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# Poverty, Efficiency of Dispute Resolution Systems, and Access to Justice in Developing Countries

## 1. INTRODUCTION AND BACKGROUND

During the past two decades, international law and development research has mainly focused on public sector macro-governance indicators as the source of all wisdom regarding economic development. Most of these indicators are based on perceptional surveys of businesspeople and average individuals. [1] Within this «governance and growth» framework, experts have worked on well compensated projects funded by international organizations generating huge flows of perceptional macro-institutional indicators to describe and analyze the impacts of judiciaries on economic growth. The poor results generated by this macro governance framework of analysis have provided little guidance for economic growth and development and have become the inspiration of other papers on the same subject. [2] Changing course may take time, but there is a real need to develop better *micro* governance indicators based on objective observations of court proceedings within specific case-files and specific mediation/arbitration proceedings (and not just general perceptions of general aspects of the judiciaries). Obtaining better observational inputs is important for improving public policies based on empirical data. The work presented here aims at contributing to the micro-institutional empirical analysis linking the quality of judicial institutions and the access to dispute resolution mechanisms.

Basic democratic governance requires the provision of formal and informal conflict resolution mechanisms in order for individuals to be able to exercise their basic political, civil, and economic rights. [3] The predictable, consistent, and

1 Daniel Kaufman: «Governance and Growth» available on-line at *http://info.worldbank.org/etools/BSPAN/ PresentationView.asp?PID=2334&EID=104.*

2 Marco Fabri and Phillip Langbroeck: The Challenge of Change for Judicial Systems: Developing a Public Administration Perspective, IOS Press, Amsterdam, 2007.

3 See Edgardo Buscaglia: «Legal and Economic Development: The Missing Links», *Journal of Inter-American Studies and World Affairs* No. 35 (1994), pp. 153-169.

coherent actual exercise of basic political, civil, and economic rights (and not just the quality of the laws in the books) are the sources of economic development and growth. [4] In this context, improvements in the delineation and enforcement of property rights are the most important conditions for economic progress within free open societies. [5] In order to perform its essential representative functions, a democracy must ensure that its formal and informal judicial institutions are also effective in allowing for the actual exercise of political, civil, and economic rights. [6] [7] In this context, the public institutions responsible for the interpretation and application of laws must be able to serve those people who cannot find any other way to redress their grievances and solve their conflicts. [8]

More generally, all kinds of state-run and private sector-run dispute resolution mechanisms must be included among the institutional mechanisms aimed at reducing the costs of resolving disputes in order to exercise the basic economic, civil, and political rights of the poorest segments of the population. This is a pre-condition for higher economic growth and social development. [9] Enhancing the effectiveness of these public and private dispute resolution mechanisms enables political governance as a precursor of economic growth. [10] In this context, the institutions responsible for the interpretation and application of laws must be able to address in an efficient manner the conflict resolution needs of those people who cannot find any other way to redress their grievances. [11] Few studies have been able to focus on poverty and access to dispute resolution and generate reliable objective (and not just perceptional) data within this domain. [12]

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4 Edgardo Buscaglia and William Ratliff: *The Law and Economics of Development*, JAI Press, New Jersey, 1996.

5 John Locke: *Two Treatises of Government* (Edited by Peter Laslett), Cambride University Press, Cambridge, 1988 (orig. 1690); John Dunn: *Le Pensée Politique de John Locke,* PUF, Paris, 1991, pp. 250-273; and later described from an empirical standpoint by Hernando de Soto: *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else,* Basic Books, New York, NY., 2000.

6 Mauro Cappelletti, Bryant Garth, John Weisner, Klaus-Friedrich Koch: «Access to Justice», *The American Journal of Comparative Law* Vol. 29, No. 3 (1981), pp. 532-535; Edgardo Buscaglia: «Objective Indicators vs. Perceptional Biases: A Governance-Based Approach to Judicial Corruption», *International Review of Law and Economics* No. 21-2 (2001).

7 See Edgardo Buscaglia: «Legal and Economic Development…», cit.

*8I* See Edgardo Buscaglia: «Legal and Economic Development…», cit., at p. 56.

9 See Edgardo Buscaglia: «Legal and Economic Development…», cit., at p. 160-162.

10 See Edgardo Buscaglia: «Introduction to Law and Economics of Development», in Edgardo Buscaglia and William Ratliff: *The Law and Economics of Development*, cit.; Friedrich Hayek: *Law, Legislation, and Liberty,* University of Chicago Press, Chicago, Il., 1973; and Edgardo Buscaglia: «Objective Indicators vs. Perceptional Biases: A Governance-Based Approach to Judicial Corruption», cit.

11 Edgardo Buscaglia: «Objective Indicators vs. Perceptional Biases: A Governance-Based Approach to Judicial Corruption», cit., at p. 56.

12 Refer to Edgardo Buscaglia: «Acces to Justice and Poverty», Paper presented at the World Bank Conference on Judicial Reform. St. Petersburg, Russia. July 2001.

Understanding the availability and efficiency of channels to redress grievances requires an account of factors affecting –on the one hand–, the supply of court services, and –on the other hand–, the demand for dispute resolution mechanisms. The first part of this manuscript will address the supply and demand-related factors. In this context, public sectors must monitor and later eradicate cultural, socio-economic, geographic and political barriers to conflict resolution that do affect the capacity of the poorest segments of the populations to demand for court services. If the poorest segments of the population are marginalized by barriers to conflict resolution, one can anticipate greater social and political conflicts and costlier disputes. [13]

This piece also aims at empirically identifying the supply and demand related barriers to access conflict resolution mechanisms for the poorest segments of societies in a sample of UN member states. In this respect, the empirical results obtained through the actual experience of individuals (within the 20 percent of the lowest socio-economic strata) that are aiming at solving conflicts within the private and public dispute resolution frameworks will provide demand-related data useful at the time of designing public policies

The theoretical framework provided by F. Hayek [14] and the empirical work by Buscaglia [15] have already provided analysis addressing how and why a centralized «top-down» approach to law making has resulted in a rejection of the legal and judicial systems by marginalized elements of the population in developing countries. [16] Comprehensive and centralized legal and judicial reforms have proven useless means to achieve modernization through international transplants from «best practice» legal systems. Most of these «best practices» (such as the use of abbreviated proceedings in France or in Italy, or plea bargain techniques used by prosecutors in the US and grand juries within the criminal justice system domain) have shown bias against low-income individuals with deficient access to medium or high-quality legal representation. [17] Large segments of the low-income populations, who lack the ability, information or economic resources to surmount significant transaction costs caused by substantive and procedural barriers wind up pleading

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13 Edgardo Buscaglia: «Acces to Justice and Poverty», cit., at 24-29 and Friedrich Hayek: *Law, Legislation, and Liberty*, cit.

