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Informal Legal Systems in Latin America

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Introduction

This study analyzes the informal legal systems that have developed across Latin America in response to the inability of the state to provide an effective judiciary. These institutions emphasize restorative justice and community harmony but have a tense relationship with the state. This study develops a typology of informal legal systems that identifies four categories of institutions, each with unique characteristics and challenges. This study concludes that although informal legal systems provide justice to marginal populations, they are inadequate solutions to fundamental problems within Latin American states. Informal legal systems are palliatives that delay necessary reform in the state system. Latin American governments should incorporate informal systems into the state sector, thereby legitimizing the state and addressing the underlying causes that produce informal systems in the first place.

This study is organized as follows: The first section describes informal legal systems generally and identifies attributes common to all such systems. The second section develops a typology of informal legal systems that identifies four categories of institutions and analyzes these quadrants through four case studies. The third section examines the consequences of informal legal systems, both from micro and macro perspectives. The fourth section analyzes the policy options available to Latin American states in dealing with informal legal systems. This study concludes by advocating a policy of incorporating informal legal systems into the state system and identifying avenues for further research.

1. Background

Large portions of Latin America exist beyond the realm of the state. Although these “brown areas” lie within the territorial borders of a state, they remain outside and beyond the reach of government apparatus.¹ The state either cannot or chooses not to provide basic services to these segments of society, leading them to develop their own substitutive informal institutions to fill the vacuum and provide amenities necessary for a complex society to function.²

The creation of informal legal systems typifies the process in which communities generate substitutive institutions to compensate for the absence of the state.³ A judiciary lies at the heart of society, regulating and enforcing collective values. The scope of the legal system spans virtually all forms of social interaction, from criminal transgressions to commercial activity, and is expected to provide a predictable forum for sanctioning violations of community norms and redressing grievances. The judicial system also preserves the requisite foundation for economic life, enforcing property rights and contracts. This stability facilitates commercial transactions and fair returns on

⁰ I am grateful to Frank Dawson, Michelle Longo Eder, and Bill Barton for their helpful comments. I also wish to thank Cambridge University and Harvard Law School for their support.

¹ Guillermo O’Donnell, “The State, Democratization, and Some Conceptual Problems.” In William C. Smith, et al. (eds.) *Latin American Political Economy in the Age of Neoliberal Reform*. Miami: North-South Center, 1994, pp. 157-179.

² Helmke and Levitsky define substitutive informal institutions as “[institutions that] are created or employed by actors seeking to achieve outcomes that formal institutions were expected, but have failed, to generate.” In Gretchen Helmke and Steven Levitsky, “Informal Institutions and Comparative Politics: A Research Agenda.” Paper Presented at Conference on Informal Institutions and Politics in Latin America, Kellogg Institute, University of Notre Dame, April 24-25, 2003., p.20.

³ The term “informal legal system” refers to “institutions with the recognized authority to administer justice, that possesses norms and the means for creating and changing them, authorities and the means for choosing them, dispute settlement procedures, sanctions, and systems to enforce them.” It excludes vigilantism, paramilitarism, gang violence, and other forms of arbitrary social control that stem not from community values and institutions but from their collapse. See Donna Lee Van Cott, “Legal Pluralism and Informal Community Justice Administration in Latin America.” Paper Presented at Conference on Informal Institutions and Politics in Latin America, Kellogg Institute, University of Notre Dame, April 24-25, 2003. Fn. 2.

investment. The inability of Latin American states to provide an effective judiciary thus both threatens the survival of neglected communities and undermines the national interest. Consequently, peripheral populations throughout Latin America have generated informal systems to maintain social order.

A. Characteristics of Informal Legal Systems

Informal legal systems in Latin America share common attributes despite diverse origins. A communitarian emphasis underlies them all, causing them to pursue collective objectives and provide a form of social ordering that is nominally independent of the state. Consequently, they have a tense and often contrary relationship with the state. The state is naturally antagonistic to such institutions, as their mere presence represents a criticism of the state. However, informal legal systems also intrigue the state, which often accommodates and even promotes them. This calculus between state hostility and tolerance, combined with the structural position of the informal legal system within the community, ultimately determines its longevity.

1. Communitarian Emphasis

Informal legal systems protect the interests of the community foremost. This collective focus contrasts with the individual focus of non-socialist states. Liberal democracies perceive government as a bottom-up process in which the state serves at the behest of the people. Individuals constitute the basic unit of society, and governments exist to protect personal liberties.⁴ Formal judiciaries focus exclusively on individual rights as codified by law and legal precedent. This notion of justice relates to process and

⁴ John Locke, the prime advocate of Liberalism, argues in his *Second Treatise of Government* that the judicial regulation of society through protection of individual liberties is the fundamental purpose of government.

requires consistent application throughout the system. By contrast, informal legal systems harbor a fundamentally different concept of rights and justice. These institutions exist to facilitate community tranquility. This “harmony ideology” endeavors to protect the community, not individual liberties.⁵ Their adjudication procedure eschews confrontation and endeavors to resolve disputes through compromise. This process minimizes tensions that threaten the long-term stability of the community. These informal systems distinguish between legality and justice; they apply community norms to the situation at hand without regard for precedent or systemic considerations.

Although these informal institutions promote cooperation and community harmony, latent coercion underlies all forms of social ordering. Like all institutions, informal legal systems entrench winners and losers within society, and they are never as devoid of conflict as appearances suggest. Despite their informal nature, these legal systems seldom challenge preexisting social hierarchies although they do augment community cohesion and promote a sense of local empowerment.⁶ Typical manifestations of informal legal systems include community-generated policing, dispute resolution, or both. The failure of the formal judiciary in high crime environments precipitates informal policing arrangements, particularly in rural environments devoid of police presence. Systems of community dispute resolution arise in order to maintain community harmony or resolve disputes not recognized by the state, such as informal property controversies. Both policing and dispute resolution arrangements establish procedures to punish social deviants. This process serves to legitimize the informal

⁵ Laura Nader analyses the origins and consequences of this phenomenon: *Harmony Ideology: Justice and Control in a Zapotec Mountain Village*. Stanford, CA: Stanford University Press, 1990.

⁶ Sally Engle Merry and Neal Milner (eds.) *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*. Ann Arbor, MI: The University of Michigan Press, 1993, p.9.

judiciary within the community. However, this coercive authority can tempt substitutive systems to pursue profit or power, transforming the institution into a kind of organized crime that specializes in racketeering and private security.⁷

2. Relations with the State

The state is naturally hostile to informal legal systems, as their very existence testifies to the state's failure and challenges its legitimacy. Max Weber postulates: "The state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." The pluralistic notion of concurrent spheres of legal ascendancy contradicts the state's claim to be the sole source of physical authority. Accordingly, the state often perceives informal legal systems as a challenge and seeks to repress them. The contrasting philosophical foundations between the formal and informal legal systems exacerbate the tension. Indeed, contention between individualism and collectivism has yielded some of the most violent conflicts in history.

Conflict between the formal judiciary and substitutive systems arises along three legal fault lines.⁸ First, the two institutions have different norms regarding legal process. The state judiciary theoretically accords with a strict procedure that protects individual liberties such as due process of law, habeas corpus, presumption of innocence, and right to an attorney. Informal legal systems are inherently less formal and seldom esteem the individual rights enshrined by the Enlightenment.

The second area of conflict lies in methods of punishment. Substitutive systems often employ sanctions that violate Western standards and may practice severe forms of

⁷ Wilfried Schärf, "Community Justice and Community Policing in Post-Apartheid South Africa. How Appropriate are the Justice Systems of Africa?" Paper Presented at the International Workshop on the Rule of Law and Development: Citizen Security, Rights and Life Choices in Law and Middle Income Countries, Institute for Development Studies, University of Sussex, June 1-3, 2000, p.6.

⁸ Van Cott (2003), p.27.

corporeal punishment considered torture under international law. However, the harmony ideology that prevails among Latin American substitutive systems usually mitigates the severity of punishment. They prefer to achieve cooperative resolutions to disputes that maintain social tranquility by reincorporating the offending party into the community. Severe punishments undermine attainment of this aspiration. Nevertheless, informal systems often banish repeat offenders or severe criminals from the community.⁹

The final point of contention involves the norms that define basic notions of legality. Substitutive systems distill community values that often conflict with those of the state. For example, religion assumes a limited role in Western legal systems but is often central to substitutive systems. Religious dissent (such as conversion to Protestantism) and accusations of witchcraft threaten community harmony and thus often constitute crimes in substitutive systems. Disagreement between the formal and informal judicial institutions sometimes results in informal legal systems crossing Helmke and Levitsky's typological border and becoming competing institutions.¹⁰ When informal legal systems prosecute behavior considered legal by the state, it represents a potential source of conflict, but the informal system remains a substitutive institution. By contrast, when the informal system considers behavior acceptable that the formal judiciary classifies as a severe offense, such as violence or drug trafficking, the informal system becomes a competing institution. This boundary is permeable, and informal systems can cross it in both directions.¹¹

⁹ Ibid, p.29.

