authority or corruption. These pernicious factors, that partially explain users’ higher average total costs and uncertainty linked to the use of the court system, are not reported (i.e. no cases) by those households using informal dispute resolution mechanisms.

(6) Finally, as also shown in Chart 2, 42% of court users consider the costs of representation to be an obstacle, and 21% consider it the main obstacle. These pernicious factors, that also partially explain users’ higher average total costs experienced when approaching the court system, are not reported (i.e. no cases) by the surveyed households using informal dispute resolution mechanisms.

Previous studies show that populations around the world usually seek to solve their disputes privately within homogenous communities and informal groups. The need to introduce generally accepted private dispute resolution mechanisms into socially marginalized communities becomes particularly urgent where the formal court system shows signs of dysfunctionality and chronic corruption. In Socha (where, as we have described above, there is a lack of conflict resolution mechanisms) the number of cases of vigilantism and “mob justice”, measured as a fraction of the population, is five and a half times greater than in other Colombian regions with similar socio-economic circumstances. This fact confirms the general finding that where neither formal nor informal dispute resolution functions adequately, human rights violations increase.

6. Conclusion

This study introduces a methodology that identifies and assesses links between access to dispute resolution mechanisms and its impact on the poor. It can be applied in other contexts and countries through the use of both objective and perceptional survey indicators such as the ones presented here. Furthermore, the empirical methodology presented in this paper provides an innovative policy-related tool that allows for the monitoring of how the use of dispute resolution mechanisms (or any other public or private institutional framework) affects the most marginalized segments of the population.

From a policy perspective, our analysis suggests the general desirability of informal dispute resolution, if only as a way to compensate for the ineffectiveness or absence of state

45 Spain (1994) and Buscaglia (2000).

provision of this service. At a minimum, our argument indicates, states should not seek to repress informal dispute resolution except in areas where a public monopoly over ex ante guidance is exceptionally important. In many instances, states also should buttress informal dispute resolution by lending official sanctions to its outcomes. This is not unprecedented. A useful example is international commercial arbitration, a dispute settlement process that most states have made a treaty commitment to respect. The treaty requires signatories to withhold public dispute resolution in connection with arbitral disputes and to lend their enforcement resources in support of arbitral awards.47

We recognize a theoretical counter argument, based on concerns about path dependency, against tolerance of informal dispute resolution.48 An obvious instance, and one our empirical study exemplifies within the Socha Jurisdiction in Colombia that is not uncommon elsewhere, would be the absence of any effective public provision of dispute resolution. Once in place, the valuable information generated by an informal system—the ex ante guidance—becomes an obstacle to subsequent public provision. Because switching from one system to the other would entail an opportunity cost, equal to the value of the ex ante guidance provided by the informal system, innovative state officials seeking to build up a state system would face a structural impediment. Yet, in most instances state providers of dispute resolution can appropriate the value of ex ante guidance generated by informal systems through straightforward incorporation strategies. Most US states did something like this at the time of their creation by directing their courts to follow the English common law as it then existed.49 The first Russian civil code similarly sought to incorporate European civil law norms into a completely novel legal environment.50 Yet, it is useful to remember that the benefits derived from ex ante guidance, unbiased determination, and reinforcement depend to some extent on the reputation of the dispute settlement system in question. A track record makes it easier to decipher the implications of any particular action and thereby amplifies the action’s consequences. Systems that have no track record must invest more to achieve the same effect.51

Colombia’s imperfect democracy needs to find innovative ways for individuals to redress their grievances. We have identified the main institutional advantages of the informal dispute resolution mechanism used by the poorest parts of society in several rural jurisdictions in Colombia’s Andean Region. As stated above, these informal mechanisms have a limited role in generating ex ante guidance for those disputes where high social value is attached for raising important legal issues that ought to be resolved in a definitive manner. Yet, the particular comparative advantages of these informal mechanisms that our study has identified, stress the relevant role that bottom up informal institutions have in raising the living

50 Id. at p. 1697.
51 This is one explanation for Soviet Russia’s lack of success in incorporating the norms of European civil law. Although the formal requirements of the Civil Code matched those found in other countries, the institutions charged with implementing this body of law were unable or unwilling to mimic their counterparts in the West.
standards of the most marginalized segments of a rural population. This relevance is greatly magnified when the decisions made within informal dispute mechanisms is recognized and utilized by state authorities. The comparative advantages of these alternative dispute resolution mechanisms can also serve as a basis for future efforts to reform the formal court system.