14 Friedrich Hayek: *Law, Legislation, and Liberty*, cit.

15 Edgardo Buscaglia: «Legal and Economic Development…», cit.; «Introduction to Law and Economics of Development», cit, and «Objective Indicators vs. Perceptional Biases…», cit.

16 Main proponents of the earlier «Law and Development» movement include Robert B. Seidman: *The State, Law and Development*, St. Martin's Press, New York, 1978; Marc Galanter: «Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change», *Law and Society Review* Vol. 9, No. 1 (1974), pp. 95- ; David Trubek: «Toward a Social Theory of Law: An Essay on the Study of Law and Development», *Yale Law Journal* Vol. 82, No. 1 (1972), p. 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.

17 See Edgardo Buscaglia: «Objective Indicators vs. Perceptional Biases…», cit.

guilty to prosecutorial charges within criminal cases or simply are not able to redress grievances within the civil domain. [18] These factors cause a massive divorce of low income populations from the formal framework of public institutions (for dispute resolution purposes linked to land titling in particular and formal access to land titles in general) and generate potential pockets of social unrest and political instability. [19] As a result, those same segments of the population classified among the poorest pursue informal and sometimes ineffective means to redress their grievances. In practice, informal mediation or arbitration systems may provide an efficient escape valve for certain types of conflict resolution. Yet many other types of disputes, some involving the exercise of fundamental economic and civil rights (linked to the public interest) go unresolved or, what is even worse, go without even being addressed in most developing countries. These problems in the provision of dispute resolution mechanisms undermine the legitimacy of the state and disproportionately burden the poorest segments of the population. [20]

This piece is aimed at re-assessing the access to dispute resolution mechanisms with a much-improved methodology based on the latest objective (and not just perceptional) *micro* governance data accounting for all the types of barriers faced by the poorest 20 percent of rural and urban households experiencing land-titling related conflicts within a sample of seventeen developing middle and low income countries. [21] The conclusions presented here are rooted on a theoretical and empirical framework first introduced by Buscaglia [22] and four years later empirically tested once again in Buscaglia and Stephan. [23] Buscaglia assesses the factors linked to access to justice in developing countries. [24] The study analyses access to public and private dispute resolution mechanisms within a sample of low/middle human development index (HDI) nations by using a law and economics approach that takes into account supply and demand-related factors.

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18 See Edgardo Buscaglia: «Acces to Justice and Poverty», cit., at pp. 28-34

19 See Edgardo Buscaglia: «Acces to Justice and Poverty», cit., at pp. 35-41

20 See Edgardo Buscaglia: «Acces to Justice and Poverty», cit., pp. 24-29.

21 The sample covers rural households in Argentina, Benin, Bolivia, Botswana, Brazil, Chile, Colombia, Guatemala, Honduras, Mozambique, Nicaragua, Nigeria, Paraguay, Peru, South Africa, Uruguay and Venezuela, The samples were selected based on regional characteristics and on obtaining strata of middle and low income rural households. The database through which the analysis performed in this paper is presented is contained in *www.derecho.itam.mx*

22 Edgardo Buscaglia: «Objective Indicators vs. Perceptional Biases…», cit.

23 Edgardo Buscaglia and P. B. Stephan: «An empirical assessment of the impact of formal versus informal dispute resolution on poverty: A governance-based approach», *International Review of Law and Economics* No. 25/1 (2005), pp. 89-106; Edgardo Buscaglia: «Objective Indicators vs. Perceptional Biases», cit. and Edgardo Buscaglia: «Access to Public Services and Poverty Levels: A Governance-Based Account», Centre for International Crime Prevention, United Nations, Vienna, 2001.

24 See Edgardo Buscaglia: «Introduction to Law and Economics of Development», cit.; and «Objective Indicators vs. Perceptional Biases», cit.

An empirical model is proposed and tested below covering eighteen developing countries in Africa and Latin America within which the access to dispute resolution mechanisms is determined by supply-related factors, such as: (a) the economic cost of providing court services *vis a vis* the cost of providing formal/informal private alternative dispute resolution mechanisms (ADRMs); (b) expectations of high or low levels of political governance among judicial system personnel; (c) the relative size of public vs. private alternative dispute resolution mechanisms; and (d) technologies used in the provision of public and private dispute resolution mechanisms. On the other hand, the demand for public and private dispute resolution mechanisms is jointly determined by (a) the price of access to public *vis a vis* private dispute resolution mechanisms faced by users; (b) relative income levels of the parties in dispute; (c) number of users/complexity of their cases; and (d) users' expectations of the governance (e.g. quality of rulings or judicial corruption) in the provision of public vs. private dispute resolution mechanisms.

An empirical model is tested by developing and using jurimetrics-based objective indicators of (judicial) efficiency in public courts and in private ADRMs (and not just perceptional indicators) that, for the first time in the literature, account for qualitative and quantitative dimensions of rulings (decisions). Qualitative indicators of judicial rulings are computed through the analysis of a sample of real case-files focused on land titling disputes experienced by users within the lowest 20 percent segment of income levels in each of 18 countries. The quality of judicial rulings indicator detects substantive and procedural judicial errors in 18 court systems between 2004 and 2008. Quantitative indicators account for the clearance rates in each country between 2003 and 2007. The real changes in judicial budget lines between 2004 and 2007 (such as changes in judicial technology, salaries, infrastructure, and judicial training) are used as explanatory factors.

Part 2 accounts for the most important supply and demand factors explaining access to justice by the poorest segments of rural and urban populations in eighteen developing nations. Part 3 provides conceptual and descriptive accounts of the sample of national jurisdictions for the subsequent empirical analysis in Part 4.

## 2. SUPPLY AND DEMAND-RELATED FACTORS EXPLAINING ACCESS TO JUSTICE

An effective judiciary should offer access for the population regardless of socio-economic status, and should provide predictable results and adequate remedies. Many judiciaries, however, suffer from a chronic lack of quality in its court rulings, lack of transparency, and endemic corruption. The basic elements of an effective judicial system may be missing, including relatively predictable

outcomes within the courts; accessibility to the courts by the population, regardless of income and educational level; reasonable time to disposition; and adequate court-provided remedies. In cases such as these, lack of confidence in the administration of justice runs high, and is most pronounced among small economic units and low-income families.