¹⁰ Helmke and Levitsky, p.19.

¹¹ Ray Abrahams, "Vigilantism: Order and Disorder on the Frontiers of the State," in Olivia Harris (ed.) *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity*. London: Routledge, 1996, p.53.

Although the state is naturally antagonistic towards informal legal systems, they nevertheless intrigue the state. This conflicting relationship produces a manic relationship between the state and substitutive systems that often varies according to political ideology. Informal legal systems present political opportunities for the state as well as politicians. The peripheral communities that develop these systems provide a natural power base for aspiring populists, who often support the local institutions. Government subjugation of substitutive systems allows the state to expand its control to areas otherwise beyond its scope. Urban environments characterized by economic informality are particularly critical to the overall well being of the state and require some form of regulation to facilitate economic efficiency. This imperative prompts states to tolerate and even cooperate with urban informal legal systems more than with their rural counterparts. This tacit acceptance of informal legal systems amounts to a recognition of the state's limitations, a break from the rigid statism that characterized nineteenth century Latin America.

3. Longevity of Informal Legal Systems

The relative costs and benefits of the informal legal system determine its longevity. Such systems require a community consensus, at least among local elites, endorsing the institution as an adjudicator that can legitimately wield force. This situation occurs when the benefits of the institution are widely perceived to exceed its costs, and institutional benefits increase proportionately to the severity of the problem the system was created to address. For example, the benefits of a community-generated policing arrangement correlate with the severity of crime.

The costs associated with organizing, developing, and sustaining legal systems are great and require communities to cooperate and sacrifice resources. Creation often provokes divisions within the community, as factions compete to influence and control the incipient institution. Selected segments of the community invariably reap disproportionate benefits from the new system. This disparity correlates inversely to the perception of institutional legitimacy within the community. Substitutive systems also require an incentive structure that recruits and maintains effective leadership, a prerequisite that has proven problematic. Voluntary leaders frequently do not receive sufficient compensation for assuming prohibitive costs, and relationships between institutional costs and benefits vary across time. For example, a community-generated policing system may succeed in decreasing crime to the extent that the benefits of the system no longer exceed costs, particularly if the institution has provoked tension within the community.

The state's position towards the substitutive system also helps determine its longevity. The state can negate the purpose of substitutive systems by providing an adequate judiciary. Alternatively, the state can formalize the substitutive system by incorporating it into the government apparatus. Conversely, the state can also oppose the institution through tactics ranging from intimidation to violent repression. State hostility towards informal legal systems exacerbates the challenges inherent in creating and maintaining them, raising the costs of systems beyond their benefit. The state's position vis-à-vis the informal legal system thus plays an integral role in determining how long it will last.

2. Typology of Informal legal systems

Helmke and Levitsky call for medium-n analysis that builds upon existing case studies in order to identify overall patterns within informal institutions.¹² Accordingly, this section develops a typology of informal legal systems designed to capture the salient differences between institutions.¹³ Two variables define the typology. The first is the geographic setting of the informal legal system, rural or urban. This factor determines many of the differences between institutions. The state cannot extend the formal judiciary to geographically isolated areas, and urban communities cannot participate in the state system due to informality. The second variable is the strength of indigenous patterns of social ordering in the community, which determines the underlying influences on the system.

The two variables of geographic setting and strength of indigenous ordering create four quadrants that reveal general types of informal legal systems. Institutions within a given quadrant share similar attributes but differ from those in other quadrants in significant ways. The quadrants depicted in this typology represent ‘ideal’ types of informal legal systems. Distinctions between indigenous and non-indigenous environments seldom appear so clear in reality. Similarly, the practical distinction between rural isolation and urban informality can blur, as rural legal systems sometimes spread into urban environments and vice versa. Nevertheless, the construction of a typology is useful even if real institutions frequently diverge from their abstract ideals, as

¹² Helmke and Levitsky, pp. 37-38.

¹³ This typology follows the example of Helmke and Levitsky’s examination of informal institutions as well as Sally Engle Merry’s taxonomy of popular justice systems. Helmke and Levitsky, p.16. Sally Engle Merry, “Sorting Out Popular Justice,” in Sally Engle Merry and Neal Milner (eds.) *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*. Ann Arbor, MI: The University of Michigan Press, 1993, pp. 31-66.

it reveals overall patterns and predicts future outcomes that would remain concealed in a separate analysis of only a few institutions.

Table 1: Typology of Informal legal systems

	Urban Systems	Rural Systems
Non-Indigenous Systems	Quadrant Two Non-Indigenous Urban	Quadrant One Non-Indigenous Rural
Indigenous Systems	Quadrant Three Indigenous Urban	Quadrant Four Indigenous Rural

The two variables defining this typology capture most major differences among informal legal systems. The geographic variable dictates characteristics such as the system’s subject matter jurisdiction, leadership structure, position of the state towards the informal system, whether or not the institution polices the community, and the longevity of the system (see Table 2). The ethnic variable determines the underlying influences on the system. Indigenous systems incorporate traditional norms, values, symbols, and rituals in their institutions, and non-indigenous systems depend on alternative sources such as the formal judiciary, military, unions, or plantations.

Table 2: Variation Among Different Informal legal systems

Variables	Rural	Urban	Indigenous	Non-Indigenous
Issue Addressed by the System	Isolation	Informality
State Position towards the System	Hostility	Tolerance	Tolerance	Hostility
Leadership Structure	Consensus	Hierarchy	Traditional	...
Engage in Community Policing	Policing	No Policing
Longevity of System	Short-term	Long-term	Long-term	Short-term
Primary Influence on the System	Traditional	State and Others

A. Non-Indigenous Rural Legal Systems

This first quadrant contains non-indigenous rural substitutive systems, which arise in geographically isolated areas without significant indigenous influence. These systems serve agricultural communities, and their constituencies range from wealthy landowners to landed peasantry. Non-indigenous rural legal systems usually develop in the form of crime prevention patrols that combat lawlessness in areas uncontrolled by the state. Systems dominated by a few landowners are particularly hierarchical and reinforce existing patterns of social control. Systems controlled by landed peasantry frequently expand beyond their original mandate into community administration and dispute resolution. Decisions typically rely on group consensus, and those in the minority submit to the majority.¹⁴

Non-indigenous rural legal systems tend to have the shortest life span of the four types of substitutive judiciaries, seldom outliving their original impetus by more than a

¹⁴ This process resembles the communitarian General Will propounded by Jean-Jacques Rousseau in *The Social Contract*. Minority factions that bitterly contest the majority opinion often accede to the inherent correctness of the majority. For example, criminals frequently thank the majority for distributing punishment, even when the accused maintains his or her innocence.

few years. Consensus-based systems drain significant resources from the community. Participants must invest time into the system and leaders face particularly severe opportunity costs. Collective decision-making often generates acrimony that divides the community, the opposite of the intended effect. In addition, the state usually is antagonistic towards non-indigenous rural legal systems. The state often perceives substitutive institutions as a threat.¹⁵ Latin America's history of left-wing agricultural rebellions render states in the region particularly hostile to non-indigenous rural legal systems, and the communitarian emphasis of these systems only exacerbates the state's concerns. The challenges inherent to this type of legal system combined with state hostility usually truncates the duration of these institutions.

1. Non-Indigenous Rural System: Rondas Campesinas of Northern Peru

Like many rural informal legal systems, the *rondas campesinas* originated as a form of community policing. Famine in the late 1970s and early 1980s exacerbated the already subsistence living conditions of northern Peru, resulting in rampant theft and cattle rustling. This situation endangered agrarian communities throughout the region, as the loss of livestock and agricultural equipment threatened the very survival of many families. The state proved unresponsive to the crime epidemic; indeed, government officials themselves often profited from the illegal activities.¹⁶ Communities organized night patrols, or *rondas campesinas*, in response to the deterioration of social order. The first *ronda* organization appeared in the village of Cuyumalca in 1976, and the innovation

¹⁵ Abrahams (1996), p.42.

¹⁶ Orin Starn, *Nightwatch: The Politics of Protest in the Andes*. Durham, NC: Duke University Press, 1999, pp. 49-50.

quickly spread throughout northern Peru.¹⁷ By 1990, 3,400 villages established *rondas*, covering a territory over 60,000 square miles.¹⁸

Controversy surrounds the sources of the *rondas campesinas*. German Nuñez Palomino argues that they are the resurrection of atavistic Inca justice systems.¹⁹ Most scholars disagree. In his definitive study, Orin Starn argues that the *rondas* are new institutions virtually devoid of indigenous influence:²⁰

The lack of a history of local autonomy in northern Peru meant villagers there had no comparable experience at making justice from themselves. So the *ronda* assembly I witnessed was not traditional or ancestral. It is hard to overemphasize what a novelty it was for villages to administer justice as they did through the *rondas* in the late 1970s and 1980s.”²¹

The *ronderos* modeled their patrols on similar entities organized by coastal haciendas before Peru’s agrarian reform. They also relied on their limited experience in the military. These two institutions provided their only experience employing patrols as a means of maintaining social order.²²

Although the military influenced the structure of the *rondas* in northern Peru, they remained outside its control and never had any affiliation. In this respect, the *rondas campesinas* of the North differ from the eponymous institutions in the South. Whereas the former are informal legal systems developed by the communities to combat lawlessness, the government organized the latter and armed them to combat the Shining

¹⁷ *ibid.*, pp. 36-69.

