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An Empirical Assessment of the Impact of Formal Versus Informal Dispute Resolution on Poverty: A Governance-based Approach

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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.

Keywords: Empirical assessment; Informal dispute resolution; Poverty

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[1] This paper is the consequence of jurimetric policy analysis conducted by Edgardo Buscaglia in 37 countries worldwide, 17 of them also included as part of the analysis contained in this paper. Professor Buscaglia wishes to thank Maria Dakolias (The World Bank) and the United Nations for helpful support in the development of this and other related work-products.

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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.[3] 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.[4]

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.[5]

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.[6] 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.[7]

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.[8] 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

[3] See Buscaglia, Edgardo. (1996). Introduction to law and economics of development. In Buscaglia, Cooter, and Ratliff (Eds.), *Law and economics of development*. New Jersey: JAI Press.

[4] Id. at p. 56.

[5] Id. at pp. 24–29; Cooter, Robert. (1996). The theory of market modernization of law. *International Review of Law and Economics, 16*(2), 141–172.

[6] The principal proponents of the earlier "law and development" movement include Seidman. Robert, B. (1978). *The state, law and development*. New York: St. Martin's Press; Galanter, & Marc. (1974). Why the "haves" come out ahead: speculations on the limits of legal change. *Law and Society Review, 9*(1), 95; Trubek, David. (1972). Toward a social theory of law: An essay on the study of law and development. *Yale Law Journal, 82*(1), 1. These authors generally promoted comprehensive and centralized reform through legislation that would achieve modernization of public and private law through international transplants from "best practice" legal systems.

[7] See Buscaglia, Edgardo, note 1 *supra*, at pp. 24–29.

[8] This paper is the product of a larger jurimetric study covering seventeen countries. Partial results of this study are shown below as part of our analysis.