As a result, these low income individuals facing a dispute tend to demand informal dispute resolution mechanisms or go without solving their disputes. Yet, democratization, growing urbanization, and the growing role of the private sectors in developing countries have created additional demands for court services throughout all regions worldwide examined in this study. These three factors have increased the complexity of social interactions, making the improvement of judicial conflict-resolution capabilities even more necessary. All these factors have created an unprecedented increase in private-sector demand for clearer definition of rights and obligations, and an increasing demand for civil justice. The judiciary's inability to satisfy the growing demand for dispositions, is one of the most challenging and important aspects of judicial reform. [25]

## 2.1 Supply Related Factors Linked to Access to the Courts

It could be argued that the supply of court services and the performance incentives faced by judges and court personnel, are at the heart of inefficiencies in many countries. Politicized appointments, lack of quality control standards for work performed by judges and court personnel, lack of proper requirements for career entry and promotions, and lack of a practical model against which to assess the character and psychological suitability of applicants for the position of a judge all add up and contribute to the poor performance of courts. This is despite the huge sums of money spent on higher salaries and better technologies in most of the countries sampled as part of this publication. In addition, court delays may be attributed to procedural defects. Other reasons are the lack of legal training, the absence of an active case-management style, and the excessive administrative burden that falls on some judges.

Poorly trained judges in an overburdened legal system are also susceptible to corrupting influences, and therefore create an environment where the rule of law cannot be guaranteed. The use of *ex parte* communication is one aspect of legal practice that especially contributes to this perception, and there are accusations that cases are decided in *ex parte* meetings where litigant lawyers bid for the drafting of court rulings. All of the problems mentioned above also add cost and risk to business transactions and thus reduce the potential flows of investments. At the same time, access to justice is blocked to those who cannot

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25 Edgardo Buscaglia, Maria Dakolias, and William Ratliff: *Judicial Reform: A National Framework for Development,* Hoover Institution Press, Stanford, Ca., 1995.

afford the expense of waiting through court delays. Lack of timely resolution of conflicts raises costs and creates uncertainty, and can obstruct the development of the private business sector. When parties do not trust that a contract will be enforced, they limit their transactions to business partners who have a strong reputation or with whom they have dealt in the past, thus precluding start-ups or other unknown players. [26] Consistent interpretation and application of the laws are necessary to provide a stable institutional environment where the long-term consequences of their economic decisions can be assessed by both businesses and the public. Clearly, there is a need for a change in legal culture, as well as a systematic change in the delivery of justice. Although the entire reform process may take generations to run its course, the effects of judicial reform will be felt by everyone: the private sector, the public, the legal community, and members of the judiciary. Ultimately, the private sector and the public should be able to rely on an efficient and equitable system that is respected and valued.

Many of the countries included in this study have implemented their own judicial reforms, with differing results. Some have implemented a few isolated reforms addressing improvements in factors linked to the supply of court services mentioned above, while others have developed broad reform programs. The discussion about the nature of successful reforms continues. This study does not aim to describe the immense wealth of experiences that the judicial systems of these countries offer. Yet, this study does offer a brief review of how and why certain demand and supply factors possess an impact on the performance of the courts. Many of the developing countries sampled for this study have been undertaking judicial reforms, others are contemplating reforms, and still others are studying the possibility of reforms. Yet, access to justice is still the main challenge of any judicial reform.

Many of the countries in Latin America and Africa included in this study are at different stages of judicial reform and offer a rich sample for comparison. Some of these countries have addressed court technology as the key to better performance, other nations have relied on introducing oral proceedings to their civil and criminal codes, while other components of reforms included the administrative, case management, alternative dispute resolution, judicial training, organizational and infrastructure domains. Some of these legal systems are criticized for a lack of independence, transparency, or trust in the judiciary. Although the Supreme Court is charged with the administration of the judicial branch, judicial councils are essential for the improvement in the supply of court services through the better management of the administrative, financial, and personnel issues of the judiciary. Judicial schools need to be established too with courses geared toward training newly appointed and current judges. In short, the

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[26] Douglass North: *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 1990, 152 pp.

supply-related factors considered in this study (in order to empirically test their projected effects) are as follows:

1.– Budget devoted to physical capital resources; i.e., fixed assets spending (on tangible capital) with the capacity to increase clearance rates (annual dispositions by the end of a year divided by annual pending cases by the end of the same year) aimed at the elasticity of supply of court services (where the elasticity indicates the percentage increase in clearance rates given by a 1 percent increase in the capital budget line) and with the capacity to increase the quality of judicial rulings. One could hypothesize that increased spending on infrastructure coupled with additional spending on court technological equipment would tend to increase the capacity of a court to dispose of cases in less time. Given the lack of reliable data, procedural times are approximated through the Cappelleti Index, where the expected duration of a case in a specific court is estimated by dividing the number of pending cases at the end of a year by the number of cases disposed that same year.

2.– Budget resources allocated to human capital where it is expected to find the same effect found in the previous variable (capital spending); i.e. an increase in budget allocations to this budget line would increase clearance rates and decrease the expected duration of cases disposed.

3.– Expenditures on wages and benefits plus other material inputs needed to keep the courts operational, as reflected in the variable cost per case disposed. We expect that a decrease in the variable cost per case disposed could be related to an increase in clearance rates and a decrease in the expected duration of a case disposed. For example, a decrease in the time allocated by each court employee to an average case filed would decrease the labor costs per case and make more time available for court personnel to deal with other cases pending.

4.– The use of technology. Software can be used to manage information in the courts, (a) to maintain a database of jurisprudence; (b) to run case-tracking systems; (c) for word processing; and (d) for e-case-file management and case-file processing. It is expected to see a decrease in procedural times and an increase in clearance rates with the additional application of technology to case processing.