¹⁸ *ibid.*, pp. 3-4.

¹⁹ His thesis derives from the rather obvious fact that the *rondas* maintain social control in the same demographic as certain institutions in the Inca Empire as well as the early Colonial period. He writes, “We can speculate that the background of today’s *rondas campesinas* lies in the Mitimae organization, since its *raison d’être* was the aim of social balance of peasant communities. “The Rise of the *Rondas Campesinas* in Peru.” *Journal of Legal Pluralism* 36: (1996), p.112.

²⁰ Starn rebuts the Incan influence thesis: “...it was unlikely the Incas even ruled the sierra of Piura and Cajamarca for more than a couple of decades. He doubted the *rondas* were a ‘survival’ from the Incas or any other civilization from the pre-Columbian past almost five centuries before.” pp. 79-80.

²¹ *ibid.*, p.109.

²² *ibid.*, p.77.

Path insurgency in the 1980s. These southern institutions bear only slight resemblance to their namesakes.

The *ronda* patrols proved extremely effective, and theft and cattle rustling virtually ceased.²³ This success promoted a sense of local empowerment. Historically marginal communities created and preserved their own social order for the first time, and the *rondas* provided a means through which peasants could forge a sense of community and pride. This empowerment eventually prompted the *ronderos* to challenge state injustices. For the first time, communities confronted the corruption of the formal legal system, even attacking a corrupt judge and burning a police station.²⁴

The success of the *rondas* prompted them to evolve from community patrols into assemblies that engage in dispute resolution. The lack of crime resulting from regular night patrols rendered them superfluous. However, the sense of community empowerment surrounding the *rondas* ensured that they outlived their original mandate. Communities thus convene *ronda* assemblies, which consist of the entire community. Although they occasionally meet today, assemblies occurred once a month at their peak in the 1980s, hearing three to four disputes per session and often meeting all night. Subject matter jurisdiction ranges from disputes over inheritance, slander, assault, severe domestic violence, damage resulting from unsupervised animals, and land or water rights.²⁵

The *ronda* president commences the assembly by stating the case. The plaintiff presents his arguments, and the defendant responds. After these testimonies, discussion

²³ Starn reports that one community lost 726 animals to theft between 1980 and 1983 but only 8 animals in 1986 and 1987 after it established a *ronda* patrol (p.81).

²⁴ *ibid.* pp. 97-103.

²⁵ *ibid.* p.106.

opens to the general assembly.²⁶ The seating arrangement of the assembly reflects the communitarian nature of the *rondas*. The *ronderos* sit in a circle around the room. The *ronda* president, secretary, and sometimes other officers sit behind a table positioned along the arc of the circle, and the disputing parties sit or stand in center. The institution requires active participation from the community, which pressures the disputing parties to conciliate. The president attempts to forge a consensus from the opinions expressed by the *ronderos* while the secretary transcribes detailed minutes of proceedings. Everyone present signs the final documents, and the leadership applies official seals.²⁷

The *rondas* borrowed from the language, symbols, and norms of the state judiciary in constructing their assemblies.²⁸ State flags sometimes adorn the assembly halls, and the meetings always emphasize written records. The procedure mirrors the formal system, but differs in that it stresses consensus and reconciliation. The *rondas* also emulate the sanctions of the formal system. The *rondas* whip repeat offenders and sometimes suspend cattle rustlers by the hands (the parakeet). Although illegal, these punishments were routinely employed by authoritarian elements of the state, including rural police.²⁹ Starn quotes one *rondero* as saying, “We know from what happens in the police station that hard methods are sometimes the best way to get a thief to confess.”³⁰

The *ronderos* elect leaders to periodic terms, but *ronda* officials have little statutory authority. Men invariably monopolize leadership positions, and there is no documented case of a woman serving in any official capacity other than chair of the

²⁶ *ibid.* p.130.

²⁷ *ibid.* p.126.

²⁸ *ibid.* p.128.

²⁹ *ibid.* p.87.

³⁰ *ibid.*

women's committee.³¹ Most of the duties and burdens associated with the *rondas* fall upon the president. The president runs assembly meetings and endeavors to forge consensus and reconcile competing factions within the community. He constantly asks, "What does the assembly think?" or "What does the community say?"³² Leaders perceived to impose their personal opinions upon the outcome risk subversive slander within the community and electoral defeat. Indeed, although the selection of *rondas* presidents draws from the most liked and respected men, their term in office alienates them from the rest of the community.³³ Some segments of the community invariably hold the president responsible for judgments rendered by the *ronda* assembly. Operating the *ronda* also requires the president to make onerous personal investments with minimal compensation. The president fields complaints and disputes within the community whenever they arise, often at odd hours. He usually pays for basic office supplies, and the opportunity cost of his time commitment to the *ronda* inhibit his personal subsistence labor. This negative incentive facilitated the decline of the *rondas* in the 1990s.

The relationship between the *rondas campesinas* and the state has fluctuated between modest cooperation and overt repression. Government policy towards the *rondas* often varied between regions, reflecting the personalistic spheres of power described by Guillermo O'Donnell.³⁴ The founding of the first *ronda* patrol in 1976 received the approval of local government officials.³⁵ However, many other officials reacted negatively to the proliferation of informal institutions across the region. Left-wing political parties infiltrated the *ronda* organizations in an attempt to cultivate grass

³¹ *ibid.* p.163.

³² *ibid.* p.131.

³³ *ibid.* p.225.

³⁴ He notes that this problem is particularly severe in Peru. O'Donnell (1994b), pp. 161-162.

³⁵ Starn, p.60.

roots support. Although these efforts never bore abundant fruit, it forever politicized the *rondas* from the vantage point of Lima. The election of the left-leaning Alan García prompted the legalization of the *rondas*. The 1986 Law 24571, the *Rondas Campesinas Act*, granted them the authority to protect local property and guaranteed legal recourse to instances of state repression.³⁶

Despite the legalization of the *rondas*, their influence waned throughout the 1990s. The *Rondas Campesinas Act* has seen sporadic application in Northern Peru. The conservative Fujimori administration ignored the 1986 statute and imprisoned many *ronda* leaders connected to left-wing political movements.³⁷ In addition, the government's success in its conflict with the Shining Path enhanced its control over the countryside, reducing the need for informal legal systems. Simultaneous improvements in the formal judiciary also contributed to the decline of the *rondas*.³⁸

Today the *rondas campesinas* exist primarily to organize public works projects. Where they still function as an informal legal system, case volume has sharply declined, and community justices of the peace assist and monitor them on behalf of the government. The balance between costs and benefits shifted in the early 1990s, as the poor leadership incentives, government hostility, and improvements in the formal judiciary reduced the need for *rondas*.

³⁶ Palomino, p.117.

³⁷ Starn, pp. 265-266.

³⁸ *ibid.* p.267.

B. Non-Indigenous Urban Legal Systems

The second quadrant in the typology encompasses informal legal systems that emerge in non-indigenous urban communities. Whereas informal legal systems develop in rural areas in response to the inability of the state to provide access to judiciary, urban institutions arise in response to economic “informality.”³⁹ Latin America’s informal sector has exploded over the past decades due to the combined pressures of urbanization and hostility towards the migrants from the formal legal system.⁴⁰ The population influx into urban areas has overwhelmed the ability of cities to provide migrants with housing and employment.⁴¹ Government regulations preclude settlers from participating in many aspects of legally recognized life, so they resort to informal behavior to procure housing, employment, and transportation. New arrivals routinely construct housing on properties to which they have no legal right. They also turn to small-scale entrepreneurial endeavors beyond the purview of the state. These informal communities have expanded over the past decades, but longevity has not conferred them with legal status. These areas remain disenfranchised from the formal judicial system as a result.

Exclusion from the formal judiciary creates a host of uniquely urban problems which informal legal systems struggle to address. The lack of guaranteed property rights

³⁹ Hernando de Soto’s analysis of Peru’s informal sector provides the definitive analysis of the phenomenon: *The Other Path: The Invisible Revolution in the Third World*. London: I.B. Tauris, 1989.

⁴⁰ Ray Bromley clarifies the concept of economic informality: “Formal activities have legal ends and are conducted by legal means. Informal activities have legal ends, but are conducted illegally because it is difficult for the participants to comply with the official regulations. Criminal activities have illegal ends and therefore cannot be conducted any way other than illegally.” From Ray Bromley, “Informality, De Soto Style: From Concept to Policy.” in Cathy A. Rakowski (ed.) *Contrapunto: The Informal Sector Debate in Latin America*. Albany, NY: State University of New York Press, 1994, p.133.

⁴¹ For example, 65 percent of Peru’s population resided in rural areas in 1940, but the same percentage lived in urban areas by 1981. (De Soto, p.7). Latin America’s population of urban poor swelled from 44.2 million in 1970 to 115.5 million by 1990. By contrast, the population of rural poor across the region remained relatively static during the same period, growing from 75.6 million to 80.4 million. (Franz Vanderschueren and Enrique Oviedo (eds.), *Acceso de los Pobres a la Justicia en Países de América Latina*. Santiago: Ediciones SUR, 1995, p.11)

in the informal economic system inhibits the formation of contracts and reduces investment. Informal ventures lack access to credit and cannot mortgage property to raise capital. These deficiencies limit economic development. Worse, the gap between de jure legality and informal reality diminishes the relevance of the state generally, and the judiciary specifically, thereby retarding progress.

Non-indigenous urban legal systems typically develop de facto systems of property rights that parallel the formal system. These institutions appear in almost every major Latin American city in the form of neighborhood associations that represent the interests of informal communities to the government. These institutions adjudicate local conflicts pertaining to the informal sector, such as property or commercial disputes. They rarely police crime, leaving this to the state police.

Non-indigenous urban informal legal systems do not practice the consensus-based models favored by the rural institutions of quadrant one. Large metropolitan populations preclude such a distilled form of democracy. Instead, they typically prefer republican formats in which elected leaders make decisions and perform judicial functions on behalf of the people. These institutions have proved remarkably durable, and systems continue to operate after several decades. Governments tacitly approve of these legal systems provided that they remain within certain bounds, for they help control the informal sector, a phenomenon that remains at once illegal but too important for the state to ignore or attempt to abolish.

2. Non-Indigenous Urban System: Pasargada Residents Association, Brazil

Boaventura de Sousa Santos' 1970 case study of the Residents' Association of Pasargada, his pseudonym for one of the oldest and largest *favelas* in Rio de Janeiro,

remains among the most influential urban analyses in legal anthropology.⁴² Pasargada originated as an informal settlement occupying farmland on the outskirts of the city around 1932, and it gradually consolidated into a permanent community. Most houses have both electricity and running water, and buildings consist of durable materials such as brick and cement. Pasargada, like all of Rio de Janeiro, experienced the rapid urbanization characteristic of Latin American cities since 1950, and the city expanded around it. Today it is located near the industrial heart of Rio de Janeiro, ensuring efficient transportation links. Inhabitants can walk to the many surrounding factories that employ most of the active population. The relative antiquity of Pasargada ensured that it consolidated before the property value of the neighborhood appreciated, precluding forcible eviction by the government.

Pasargada founded its Residents' Association in 1966 with the assistance of the government, which sought to facilitate the community's participation in the formal sector. The Association originally had an external orientation, liaising with the state on behalf of residents in order to secure public works and improve the quality of life. However, the government neglected the Association and frequently reneged on promises of aid.⁴³ Consequently, the institution turned its attention inward and established its subject matter jurisdiction over economic and property disputes within the community. The Association has the authority to authorize and inspect housing repairs as well as demolish buildings in violation of its edicts.⁴⁴

⁴² Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada." *Law and Society Review* 12:4-126 (Fall 1977).

⁴³ *ibid.* p.41.

⁴⁴ *ibid.*

The Association eschews any involvement in community policing or judging criminal matters, deferring to the formal system. Regulating crime would divert the institution's limited resources to a few impoverished sections of Pasargada and attract the potentially violent antagonism of criminals. As such, the Association confines its efforts to substituting for the formal judiciary in regulating the informal economy of Pasargada.

The Association provides two services that promote economic stability. It provides an informal notary service to prevent property and contract conflicts, and it arbitrates between disputing parties. In neither case does the Association have the power to punish violators, so it employs elaborate procedures to legitimize its authority. Residents seeking to enter a legal relationship, such as a contract or lease, visit the president of the Association, often accompanied by friends and relatives who serve as witnesses. The parties explain the situation to the president, who questions them regarding the terms of the prospective agreement. The president anticipates sources of potential conflict and defuses them by resolving the issues in advance. The secretary or treasurer types the requested document and reads the text. Both parties sign the documents along with two witnesses. The president ratifies the document by stamping it with the Residents' Association seal. The Association provides the parties with one copy of the document and retains another in its records.

The Association follows a similarly elaborate procedure when resolving dispute among residents. The plaintiff brings his grievances to the president or a member of the board of directors, who ensures that the dispute lies within the subject and territorial jurisdictions of the Association. He also scrutinizes the reasonableness of the claim and may dismiss it outright. If he accepts the case, he records the names and addresses of the

involved parties and schedules a hearing. The Association sends a written invitation to the defendant notifying him of the hearing. If the he fails to respond, the Association asserts is personal jurisdiction through persuasive messengers, such as a friend, the president himself, or a police officer.⁴⁵ The actual hearing occurs in a closed room in the Association building. Both sides present their arguments, and the president makes the final judgment.

The Association appropriates norms and rituals from the state and the formal sector to imbue itself with a sense of the official. This formal mask hides a lack of coercive power to enforce decisions.⁴⁶ The Association's initial step in any procedure is to ensure that the matter lies within its subject matter jurisdiction. The president's interrogation of parties as well as their recitation of oaths affirms the authority of the Association before official action occurs. In addition, the president and directors often refer to the "official character" of the institution, implying a connection with the state.⁴⁷ These procedural steps legitimize the Association within the community, ensuring that residents comply with its decisions.⁴⁸

The Association reinforces this authority through symbolism. A two-story office made of brick locates it near the center of the community. Both the location and the building itself symbolize the institution within the community. The organizational structure of the Association also conveys a sense of formality, as it mirrors formal corporations. The president is the dominant official, and he works daily along with the

⁴⁵ *ibid.* p.65.

⁴⁶ *ibid.* pp. 66-67.

⁴⁷ *ibid.* p.41.

⁴⁸ *ibid.* p.67.

treasurer.⁴⁹ A board of directors governs the Association, which represents all people in Pasargada. Residents contribute monthly dues, but usually only informal enterprises that rely on the Association conform to this practice. This mutual dependence between the Association and community strengthens bonds between the two, endowing the Association with legitimacy absent in the formal judiciary.

The relationship between the Association and the state is asymmetrical. The Association provides numerous benefits to the state, which tolerates it in return. Santos depicts this pattern as a dialectic between repressed and dominant classes.⁵⁰ The Association mimics the state legal system and aspires to formality, even falsely claiming an “official character.” It regulates informal economic activity and maintains social order, increasing productivity and facilitating the Pasargada’s incorporation into society. The Association also promotes the acceptance of values aligned with the state, such as the right to private property and enterprise.⁵¹

The police interact with the Association more than other government institutions. They maintain cordial relations with the Association, delivering written invitations on its behalf and pressuring people to comply with its judgments. The Association accepts this assistance, but avoids close affiliation with an institution perceived as corrupt within the community.⁵² The state’s benign neglect of neighborhood associations such as in Pasargada combined with the interminable need to regulate the informal economy ensures that these institutions are durable and have protracted life spans. The relevance

⁴⁹ *ibid.* p.43.

⁵⁰ *ibid.* p.7.

⁵¹ *ibid.* p.90.

⁵² *ibid.* p.43.

today of Santos' 1970 study testifies to the longevity of non-indigenous urban legal systems.

C. Indigenous Urban Legal Systems

The third quadrant involves indigenous urban legal systems. These institutions arise in metropolitan environments dominated by a particular ethnic group or tribe when large indigenous populations have experienced urbanization. This process transplants many indigenous values, hierarchies, and identities into the urban context. However, the radical alteration of social networks, employment patterns, and lifestyle associated with urbanization transforms traditional values, generating discord between rural and urban communities.⁵³ States cooperate with these legal systems in a manner similar to the non-indigenous urban systems of quadrant two. Urban institutions regulate and maintain control of the informal sector, and state acceptance leads to institutional longevity.

3. Indigenous Urban System: Juntas Vecinales of Bolivia

Urbanization in regions with large indigenous populations creates informal communities influenced by traditional customs. The development of the *juntas vecinales* in Bolivia typifies this process.⁵⁴ Poor urban neighborhoods in Bolivia exhibit de facto segregation along tribal as well as regional lines.⁵⁵ These links reinforce a sense of local community among Aymara and Quechua populations and compensate for the social

⁵³ Schärf, p.3.

⁵⁴ The Bolivian Ministry of Justice and Human Rights published ten studies of different informal legal systems in their various aspects. As referenced by Van Cott (2003): Ministerio de Justicia y Derechos Humanos. *Justicia Comunitaria 1-10*. La Paz: Ministerio de Justicia y Derechos Humanos, Banco Mundial.