5.– Organizational improvements address, for example, the amount of time dedicated by each judge to jurisdictional tasks. An improvement in this factor would tend to decrease the expected duration of an average case-file, and increase clearance rates and an increase in quality of judicial rulings. Another side of the organizational dimension is the amount of time dedicated by each judge to administrative tasks. An increase in this variable would tend to decrease clearance rates and increase the expected duration of cases disposed while diminishing the judicial quality of resolutions. The

third dimension of the organizational domain is the managerial style of the judge. As a judge becomes more active in managing a case-file, the higher court efficiency will result. Managerial activism can be determined through (a) the delegation of administrative tasks to court personnel; (b) the use of technology to accelerate administrative tasks; and (c) the use of evidentiary or complexity criteria for attending a case-file. Effective management would tend to decrease the expected times to disposition, increase clearance rates, and increase the quality of judicial rulings. This variable also touches on the main aspects of the organizational factors affecting court efficiency. A court organization that avoids duplication of administrative tasks, specifies criteria for managing cases based on, for example, the complexity of the stakes, and applies technology to administrative matters would tend to increase clearance rates, reduce the expected duration of cases filed, and increase the quality of judicial decisions.

This jurimetrics-based study recommends that data should be gathered in order to determine the strength of the above relationships. The indicators we recommend using in all jurimetrics assessments of judiciaries can be classified as follows:

1.– Procedural (procedural times, clearance rates, and quality of judicial rulings by assessing the frequency of errors found in a sample of court rulings by case type).
2.– Administrative indicators (budget size; the salaries of administrative personnel and judges).
and 3.– Organizational (number of employees, use of technology, and managerial techniques).

By identifying the strength of the empirical relationships between input and output variables, we hope to help those responsible for designing judicial policies to focus on the most effective means of improving court services.

Below, we highlight the results of court performance between 2004 and 2008 in several countries sampled for this study. The results shown here include clearance rates combined with the quality of court rulings where litigant court users are within the bottom 20 percent of the lowest income ranges within each country. While many results tend to confirm our hypotheses stated above, some debunk common ideas about how to structure a judicial reform program from a resource allocation point of view. It is important to remember that these results assess court performance measured through clearance rates and the quality of judicial rulings (i.e. we do not gather data from perceptional surveys to measure the quality of judicial resolutions or clearance rates). [27] As can be seen below,

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27 Daniel Kaufman: «Governance and Growth», cit.

infrastructure is identified as one of the supply (of court services)-related factor. In some of these countries, infrastructure is a serious problem; the court houses are crowded, there are lines to use the elevators, and there is little space in which to keep files safe. The number of judges is seen by most surveyed to have a moderate to high impact on procedural times.

For the purposes of calculating an indicator of judicial output, we consider the following two main areas: (i) the average clearance rates (annual dispositions divided by pending cases by the end of the same year) in each country's judicial system within the civil domain covering all those case-types addressing land titling disputes filed before the main urban court and the main rural court and (ii) a ranking of judicial quality (measured on a 0-100 scale) is also computed where a ranking of «0» means that the sampled court has 100 % of its sampled case-files subject to substantive and procedural judicial errors that would have changed the nature of the rulings (the checklist of all possible judicial errors is provided by the criminal code and the code of criminal procedures). One the other hand, a «100» rank means that none of the rulings sampled in each court experience substantive and/or procedural errors that would have changed the nature of the rulings (i.e. 100% would represent a perfect score). This study focuses on representative samples of the annual flows of case files dealing with land titling disputes brought to first instance courts within the main urban district and the main rural district of each country analyzed here. As a result of the above, this study combines procedural times and case-flow indicators (within the clearance rate) and quality of judicial decision indicators for the first time in the literature. Within this framework, one would expect that if an increase in budget resources devoted to infrastructure-training-and technological equipments (input variables) comes hand in hand with a decrease in the clearance rates (i.e. a decrease in the fraction of annual dispositions divided by pending cases by the end of each year) while at the same time this same country experiences a decrease in the quality of judicial rulings (both judicial output variables), then efficiency will be considered impaired.

The Table below provides an account of judicial efficiency that for the first time takes into account factors addressing *quantity* and *quality* of justice at the same time. The judicial errors are computed through the examination rulings contained in real case-files sampled in of the sampled each countries. The case types focus on land titling disputes faced by court users within the bottom 20 percent of the socioeconomic range of the population in each country. The examiners (a team of 561 lawyers worldwide) verify the correct legal foundation and correct legal motivation within each judicial ruling pointing at substantive and procedural errors (in the light of the national civil and procedural codes), and calculate the average number of case-files where significant substantive and procedural judicial errors were made. [28] Therefore, the Table below addresses the impact of increasing

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[28] This methodology has been in use since Edgardo Buscaglia: «Acces to Justice and Poverty», cit.

judicial budget resources on the quantitative performance of courts and on the quality of judicial rulings faced by the poorest segments of the court users in each country.

Budget resources are analyzed in the following two main areas (i) real percentage changes (discounting for inflation) in capital spending focused on judicial infrastructure, court technology, and judicial training and (ii) real percentage changes (discounting for inflation) in operational spending focused on salaries and personnel benefits.

One can see in Table 1 below that between 2003 and 2007 Argentina has experienced a 5 percent increase in budgetary allocations devoted to infrastructure and a 17 percent increase in its budget devoted to court technology while its budget lines devoted to judicial training of personnel have dropped by 2 percent. At the same time, Argentina's clearance rates have experienced a 7 percent decrease (i.e. case dispositions as a proportion of cases pending has decreased by 7 percent) and the quality of land titling dispute rulings have dropped from 73 to 71 between 2006 and 2008 (i.e. in 2008, 29 percent of sampled land titling case files showed significant substantive and/or procedural judicial errors with the capacity to alter the nature of the judge's ruling, compared to 27 percent with significant judicial errors in 2006). This simply means that Argentina, despite of its percentage increases in budget resources devoted to judicial inputs, is clearing less cases from its dockets (as a proportion of pending cases) and its experiencing less quality in its rulings. This descriptive data found on Table 1 below provides evidentiary analysis of a decreased efficiency of budget resources when allocated to the supply of court services for the poorest segments of court users in Argentina during the period 2003-2008. The same pattern of inefficiency can be observed in the rest of the sampled countries included in Table 1 below, except for the cases of Chile and Colombia. More specifically, Chile, and Colombia experience a huge percentage increase in budget resources (as part of their judicial reforms towards a procedural oral legal system) and these increases in budget lines were allocated to court technologies (case management software, case-tracking software and electronic case filing: a 219 percent increase in Chile and 183 percent increase in Colombia, in both cases, between 2003 and 2007), for training of judicial personnel (587 percent increase in Chile and 83 percent increase in Colombia), for infrastructure (422 percent increase and 213 percent increases for Chile and Colombia, respectively); while salaries and benefits have been increased by 59 percent in Chile and 64 percent in Colombia. On the judicial output domain of Chile and Colombia, the ratio of disposed to pending cases (i.e. clearance rates) in Chile increased by 72 percent and the proportion of sampled rulings *without* significant errors significantly improved from 60 to 93 percent in Chile. In Colombia the ratio of disposed to pending cases increased by 91 percent (in great part through the use of alternative dispute resolution mechanisms) and the proportion of sampled rulings without significant errors (i.e. judicial quality) also improved from 79 percent to 98 percent, thus giving Colombia a significant

**Table 1 Changes in Supply-Related Variables Affecting Quality and Quantity of Court Services (2003-2008)**

| *Country* | *Budget % Change Capital (Infraestruct.)* | *Budget % Change Capital (Training)* | *Budget % Change Cap. Technolog.* | *Budget % Change (Salaries)* | *Clearance % Change (2005-2008)* | *Judicial Quality of Rulings 2006-2008* |
|---|---|---|---|---|---|---|
| ARGENTINA | 5 | –2 | 17 | 45 | –7 | 73-71 |
| BENIN | 3 | –7 | 5 | 2 | –17 | 35-18 |
| BOLIVIA | –11 | 14 | 21 | 31 | –21 | 61-33 |
| BOTSWANA | 1 | 18 | 2 | 49 | –2 | 72-65 |
| BRAZIL | 19 | 35 | 72 | 151 | 19 | 88-72 |
| CHILE | 422 | 527 | 219 | 59 | 72 | 60-93 |
| COLOMBIA | 213 | 83 | 183 | 64 | 91 | 74-98 |
| GUATEMALA | 2 | –15 | 34 | 29 | –49 | 49-43 |
| HONDURAS | 4 | 11 | 61 | 7 | –7 | 37-32 |
| MOZAMBIQUE | –7 | –14 | 39 | –11 | –26 | 54-29 |
| NICARAGUA | 1 | 82 | –9 | 37 | –20 | 31-23 |
| NIGERIA | –51 | –32 | –61 | 73 | –13 | 74-57 |
| PARAGUAY | –21 | –6 | –13 | 19 | –4 | 42-31 |
| PERU | 23 | –7 | 18 | 62 | –2 | 81-72 |
| SOUTH AFRICA | 3 | 6 | 5 | 11 | –2 | 89-85 |
| UGANDA | 6 | 1 | 7 | 27 | –9 | 32-28 |
| URUGUAY | 0 | 2 | –1 | 4 | –1 | 81-80 |
| VENEZUELA | –3 | 5 | 12 | 52 | –39 | 75-41 |

NOTE: Statistics above are rounded up. All the indicators are primary data developed by the author, based on average percentage changes in budget allocations (in real terms discounting for inflation at 1998 prices) and budgets exercised and approved by Parliaments. Data on clearance rates are based on court-specific data extracted from books and quality of court rulings is an indicator based on sampling court rulings on land titling case files within which court users are always within the 20 percent of the poorest based on Economic Ministries. The samples of case files to calculate judicial quality of court rulings corresponded to casefiles within which litigants belong to the poorest court users accounting within the lowest 20 percent of the lowest income levels in order to assess the barriers faced when aiming to access justice and other public services. Refer to website with data base at *http://derecho.itam.mx/facultad/facultad_invitados_buscaglia.html*

improvement in its quality of court rulings. Therefore, Chile and Colombia are the only two countries in our sample that show judicial efficiency when taking into account judicial quantity (percentage increase in clearance rates) and judicial quality (percentage increase in the proportion of sampled case files without significant errors that would have altered the course of the rulings in land titling disputes). The rest of the countries show inefficiencies linked to increasing budget allocations with decreasing quantities of cases disposed coupled with decreasing qualities of court rulings.

Note the significant drops in judicial performance experienced by Bolivia and Venezuela (i.e. drops in the quantities and qualities of judicial outputs measured through the clearance rates and the proportion of case files examined that experience no significant judicial error) even when, as shown in Table 1 above, budget resources devoted to technology, training, and salaries have increased significantly since 2004 in both countries. In the case of Venezuela, the proportion of sampled case-files without significant substantive or procedural judicial errors decreased from 75 percent to just 41 percent (i.e. 59 percent of the land titling disputes-related case files sampled were experiencing judge's errors that could have altered the nature of the ruling *per se*). Among the worst performing judiciaries, Benin stands with the lowest judicial quality with 18 percent of the case files sampled without significant errors followed by Nicaragua with 23 percent, Mozambique with 29 percent, Paraguay with 31 percent, and Honduras with 32 percent. Guatemala is a remarkable case with its 49 percent collapse in its clearance rates and also experiencing a decrease in its judicial quality within court rulings (dropping to 43 percent of correct rulings in 2008 from 49 percent in 2006) while at the same time budget resources were increasing (i.e. a significant drop in judicial efficiency). In other words, Guatemala increased its budget resources while experiencing a sharp decrease in judicial quality and quantities of cases disposed.

Note that judicial efficiency is measured here as a relationship between judicial inputs and outputs. The judicial outputs considered here are not limited to procedural times or case-flows. Clearance rates capture the relationship between dispositions and pending cases (that according to the Cappelleti Index is also linked to procedural times). Yet, the judicial output indicators also take into account quality of rulings. In this respect, this jurimetrics technique represents an innovation in relation to the prior literature by compounding quality and quantity indicators.

Now that we have examined important factors linked to the supply of court services, it is important to analyze the clearance rate as the by-product of supply (dispositions) and demand for court services (inflows). Within this framework, demand for court services will be examined below.

## 2.2 Demand-Related Factors Linked to Access to the Courts

Recent empirical studies account for the demand for court services-related political, economic, geographic, and cultural barriers to access justice in most developing legal environments. [29] In order to eradicate these barriers to access court services, the judiciary must address policies to enhance the effectiveness of the substantive and procedural mechanisms for reducing the transaction costs (e.g. costs of legal information, costs of delineation and enforcement of property rights) faced by individuals and firms seeking to resolve their conflicts. Demand and the aforementioned supply-related factors jointly determine the price of access to dispute resolution mechanisms.

Recent studies also point to the cause-effect linkages between low levels of judicial governance and poor capacity of the state to resolve civil, electoral, social, and labor disputes. [30] In this context, if the segments of the population are marginalized by barriers to the judicial system (due to defects linked to demand and/or supply related factors), one can anticipate greater social and political conflicts and costlier disputes. [31] Yet, Buscaglia [32] has pointed at existing mechanisms that poor segments of the populations in developing countries use to bypass ineffective and inefficient court systems. This paper is aimed at assessing these types of mechanisms by identifying their main comparative advantages *vis a vis* the formal court system.