⁵⁵ José Blanes, "La Paz, Juntas Vecinales y Comité de Vigilancia." Paper prepared for the Center of Urban and Community Studies, University of Toronto, April, 1998, p.2.

upheaval that accompanies urbanization. Thousands of *juntas* have developed in metropolitan centers across Bolivia since the early 1950s, with particularly sharp growth during the economic travails of the 1980s.⁵⁶

The diversity of indigenous customs, even within the same tribe and region, results in considerable variation among the *juntas*, so comprehensive institutional analysis of the phenomenon must remain vague. Nevertheless, *juntas* of all varieties share important attributes. Indigenous migrants in Bolivia retain ties to their homelands and often own land there, typically returning at least annually to celebrate festivals and family events.⁵⁷ This pattern maintains tradition within urban institutions. Like most neighborhood associations in Latin America, the *juntas vecinales* formed to lobby the government for public works and improved infrastructure on behalf of the community. Their limited success in petitioning the government prompted them to evolve into informal legal systems.⁵⁸ Like many other informal legal systems, the *juntas* maintain detailed records of all proceedings and resolutions in a community book of acts, which endows the institution with a veneer of formality.

The *juntas* employ justice-making procedures that incorporate traditional symbols and norms. Most *juntas* operate two dispute resolution forums: the president and/or secretary of conflicts and the disciplinary tribunal. The president and/or secretary of conflicts serve as mediators in property disputes, much as in non-indigenous legal systems. Although the *junta* official endeavors to forge consensus between parties, he

⁵⁶ Van Cott states there are between 4,000- 8,000 *juntas* in Bolivia (2003, p.22). José Blanes indicates that it is impossible to gauge the number but also suggests there are thousands of *juntas* across Bolivia. “*Juntas Vecinales y Comites de Vigilancia: Su Papel en la Planificación Urbana.*” Paper prepared for the Center of Urban and Community Studies, University of Toronto, February 13, 1998.

⁵⁷ Van Cott (2003), p.17.

⁵⁸ *ibid.*

eventually adjudicates the issue. Plaintiffs look to the president or the secretary of conflicts in most disputes, but particularly complex or ambiguous situations often involve the disciplinary tribunal. This body consists of several respected members of the community, who investigate facts and judge accordingly. This process is more likely to integrate traditional spirituality into its procedure than mediation by the president. Some *juntas* rely on a spiritual seer to confirm the veracity of testimony or assign responsibility when it is unknown.⁵⁹ Procedures often incorporate traditional symbols, such as a crucifix and Bible set upon a block of salt.⁶⁰

The urban indigenous justice systems exhibit multiple influences. Aymara tribal institutions remain largely intact in rural Bolivia, and their urban communities reflect this influence.⁶¹ Quechua communities have experienced more cultural mixing, decreasing the salience of customary norms in their urban institutions. They rely more on agrarian *campesino* unions and the government for their customs.⁶² However, both ethnic groups have adapted traditional institutions to urban settings. The bureaucratic structure of the *juntas* both mirrors and contrasts traditional structures. Like their customary antecedents, the *junta* leadership consists of a group of between one and two dozen males respected by the community. Women have yet to occupy leadership roles, but many *juntas* have removed formal prohibitions against their participating due to the work of feminist organizations in recent years.⁶³ The *juntas* differ from their rural counterparts in their highly bureaucratic structure. Each member of the *junta* leadership has a specific title with carefully delineated responsibilities, such as president, secretary of justice, or

⁵⁹ *ibid.* pp. 20.

⁶⁰ *ibid.* p.21.

⁶¹ *ibid.* p.17.

⁶² *ibid.* p.18.

⁶³ Blanes (1998a), p.8.

secretary of education. In addition, the selection criteria for *junta* leaders differ from customary institutions. *Junta* leaders possess traits reflecting success in an urban environment, such as wealth and education.⁶⁴

The traditional nature of the *juntas* typically endows them with greater legitimacy than non-indigenous urban systems, which generally confine themselves to resolving property and rental conflicts. These institutions lack official authority or coercive power, and they struggle to establish and maintain legitimacy within the community. By contrast, tradition enhances the authority of the *juntas*, and their purview includes almost all aspects of community life. In addition to regulating the informal economy, the *juntas* decide some criminal cases as well as domestic disagreements. The traditional legitimacy of the *juntas* also allows them to sanction offenders and order restitution with reasonable certainty that parties will comply. Although the *juntas* technically lack official authority, their position in the community exerts sufficient pressure on residents to ensure compliance with their judgments. Unlike many rural legal systems, the *juntas* do not employ physical punishments, but observer bias precludes certainty on this matter, as they are unlikely to record or report actions in direct violation of state norms.⁶⁵

The *juntas vecinales* enjoy a productive relationship with the state. The 1994 Law 1551, the Law of Popular Participation, incorporated a variety of informal institutions into the state sector. Although the statute did not formalize the justice-making aspects of the *juntas*, it legalized their existence and appropriated resources to them for community planning. However, the state unofficially tolerates *junta* dispute resolution, perhaps because the *juntas* refer serious cases to the formal system, and people

⁶⁴ *ibid.* p.5.

⁶⁵ Van Cott (2003), p.20.

occasionally appeal *junta* verdicts to the formal system.⁶⁶ The *juntas* encourage police presence in their communities, but they engage in neighborhood policing where the formal institution is deficient.⁶⁷

Bolivian *juntas* have united to form an umbrella organization, the Federation of *Juntas Vecinales* (FEJUVE).⁶⁸ Informal legal systems rarely initiate collective action, as they are inherently decentralized institutions. The unionization of the *juntas* is particularly unusual in that it incorporates diverse institutions across cultural and linguistic divides. This accomplishment allows otherwise marginal populations to lobby the government at its highest levels. This may account for the relatively harmonious relationship between the state and the *juntas vecinales*, allowing them to serve as an informal but enduring informal legal system.

D. Indigenous Rural Legal Systems

Quadrant four contains indigenous rural informal legal systems. Traditional forms of tribal ordering heavily influence these new legal systems, which often incorporate customary law. Tribal leaders retain authority, and traditional rituals and symbols combine with state symbols and integrate the informal legal system into indigenous life.

The format of indigenous rural legal systems varies more than the systems in other quadrants due to the diversity of indigenous cultures. These institutions are the most likely type of informal legal system to receive official recognition from the state due

⁶⁶ *ibid.* p.21.

⁶⁷ *ibid.*

⁶⁸ Blanes (1998b), p.14.

to the “multicultural constitutionalism” that has swept Latin America in the last fifteen years.⁶⁹ Latin American countries now seek to incorporate indigenous systems into the state in order to expand their influence. The prevailing emphasis on multiculturalism as well as obligations under international law also drive most states to tolerate indigenous systems of legal ordering, even recently created substitutive institutions.⁷⁰

4. Indigenous Rural System: Maya of Guatemala

Mayan communities reconsolidated informal legal systems in the wake of the 1995 armistice in Guatemala. The protracted civil war militarized the countryside and virtually annihilated traditional Mayan communities in many parts of the country. The state’s genocidal counter-insurgency massacred 626 indigenous communities, with guerilla forces eliminating a further thirty-two.⁷¹ The conflict displaced over fifty percent of the population in some areas.⁷² Thousands endured nomadic lifestyles in the jungle, and more were concentrated in military camps. The military perceived almost all forms of indigenous social organization as a threat to be exterminated, targeting elders and others affiliated with traditional culture.

Mayan communities have attempted to establish social order through the recreation of customary legal systems, but local tensions resulting from the war hinder these efforts. Hostility between those who cooperated with the military and the rest of society remains. The spread of evangelical sects resistant to indigenous rituals further

⁶⁹ Donna Lee Van Cott, *The Friendly Liquidation of the Past, The Politics of Diversity in Latin America*. Pittsburgh: University of Pittsburgh Press, 2000, p.17.

⁷⁰ The International Labor Organization Convention 169 of 1989 obligates states to permit indigenous legal customs as long as they do not violate human rights.

⁷¹ Hans Petter Buvollen, “Cultural and Legal Barriers to Justice in Guatemala.” Paper Presented at the United Nations Development Program Access to Justice Conference, Oslo, March 4, 2002, p.3.

⁷² Rachel Sieder, “Customary Law and Democratic Transition in Guatemala.” University of London Institute of Latin American Studies Research Papers #48 (1997), University of London., p.34.

divides many communities. In addition, the physical arrangement of some Mayan villages transformed during the war, as the military ordered people to move closer together for protection.⁷³ This alteration increases conflicts within the community and requires fundamental social adjustments. Despite these challenges, the Maya have generated new legal systems based on idealized notions of traditional justice.⁷⁴ The heterogeneity of Mayan communities produces broad variation in these new institutions.⁷⁵ However, they exhibit common patterns.