Authors such as Cappelletti *et al.* [33] and Buscaglia [34] have provided theoretical and empirical analyses, respectively, addressing how a centralized «top-down» approach to law making has resulted in a social tendency to reject the use of formal legal system, when property rights-related conflicts are faced by specific segments of the population (e.g. socio-economically marginalized groups, small business owners, ethnic minorities, or members of political parties within the opposition), through the use of alternative informal dispute resolution mechanisms. [35] Moreover, large segments of the population who lack the ability, information or resources to surmount significant substantive (lack of a legal

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29 Mauro Cappelletti, Bryant Garth, John Weisner, Klaus-Friedrich Koch: «Access to Justice», cit., and Edgardo Buscaglia: «Acces to Justice and Poverty», cit.

30 Edgardo Buscaglia and William Ratliff: *The Law and Economics of Development*, cit., at pp. 12-57

31 See Edgardo Buscaglia: «Legal and Economic Development…», cit., at 24-29.

32 See Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor». Paper Presented at the World Bank Conference on Judicial Reform. St. Petersburg (Russia), August 2001.

33 See Mauro Cappelletti, Bryant Garth, John Weisner, Klaus-Friedrich Koch: «Access to Justice», cit.

34 See Edgardo Buscaglia: «Legal and Economic Development…», cit.

35 Refer to Alan Watson: The Civil Law, Harvard university Press, Cambridge, Ma., 1979 and Edgardo Buscaglia: «Legal and Economic Development…», cit.

definitions of rights) and procedural barriers (e.g. court delays or judicial corruption) are «divorced» from the formal dispute resolution framework. As a result, those same segments of the population classified among the poorest pursue informal and sometimes ineffective means to redress their grievances. [36] In practice, informal institutions may provide an escape valve for certain types of property-related conflict resolution. Yet many other types of disputes, some involving fundamental rights addressing a public interest go unresolved, or worse, go without being addressed. These problems in the provision of dispute resolution mechanisms undermine the capacity of the states to provide dispute resolution mechanisms within the civil law domain and undermine the implementation of criminal law. [37] Thus, the states' legitimacy as an effective provider of public goods is hampered while the lack of judicial governance disproportionately burdens the poorest segments of the population by making it more costly to access court services. [38]

Case study analysis has already identified the links between access to justice, poverty, and the institutional factors impeding access to justice by the poorest segments of the population. [39] Yet, no empirical studies have offered a descriptive and analytical account of the factors to be addressed in order to reduce barriers to access justice. This policy analysis is approached here through surveying samples of the rural populations of a representative number of countries within Africa and Latin America. [40] Substantial evidence is then found for the claim that effective dispute resolution mechanisms have a positive effect on household net wealth.

## 3. A DEMAND AND SUPPLY COMPARATIVE ANALYSIS OF SEVENTEEN NATIONAL JURISDICTIONS

If the decisions reached by dispute resolution mechanisms are observable, coherent, and consistent, then the information provided in judicial rulings may allow individuals and organizations to predict the consequences of their actions linked to possible disputes and better plan their social and economic activities with much more accuracy than when judicial mechanisms are ineffective and opaque in

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36 Refer to Edgardo Buscaglia *et al*: «An Empirical Assessment of the Impact of Formal versus Informal Dispute Resolution on Poverty: a Governance-Based Approach to Access to Justice», *International Review of Law and Economics* No. 25 (2005), pp. 89-106.

37 Edgardo Buscaglia and Maria Dakolias: *Comparative International Analysis of Court Performance,* The World Bank Press, 1999.

38 See Edgardo Buscaglia: «Legal and Economic Development…», cit., at pp. 24-29.

39 Refer to Edgardo Buscaglia: «Acces to Justice and Poverty», cit., and to Edgardo Buscaglia *et al*: «An Empirical Assessment of the Impact of Formal versus Informal Dispute Resolution on Poverty…», cit. Yet, this paper is the product of a larger and expanded jurimetrics study covering a different sample of countries.

40 A full description of the nature and scale of the samples is offered below as part of the main body of this piece.

addressing dispute resolution. In the kind of environment characterized by legal/judicial uncertainty, production and investment planning is much more difficult to be performed. This socio-economic uncertainty linked to the delineation and enforcement of property rights affects all economic segments of the population (rich, middle class, and poor).

It is common to think of the association between state power and dispute resolution. Yet, for many centuries, other forms of informal provisions and dispute resolution mechanisms have existed and still do exist. For example, the dispute resolution mechanisms observed in trade fairs in medieval Europe [41] or, contemporarily, the internal effectiveness within ethnically homogenous middlemen groups providing a combination of mediation and arbitration in rural areas within Colombia, Mexico, Nigeria, South Africa, and Southern Sudan. [42] All these non-state collective mechanisms tend to provide effective dispute resolution when they enjoy a relative amount of higher social legitimacy than the formal court systems due to the users' perceptions of greater procedural transparency, enhanced efficiency, higher quality of decisions, and lower administrative complexity involved in seeking informal dispute resolution services. [43] Based on Buscaglia's framework, this paper provides an expanded evaluation of the comparative advantage of informal dispute resolution mechanisms. Yet, one also needs to account for the fact that these perceived benefits are severely limited to a much smaller range of simpler types of property, family, and labor-related conflicts within the private legal domain that are usually resolved through informal dispute resolution mechanisms (and many times resolved without complying with international human rights rules and standards). [44]

As explained in Capelletti [45] and Buscaglia, [46] the great majority of the legal systems found in Latin America and Africa today were totally or partially transplanted in the Nineteenth Century (with great influence from the Common

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41 Lisa Bernstein: «Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms», *University of Pennsylvania Law Review* No. 144 (1996), pp. 1765-; Avner Greif, Paul Milgrom & Barry Weingast: «Coordination, Commitment and Enforcement: The Case of the Merchant Guild», *Journal of Political Economy* No. 102 (1994), pp. 745-; Gillian K. Hadfield: «Privatizing Commercial Law», *Regulation* No. 40/1 (2001); Janet Landa: «A Theory of the Ethnically Homogenous Middleman Group: An Institutional Alternative to Contract Law», *Journal of Legal Studies* No. 10/2 (1981), pp. 349- ; Francesco Parisi: «The Formation of Customary Law», *George Mason University Law and Economics Research Paper Series* No. 01-06 (2001); «Sources of Law and the Institutional Design of Lawmaking», *George Mason University Law and Economics Research Paper Series, No*. 00-42 (2000).

42 Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor», cit.

43 Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor», cit., at 12-16.

44 Edgardo Buscaglia: «Justice and the Strengthening of Democracy», Paper Presented to USAID Conference on Justice and Democracy, Quito, Ecuador, August 7-9, 1996.

45 Mauro Cappelletti, Bryant Garth, John Weisner, Klaus-Friedrich Koch: «Access to Justice», cit., and Edgardo Buscaglia: «Acces to Justice and Poverty», cit.

46 Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor», cit.,

Law, Germanic, Scandinavian, and French systems). [47] Most of these legal transplants disregarded local customs while centralized approaches to lawmaking prevailed. Most of these transplants injected procedural formalism and administrative complexity to the resolution of civil conflicts, such as in the case of land title disputes faced by the socially and economically weakest segments of the population. [48] The failure of the public judicial system to satisfy the public's demand for dispute resolution services has been documented, [49] and the gaps between the laws in the books and the same laws in action have been measured, in both cases by in Buscaglia. [50]

Studies showing that most developing countries' judicial sectors are ill prepared to promote private-sector development point to the fact that most basic elements of an effective judicial system are absent. Elements required for an effective judicial system to function include: (a) predictable judicial discretion applied to court rulings; (b) access to the courts on the part of the general population regardless of income levels or social status; (c) disposition within a reasonable time; and (d) adequate remedies. [51] Increases in delay, backlog and uncertainty associated with unexpected judicial outcomes hamper access to justice and diminished the three types of benefits explained above. [52]

Several authors and most proposed judicial reforms in Africa and especially in Latin America (e.g. Guatemala, Paraguay, or Venezuela) describe how the poorest elements of society face significant institutional disadvantages with respect to access to justice. [53] Yet, judicial reforms in developing countries keep failing to make access to an effective court system their main objective and they fail to identify the sources of blockages that impede the access to dispute resolution. This paper aims at covering this gap by providing an expanded analysis of a 17-country sample. This piece employs a methodology based on sampling the poorest

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47 Alan Watson: *The Civil Law*, cit.

48 Edgardo Buscaglia: «Introduction to Law and Economics of Development», in Edgardo Buscaglia and William Ratliff: *The Law and Economics of Development*, cit., at pp. 13-18.

49 Edgardo Buscaglia, William Ratliff & Maria Dakolias: «Judicial Reform in Latin America: A Framework for National Development», *Essays in Public Policy*, Stanford University Press, Stanford, Ca., 1995.

50 Edgardo Buscaglia and William Ratliff: *Law and Economics in Developing Countries*, Stanford University Press, Stanford, Ca., 2000; and Edgardo Buscaglia & William Ratliff (eds.): *Law and Economics of Development*, cit.

51 Edgardo Buscaglia & William Ratliff (eds.): *Law and Economics of Development*, cit., at 13-15

52 Edgardo Buscaglia & William Ratliff (eds.): *Law and Economics of Development*, cit. at 16-18 and Maximo Langer: «Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery», unpublished manuscript, 2007 (winner of the 2007 Margaret Popkin Award for best paper on the law from the Law and Society Section of the Latin American Studies Association).

53 Larry Spain: «Alternative Dispute Resolution for the Poor: Is It an Alternative?» *North Dakota Law Review* Vol. 70 (1994); Alan W. Houseman: «ADR, Justice, and the Poor», *National Institute for Dispute Resolution* (1993), pp. 56-78.

segments of a jurisdictions' rural population to then determine the nature of the links between access to justice and poverty. The same methodology can be used with respect to urban areas.

In this framework, one needs to take into account the fact that the rural population of Africa and Latin America account for 60.7% and 76.4 % of those living in poverty, respectively. [54] For example, in the Andean rural region of Colombia where 68.4% of Colombians reside, government statistics indicate that 67% of the land devoted to productive purposes has a size equal to 5 hectares or less. In South Africa, where 51 percent of the poor reside in rural areas, 73 percent of the land has a size equal to 3 hectares or less. Furthermore, 68% and 79 percent of those working these small plots in Colombia and in South Africa, respectively, are considered «poor» or «extremely poor» according to these statistics. [55] Yet one finds that this rural segment accounts for just 1.6% of the total number of claims linked to formalizing or delineating land titles in Colombia and 3 % in South Africa seeking to resolve civil disputes through formal court services. [56] Forty-seven percent of these civil disputes from rural areas in Colombia and sixty one percent of these civil disputes from rural areas in South Africa involve land-title-related issues and 35% involves family-related cases. [57] It seems clear that a latent demand for formal dispute resolution services exists, to which developing countries' in African and Latin American public sectors do not adequately respond. According to Surveys conducted by Buscaglia [58] most of these rural households attest to their lack of access to public services in general and lack of court services in particular. [59] Yet, these households do attest that when faced with property-related conflicts, they seek informal dispute resolution through communal bodies.

Within our African sample covering Benin, Botswana, Mozambique, Nigeria, and South Africa, United Nations (UN) statistics indicate that 73% of the land devoted to productive purposes, where 59% of Africans reside, has a size equal to 7 hectares or less. [60] Furthermore, 89 percent of those working these small plots are considered «poor» or «extremely poor» according to UN statistics. [61] As in Latin America, one finds that in Africa the rural segment of the population accounts for a very small minority of those using or even seeking formal court services. [62] Taking African and Latin American countries jointly, 51.5 % of civil disputes in rural areas involve land-title-related issues (formalization or delineation

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54 Refer to Edgardo Buscaglia: «Acces to Justice and Poverty», cit., and *UN Development Reports,* UNDP, New York, NY., 2000, 2001, 2005.

55 *UN Development Reports,* UNDP, New York, NY., 2000, 2001, 2005.

56 *UN Development Reports,* UNDP, New York, NY., 2000, 2001, 2005, at 14-17

57 *UN Development Reports,* UNDP, New York, NY., 2000, 2001, 2005, at 56-61

58 Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor», cit.

59 Edgardo Buscaglia: «Acces to Justice and Poverty», cit., at 17-18

60 *UN Development Reports,* UNDP, New York, NY., 2000, 2001, 2002, 2006.

61 *UN Development Reports,* UNDP, New York, NY., 2000, 2001, 2002, 2006, at 134-138

62 See Edgardo Buscaglia and Maria Dakolias: *Comparative International Analysis of Court Performance,* cit., at 21.

disputes) and 23 % involve family-related cases. It also seems clear in Africa that an unsatisfied demand for dispute resolution services exists within the sample, to which the public sector does not adequately respond.