Dispute resolution in most Mayan communities revolves around either a council of elders or an auxiliary mayor. The importance of elders correlates with religious unity.⁷⁶ Elders mediate conflicts based on their collective wisdom as well as their knowledge of tradition. Much of their authority derives from expertise in tradition and rituals. Evangelicals reject these qualifications and thus tend to have less respect for elders. Despite the appearance of tradition, the formation of councils of elders is a recent phenomenon. The Catholic Church has long discouraged these councils, and they had little influence before the war.⁷⁷ By contrast, the office of auxiliary mayor predates the war, but the government appointed the officials. Communities now elect auxiliary mayors, endowing them with greater legitimacy in adjudicating disputes.

Mayan communities employ similar procedures when resolving disputes regardless of whether the adjudicator is a council of elders or an auxiliary mayor. Parties discuss their disagreements at length before the official(s), who promote(s) dialogue. This process encourages conciliation, and the council or mayor will suggest solutions

⁷³ *ibid.*

⁷⁴ *ibid.* p.41.

⁷⁵ For example, the Guatemalan Maya speak twenty-three languages. Buvollen, p.1.

⁷⁶ Sieder (1997), p.40.

⁷⁷ *ibid.* pp. 40-41.

until both parties agree. If one party remains obdurate, the council or mayor will decide the case. Although the legal system has no authority, community shaming encourages compliance. Some communities write the name and circumstances of repeat offenders in the municipal register.⁷⁸

Mayan legal systems prefer restorative justice to punitive sanctions. They associate incarceration and physical punishment with the military, and reject them accordingly.⁷⁹ Sanctions emphasize community cohesion and address the root cause of conflicts. Hans Petter Buvollen provides an instance of Mayan justice that demonstrates these principles:

A surprising example of local justice is the thief who is brought to justice for stealing two chickens from his neighbor. The thief is poor, and desperately tries to support his family. The elders decide that the victim donate another two chickens to the thief and teach him how to raise chicken. When the chickens have produced offspring, the thief returns four chickens to the victim.⁸⁰

This emphasis on community harmony distinguishes contemporary Mayan legal systems from the state and, to an extent, from indigenous institutions before the civil war. The current collective emphasis is part of an attempt to rekindle communities after the war. This process idealizes Mayan customary law of antiquity and portrays it as a paragon of harmony.

Contemporary Mayan legal systems are the products of both indigenous custom and state repression. The norms and rituals of local dispute resolution derive from traditional culture. However, the legacy of the counter-insurgency also influences these institutions. Indeed, Mayan legal systems define themselves in opposition to the military. They avoid physical punishment because of its association, and the very nature of decentralized authority contrasts with the hierarchical structure of the military. Nevertheless, communities have appropriated institutions

⁷⁸ *ibid.* pp. 44-45.

⁷⁹ *ibid.* p.44.

⁸⁰ Buvollen, p.2.

created by the state, such as the auxiliary mayor and local committees, and turned them into tools for social empowerment.

The relationship between Mayan legal systems and the state improved after years of genocidal repression when the government and guerillas signed the Accord on the Identity and Rights of Indigenous Peoples in March 1995. Among other provisions, this agreement promised to decentralize judicial authority and provide interpreters to indigenous people wishing to participate in the formal judiciary. However, progress has failed to match expectations. Although the state tolerates Mayan legal systems, it has failed to incorporate them into the formal judiciary as promised.⁸¹ A recent constitutional amendment that would formalize indigenous legal systems failed in a national referendum. In addition, promised improvements in the state judiciary have not occurred. The state has hired few additional interpreters,⁸² and the indigenous populations widely perceive it as racist, corrupt, and inaccessible.⁸³

E. Discussion

The four case studies reveal patterns among the different types of informal legal systems and confirm the salience of geography and the strength of indigenous influence in determining the characteristics of informal legal systems. These variables influence the procedures employed by the institution, the sources of the system, and its relations with the state. Institutions in each quadrant are related to those in the two adjoining quadrants but differ from those in the opposite one.

With the exception of the Pasargada Residents' Association, the state has only recently recognized the legality of these substitutive systems. The state has always

⁸¹ *ibid.* p.4.

⁸² *ibid.* p.5.

⁸³ *ibid.* p.1.

tolerated urban institutions with limited subject matter jurisdictions in order to regulate the informal sector as demonstrated by Santos' 1970 study. However, relations between the state and rural institutions have only recently stabilized, evidencing the emergence of a multicultural consensus. This formal recognition provides scant protection from future oppression, as Fujimori's campaign against the *rondas* demonstrated in the early 1990s. Latin American states may return to repressing informal legal systems in the future. Nevertheless, the four case studies demonstrate that the relationship between informal legal systems and the state has improved in Latin America.

The four case studies also reveal that informal legal systems place great emphasis on written documents in order to emphasize their legitimacy. The *ronda* archives, the typed contracts of Pasargada, and the *junta* book of acts reveal a preoccupation with text. The process of writing and record keeping both emulates the state system and endows proceedings with a sense of formality. Orin Starn observes that the act of documenting proceedings empowered the traditionally marginal *rondas* communities: "The management of rubber stamps, memos, and minutes was a matter of self-respect for villagers who for centuries has been cast into what anthropologist Michel-Rolph Trouillot calls the 'savage slot' and dismissed as backward and uncivilized."⁸⁴ Only indigenous rural legal systems appear immune to this emphasis on written records. These institutions do not emulate the state judiciary and rely on customary procedures. As such, they do not need to legitimize their institutions through written archives.

The existence of four distinct quadrants does not preclude the possibility that a informal legal system may fall into more than one. The *rondas campesinas* originated as rural institutions, but they appeared in some cities in Northern Peru. Similarly, the *juntas*

⁸⁴ Starn, p.126.

vecinales developed amongst indigenous urban migrants, but they have the potential to transplant into rural communities in need of social regulation. Informal legal systems also can shift across quadrants over time through institutional evolution, or they can occupy more than one quadrant simultaneously. This demonstrates the inherent challenges to classifying informal institutions, as reality is never as lucid as the abstract.

3. Consequences of Informal Legal Systems

Informal legal systems provide an efficient legal forum to communities without recourse to a formal judiciary. Donna Lee Van Cott writes, "...informal justice systems are a cost-efficient means of increasing the supply of justice in Latin American society for some of the populations that need it most."⁸⁵ Although substitutive systems maintain social stability in communities that would otherwise lack it, the quality of this justice remains questionable. O'Donnell maintains that rule of law entails "certainty and accountability" across all sectors of society.⁸⁶ Informal legal systems seldom meet these criteria. Their disregard for precedent and codified law renders them somewhat unpredictable while, like all social institutions, they reflect underlying power asymmetries.

Informal legal systems lack structural provisions that protect minority groups and opinions. They do not separate powers or even guarantee due process, and they are as capable of oppressing marginal groups as the state. In communities without ethnic or class cleavages, for example, substitutive systems typically protect the interests of older

⁸⁵ Van Cott (2003), p.37.

⁸⁶ O'Donnell also defines the rule of law as the exclusive domain of the state. Guillermo O'Donnell, "Polyarchies and the (Un)Rule of Law in Latin America." in Juan E. Méndez, Guillermo O'Donnell, and Paulo Sérgio Pinheiro (eds.), *The (Un)Rule of Law and the Underprivileged in Latin America*. Notre Dame, IN: University of Notre Dame Press, 1999, p.307.

men, and most allegations of witchcraft target older women.⁸⁷ Even Van Cott concedes this point in her sole criticism of these institutions: "...informal justice systems have many flaws that reflect the jealousies, power-imbalances, cruelty, and ignorance that are common to all human groups."⁸⁸ Informal legal systems are never as harmonious as they first appear, and despite their communitarian emphasis, they invariably distill winners and losers. Competition within even homogenous communities often generates discord, "harmony ideology" notwithstanding.

On the positive side, the development of informal legal systems often improves the formal judiciary. This institutional syncretism occurs on several levels. The new institutions alleviate the excessive caseload of the formal system, allowing it to devote more time and resources into serious disputes.⁸⁹ In addition, informal legal systems introduce market forces into the legal sector. The adjudication of serious crimes, such as murder or rape, lies in the exclusive domain of the formal system. Similarly, minor disputes remain confined to informal legal systems. However, the state judiciary must compete with informal legal systems for cases of medium severity, such as small-scale theft and violence.

The formal judiciary is by design an insular bureaucracy, but evidence suggests that the development of substitutive institutions ameliorates its poor performance.⁹⁰ Judicial access and efficiency improve in the wake of increased competition. Judicial independence also improves to an extent, as competitive pressures decrease corruption. Informal legal systems have the potential to soften the confrontational nature of positive

⁸⁷ Abrahams (1996), p.52

⁸⁸ Van Cott (2003), pp. 39-40.

⁸⁹ Van Cott (2003), p.37.

⁹⁰ Starn, pp. 267-8.

law.⁹¹ Their collective emphasis promotes harmony and reconciliation that filters into the antagonistic formal judiciary. State acceptance of substitutive systems also assists states in reclaiming any moral legitimacy lost through neglecting or repressing marginal populations.⁹² This acceptance provides a potential model of “decentralized democratization.”⁹³

Although the development of substitutive systems improves the formal judiciary, it harms the overall state and delays reform. Informal legal systems immiserate the concept of the state, which produces more substitutive institutions. They may develop in response to state’s inability to provide a judiciary, but their presence entrenches state weakness. The failure of the formal judiciary undermines the concept of state hegemony, further impairing its already tenuous legitimacy. Informal legal systems also allow the inadequate formal judiciary to suffice, thus reducing the state’s incentive to reform and sustaining the judicial deficiencies that plague Latin America. These poor formal institutions then further undermine basic notions of citizenship and democracy.⁹⁴ This ‘atomization’ of the state leads to particularistic rule in marginal areas.⁹⁵

Informal legal systems help shape and empower community identity among traditionally peripheral populations. They support cultural autonomy by facilitating the articulation and enforcement of collective values. Formulating a legal institution is the ultimate manifestation of this process, strengthening the community and reinforcing group cohesion. Individuals submit personal sovereignty to a social contract that is

⁹¹ Van Cott (2003), p.39.

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ Guillermo O’Donnell, Guillermo, “Delegative Democracy.” *Journal of Democracy* 5 (January 1994), p.18.

⁹⁵ O’Donnell (1994b), p.162.

supposed to regulate the common good, a process so powerful that it can potentially forge community identity *ex nihil*. The interaction between substitutive and formal legal systems also provides a social space in which peripheral communities can engage the state on equitable terms. This process empowers marginal communities to assert their cultural identities and challenge state neglect or repression. Although all Latin American democracies maintain nearly universal suffrage to free and fair elections, they often fail to protect liberal rights or provide basic services.⁹⁶ Informal legal systems allow these groups to redefine citizenship within weak states and thereby ameliorate this “low-intensity citizenship.”⁹⁷ States that accept informal legal systems better reflect the diversity that characterizes Latin America, and ethnic repression and tension declines when states accept these institutions.⁹⁸

Although this process empowers traditionally marginal communities, it produces tension within the state. Many substitutive institutions support the state and seek to avoid such conflict, but structural conditions undermine their good faith efforts. The very existence of these institutions testifies to a failure of the state and challenges its monopoly of force. Tension inevitably ensues. Scholars usually treat this hostility as a transgression perpetrated by the state. In reality, structural forces invariably position the state in opposition to informal legal systems. State acceptance of informal legal systems results from mutual transformation of both formal and informal systems. This institutional syncretism sometimes yields a stable equilibrium between the two. Rural

⁹⁶ O'Donnell (1994a), p.18.

⁹⁷ O'Donnell states: “A state that is unable to enforce its legality supports low-intensity citizenship.” (1994b), p.166.

⁹⁸ Van Cott (2003), p.38.

systems are more prone to friction with the state than urban ones.⁹⁹ Latin American states typically accept urban informal legal systems in order to regulate the informal economy, yet mutual suspicion contaminates even these symbiotic relationships.

Reconciling the conflicting values underlying state judiciaries and informal legal systems has proven difficult. Informal legal systems promote collective rights and other values at odds with the liberalism that has defined Latin American states since independence. “Neo-Colonial” Latin American states have a history of repressing ethnic cultures in the name of national homogeneity.¹⁰⁰ Although these excesses are justly condemned, liberalism remains a compelling basis for government and should not be rejected due to the weakness of contemporary Latin American states. The state is better ordered on individuals than groups (with appropriate deference to indigenous nations). Individual liberties represent something sacred, and people are best served by a state that protects their rights, not those of a group. Latin American corporatism has decayed, and reversion to this flawed system is not in the region’s best interest. The tension between the individualism and collectivism is history’s greatest political fault-line. Informal legal systems protect collective rights, often to the detriment of individual liberties. This spread of this subtle but profound philosophical shift under the banner of multiculturalism bodes ill for the stability of the region. Informal legal systems engage in practices that strain the limits of cultural relativism. They routinely abridge personal liberties and sometimes employ punishments considered torture under international law.

⁹⁹ Urban informal legal systems in Africa have engaged in militarized disputes with the state police. These institutions mirror the ones of rural Latin America in that they exist to maintain basic social control in the absence of the formal system. Urban institutions in Africa do not necessarily exist to regulate economic informality as in Latin America. This difference accounts for the variation in state hostility.

¹⁰⁰ Donna Lee Van Cott, “A Political Analysis of Legal Pluralism in Bolivia and Colombia.” *Journal of Latin American Studies* 32:1 (February 2000), p.211.

These practices justify the Kantian judgment that Latin American states, for all their weaknesses, represent a better pattern of social ordering than informal legal systems.

Commentators overstate the positive effects of informal legal systems and understate the negatives due to methodological bias. The vast majority of studies of Latin American informal legal systems takes the form of anthropological fieldwork (n=1), which fails to identify the full spectrum of consequences. Case studies capture the positive outcomes of informal legal systems, most of which appear at the micro level. However, many of the negatives emerge only from macro analysis.

4. Analysis of State Policies

Latin American states have four policy options in dealing with informal legal systems: repression, abstention, cooperation, and incorporation. States traditionally tergiversate between repression and abstention when dealing with rural institutions, but they typically fluctuate between abstention and cooperation when dealing with urban institutions. Incorporation is the best option for Latin American states, as it extends the state apparatus into peripheral areas and can mitigate many of the negative consequences of informal institutions.

Latin America's history of authoritarianism combined with the inevitable tension between the state and informal legal systems has often resulted in their repression. Rural informal legal systems are particularly vulnerable, as they do not provide the state with a value-added component comparable to the regulation of the informal sector by urban institutions. However, even urban institutions do not enjoy immunity from state

repression, particularly before the consolidation of the community.¹⁰¹ Repression typically entails human rights abuses and further alienates marginal populations. States should avoid this counterproductive option.

The state usually adopts a policy of abstention towards informal legal systems, sustained by political inertia. This represents a de facto acceptance of informal legal systems. It is the default government policy, as it preserves the status quo and requires neither action nor resources. However, this option applies an inadequate dressing to a fundamental state problem. Although expedient, abstention is a sub-optimal program in that it ignores the state's underlying deficiencies that produce informal legal systems.

Cooperation provides states with a better alternative. Urban environments typically foster government cooperation with substitutive systems that assist the state in regulating the informal sector. The state cooperates in return, providing basic services such as plumbing and electricity. This symbiosis characterizes the long-term cooperation between the government and urban legal systems. States also cooperate with rural legal systems but do so infrequently. Populist governments are particularly prone to rural cooperation, as these communities present opportunities for political gain. Cooperation with rural systems usually entails injecting government resources into the community or assistance from some part of the government apparatus. This particularistic exchange lacks the stable foundation that characterizes the interaction between the state and urban legal systems. State cooperation with rural systems is opportunistic and thus generally lacks longevity. The policy of cooperation represents an improvement over abstention, as it magnifies many of the positive outcomes associated with substitutive systems.

¹⁰¹ De Soto (1989), pp. 21-23.

However, it does not address the negatives, and the root causes of informal legal systems remain even in a program of cooperation.

Incorporating informal legal systems into the formal sector is the preferred policy available to Latin American states because unlike its alternatives, it expands the reach of the state and can increase its legitimacy. Incorporation addresses the root causes of substitutive systems by extending an arm of the formal judiciary into the peripheral communities that most need it. The state has three options when attempting to incorporate informal legal systems. First, it can appropriate existing informal legal systems and attempt to formalize them. Second, the state can establish new institutions that resemble informal legal systems. Third, the state can attempt a combination of these two by creating new institutions that formalize existing informal legal systems. The state should evaluate several variables in determining the most appropriate path to incorporation: the availability of state resources, the prevalence of existing informal legal systems, and their institutional characteristics. States around the world have attempted to incorporate informal legal systems.¹⁰² Their efforts demonstrate both the attributes of successful reform and the obstacles to incorporation.

The African countries of Zimbabwe, Malawi, and Uganda formalized existing informal legal systems, allowing participants to appeal their decisions to state courts.¹⁰³ Theoretically, this system both reflects community values and protects individual rights. This policy attracts weak states in that it requires relatively few resources. However, the flaws in the formal judiciary that originally inspired the development of the substitutive system remain, so the right to appeal proffers little benefit. In addition, informal legal

¹⁰² Sally Engle Merry, "Popular Justice and the Ideology of Social Transformation." *Social and Legal Studies* 1 (1992), pp. 161-162.

¹⁰³ Schärf, p.17.

systems establish institutional winners with vested interests in maintaining the status quo. These people resist reform and often derail state attempts to incorporate informal institutions.¹⁰⁴ As such, state formalization of informal legal systems often fails to deal with many of their negative attributes.

The countries of the Philippines, Sri Lanka, and Papua New Guinea created new institutions that resemble informal legal systems with some success.¹⁰⁵ Establishing new systems from scratch requires more resources than appropriating existing ones, but it also affords the state considerable influence over the final product. This policy produces institutions better integrated into the formal system than those resulting from appropriating existing institutions, thus augmenting the reach of the state. However, the end product often lacks the legitimacy of organic informal legal systems. The systems created by these countries did not have to compete with existing informal legal systems as they would in many Latin American states. The significance of this distinction remains unknown, but it is potentially vast. This uncertainty renders the creation of new institutions an advisable policy only for those Latin American countries without entrenched informal legal systems, such as Costa Rica and Chile.

Peru and Guatemala have pursued a policy that combines elements of appropriating informal legal systems with creating new institutions.¹⁰⁶ They established community justices of the peace to coordinate between the state and substitutive systems. While this policy prevents informal legal systems from violating individual liberties, the overall system remains largely outside state control. Van Cott argues this informality

¹⁰⁴ Helmke and Levitsky, p.31. Schärf, p.17.

¹⁰⁵ Merry (1992) analyzes these reform programs in more detail.

¹⁰⁶ Van Cott (2003), pp. 34-36.

benefits communities.¹⁰⁷ However, it also preserves many of the deleterious effects informal legal systems inflict on the state. Furthermore, structural elements within the informal legal systems dictate the feasibility of this policy. Peruvian *rondas campesinas* lack the indigenous influence found in Mayan justice systems. This difference in this variable produces contrasting outcomes. Peruvian justices of the peace have succeeded in incorporating the *rondas* into the formal system, injecting some state influence while providing communities with wide latitude.¹⁰⁸ Communities elect justices of the peace, endowing the state official with local legitimacy. The non-indigenous nature of this institution facilitates the acceptance of the state, as the *rondas* originally adopted many of its norms, rituals, and symbols. By contrast, Guatemalan justices of the peace lack legitimacy among indigenous Mayan communities.¹⁰⁹ Traditional leaders resent the outside incursion into their institutions and have resisted its influence. Indigenous influence in informal legal systems complicates the state's attempt to incorporate them into the formal system.

State programs of incorporation entail the formalization of informal legal systems and the deformalization of part of the state judiciary. The resulting hybrid institutions are known as systems of “popular justice.”¹¹⁰ Sally Engle Merry argues that these institutions occupy social space between state and folk law, empowering communities

¹⁰⁷ *ibid.* p.39.

¹⁰⁸ *ibid.* p.35.

¹⁰⁹ *ibid.*

¹¹⁰ Popular justice systems differ from informal legal systems in their relations to the state. Merry and Milner define popular justice systems as follows: “Characteristics typically involve popular sovereignty, direct governance and control by the people, the capacity of judges to exercise social power autonomously, a minimum level of institutionalization and bureaucratization, nonprofessional handling of disputes, and little specialization... Located on the boundary between state law and local or community ordering, distinct from both but linked to each.” Sally Engle Merry and Neal Milner (eds.) *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*. Ann Arbor, MI: The University of Michigan Press, 1993, p.4.

while remaining affiliated with the state.¹¹¹ Peter Fitzpatrick, by contrast, maintains that despite their apparent informality, popular justice systems remain an agent of the state.¹¹² Although they employ informal procedures, they ultimately depend on the coercive power of the state.

Whatever their proximity to the state, effective popular justice systems share common attributes. They increase citizen participation in state affiliated institutions, which promotes the rule of law and improves civic dialogue.¹¹³ Procedures are in the predominant language of the community.¹¹⁴ Assessors or other officials come from the community where possible, and they receive sufficient training to facilitate the reconciliation of state law with community values. The assessor protects the rights of the accused but remains focused on the substantive fairness of the outcome, not legal procedure or precedent.¹¹⁵ Citizens can engage the system without an attorney or even specialized knowledge. Evidence is allowed in narrative form and does not entail complicated procedures. Punishments draw from community norms (subject to a repugnancy clause) and emphasize group cohesion, not incarceration. The system integrates state symbols and rituals into proceedings, such the placement of flags and the recitation of oaths. Popular justice systems that incorporate these attributes enhance access to efficient and reasonably impartial adjudication. They address the underlying

¹¹¹ Merry (1992), p.162. For a critical analysis of Merry's structural conception of popular justice systems, see: Lauren Benton, "Beyond Legal Pluralism: Towards a New Approach to Law in the Informal Sector." *Social and Legal Studies* 3 (1994) pp. 223-242.

¹¹² He writes: "Popular justice is but an extension of formal regulation, its mere mask or agent." Peter Fitzpatrick, "The Impossibility of Popular Justice." *Social and Legal Studies* 1 (1992), p.199.

¹¹³ William Prillaman reports that among poor people in Latin America, those who have accessed the formal judiciary harbor more favorable attitudes towards the rule of law and democracy than those who have not, regardless of the verdict received. *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Westport, CT: Praeger, 2000, p.2.

¹¹⁴ Schärf, pp. 17-18.

¹¹⁵ *ibid.*

causes of substitutive institutions, retaining many of their positive outcomes and minimizing many of the negatives.

5. Conclusion and Avenues for Further Research

Informal legal systems address the symptoms of state weakness, not the causes. They provide justice to marginal populations but reduce demand for meaningful judicial reform. As such, informal legal systems are inadequate solutions to fundamental problems within Latin American states. Incorporating substitutive systems into the formal system legitimizes the state and addresses the underlying weaknesses that produce substitutive systems.

This study has revealed a series of theoretical and practical questions that warrant further exploration. These lines of inquiry reflect the multidisciplinary nature of informal legal systems.

The categorization of informal justice systems requires further refinement. The boundaries between different types of institutions remain nebulous. Different systems such as informal legal systems, vigilantism, customary law, popular justice, and even organized crime remain discrete in the abstract, but marginal cases invariably strain distinction. The same challenge applies to subcategories of informal justice institutions. The typology developed in this paper requires further scrutiny and elaboration in this light. Elucidation of what does and does not constitute a informal legal system will enhance the analytic clarity of future studies.

Informal legal systems call for a redefinition of basic social science terms. They support O'Donnell's assertion that the weak states of Latin America strain notions such

as state, citizenship, democracy, and rights.¹¹⁶ Informal legal systems may also challenge Western notions of human rights and torture. The definition of these terms has tangible consequences in international jurisprudence. The physical punishments sometimes dispensed by informal legal systems constitute torture as commonly defined. These sanctions are common in many communities and are often regarded as preferable to incarceration. The tension between these two perspectives deserves further attention.

Informal legal systems have not received sufficient quantitative analysis, and methodologies should be developed to measure different attributes. Several case studies have measured the effect of a informal legal system on the caseload of the formal judiciary.¹¹⁷ As the data pool expands, this analysis will facilitate large-n comparisons between types of substitutive systems.

The economic impact of informal legal systems in rural areas deserves further research. Hernando de Soto's research on the economics of urban institutions provides an appropriate model. Rural informal legal systems also have an economic impact on their communities and the state, yet their significance remains unknown.

More medium-n analyses of informal legal systems will facilitate comparisons between Latin America, Africa, Asia, and, to a lesser extent, the developed world. Variation across regions will highlight structural factors that influence substitutive systems. Temporal analysis will complement these regional comparisons. Alterations in institutions across time will clarify developmental patterns in the life of informal legal systems. It will also reveal the impact of social change on institutions, such as the affect, if any, of the Internet or neoliberal reforms on informal legal systems. Although

¹¹⁶ O'Donnell (1994b), pp. 166-167

¹¹⁷ Van Cott (2003), p.36.

methodological barriers obstruct temporal analysis, newspaper records and other archives reveal evidence of extinct informal legal systems.

Further research is required regarding the influence of structure. Little is known about why certain institutions become profit seeking or lurch into criminality (as in Mozambique).¹¹⁸ Similarly, what attributes prevent the “Ugandan dilemma,” the decline of volunteerism in substitutive systems after initial enthusiasm wanes?¹¹⁹ Resolving these questions will promote the development of more sustainable community justice systems.

Van Cott’s question regarding the impact of informal justice systems on the quality of democracy warrants further attention.¹²⁰ Commentators have been generally optimistic regarding the impact of substitutive and other informal legal systems on the quality of democracy; however, methodological bias overstates their positive effects and understates the negatives. The vast majority of studies of Latin American informal legal systems takes the form of anthropological fieldwork (n=1), which fails to identify the full spectrum of consequences. Individual case studies capture the positive outcomes of substitutive systems, most of which appear at the micro level, but many of the negatives emerge only from macro analysis. Although substitutive systems improve citizenship and democracy within their communities, it appears that the proliferation of these institutions across the region retards the consolidation of democracy and citizenship on a larger national scale. Further exploration of the positive and negative consequences of informal legal systems is needed on the micro, meso, and macro levels.

¹¹⁸ Schärf, p.19.

¹¹⁹ *ibid.*

¹²⁰ Van Cott (2003), p.36.