## 3.1 Methodology

The previous Buscaglia [63] and Buscaglia and Stephan [64] studies on 4,700 rural households in the Pauna and San Pablo de Borbur districts of Colombia, and 6713 rural households, is here expanded to sixteen additional countries. The surveys consist here of two instruments. The first survey measures the perceptions by those rural households with direct experience in seeking court services and ADR mechanisms (mediations, arbitrations, and combinations of both) through informal community-based mechanisms. [65] Perceptions of governance-related factors associated with the use of the courts and alternative dispute resolution mechanisms are measured and later compared for two case types: land title formalization and disputes centered on the delineation of property rights. The governance variables include procedural transparency, effectiveness of dispute resolution mechanisms, quality of decisions reached by courts and by informal dispute mechanisms, perceived corruption, and perceived accountability of those responsible for generating rulings. The second instrument measures the impact of resolving or not resolving a land-tenure related dispute on the rural household's net worth. In each of the countries, the samples within each of the selected jurisdictions are stratified into socio-economic respect (income level, patterns of trade and economic activity, age distribution, and gender composition). [66]

The surveys are focused on the poorest segments of the rural population (bottom –quintile– 20 percent of net worth) attached to formal/informal property rights. We compare the changes in net worth of these households (*i.e.*, by taking into account the negative and positive changes in net worth of all households-parties involved in a land titling conflict) before and after their access to formal and informal conflict resolution mechanisms (with a one-year difference) in cases dealing with land-title-related disputes. As noted above, these are the most common types of cases affecting the poorest rural households in each of the country regions covered by our samples. We then seek evidence of how and why

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63 Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor», cit.

64 Edgardo Buscaglia and P. B. Stephan: «An empirical assessment…», cit.

65 The sample size of rural households is as follows: Argentina: 3,519, Benin: 2,891, Brazil: 6,329, Bolivia: 1,718, Botswana: 1,943, Chile, 1,392, Colombia 3,178, Guatemala: 993, Honduras: 816, Mozambique: 2,193, Nicaragua 1,203, Nigeria 7,921, Paraguay: 931, Peru: 1,610, South Africa: 3,915, Uruguay: 719, and Venezuela: 1,961. In each of the countries, the samples within each of the selected jurisdictions are stratified into socio-economic respect (income level, patterns of trade and economic activity, age distribution, gender composition, *etc.*)

66 Edgardo Buscaglia: «Acces to Justice and Poverty», cit.

dispute resolution mechanisms affect the average household's net worth and its relationship to poverty. [67]

In each of the seventeen countries examined below, the empirical analysis focused on a representative sample of poor rural households within five percent of the poorest rural jurisdictions. In each household, the survey focuses on the female and male members separately due to the much common perception that women may suffer systemic discrimination in accessing the court systems and enforcing their property rights. In general, our sample represents between 3 and 4 percent of each of the 17 countries rural household population seeking to address a conflict resolution. [68] All of the surveyed rural households are attached to formal or informal tenures of plots of land of less than 5 hectares (in eleven of the seventeen countries) and less than 9 hectares (in six of the seventeen countries samples below).

## 3.2 Descriptive Findings

Within the sample of 17 countries, between 30 and 40 percent of those rural households interviewed showed proof that they had attempted to access formal court-provided civil dispute resolution mechanisms while just 0.2% of the sampled households reported that they had obtained some kind of final resolution to their land dispute through the court system (a table below will provide a country by country description of these indicators). One can observe from examining the regional samples that an average of 94% of those seeking formal court services in Africa and 76.6 % in Latin America during the period 2001-2005 were within the upper 10 percent range of net worth, while just 5% of the African sample of households and 7% of the Latin American sample of rural court users were in the lowest 10% range of measurable net worth within each region. [69]

In contrast to the weak demand for court services, we find that 47.5 percent of those Latin American rural households interviewed during the period 2001-2005 and 62.1% of those African households interviewed during 2001-2006 provided specific information about their use of informal community or tribal-based informal dispute resolution mechanisms (mostly bodies composed of neighborhood or tribal leaders) and of reaching a final resolution to their land-title matter. Yet, in Mozambique, for example, the sample shows no cases attempting to use informal mechanisms. In this case, Mozambique's formal court system

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[67] The problem of measuring poverty is extremely complex due to many factors. Moreover, poverty is not a homogenous concept and the vulnerability of social groups must be considered.

[68] The samples were designed to allow for a 1.5% margin of error and estimates results with a 95 percent confidence level.

[69] Net worth was measured in an objective manner by calculating, as part of the survey, the value of family assets net of liabilities.

enjoys a complete monopoly in the production and/or validation of resolutions linked to land disputes. This lack of alternative dispute resolution mechanisms in rural Mozambique jurisdictions show dire consequences in the results to be shown below.

Successful informal tribal or neighborhood bodies usually composed of three to nine members (depending on the country within the sample) enjoy a natural legitimacy emerging from the fact that the local populations accept their role as informal dispute resolution mechanisms due to general aspects surrounding their religious or community leadership or their social prestige as representatives of their communities in many other aspects, beyond conflict resolution, such as political, social, healthcare, or even military affairs. [70] For example, the Complaint Board or Panels in Colombia described in Buscaglia and Stephan [71] is composed of three «prominent local residents» selected by a Rural Council (*Parroquias Vecinales*). They enjoy a high level of popular legitimacy. Although the decision of a Board is not legally binding, they do receive tacit support from municipal authorities. Survey Bureaus within the municipal governments of these three regions expressly refer to the Boards' findings to substantiate their own rulings. [72] This behavior indicates the local governments' recognition of the Boards' legitimacy. Board decisions are not appealed, and informal social control mechanisms usually provide their enforcement. This same official recognition of Community Boards in Mozambique does not exist. As stated above, the formal court system in Mozambique enjoys a complete monopoly power in the legal recognition of resolutions to land disputes with dire consequences in terms of higher costs of accessing dispute resolution mechanisms as will be seen below.

Table 2 below measures the proportion of the rural population in each country that reports not having access to justice.

One can observe in Table 1 measurements of the sampled proportions of poorest rural households that classify themselves as excluded from the provision of public services in general (health and education) and justice in particular. The entire samples of rural households correspond to the 20 percent of the lowest quintiles of income levels in each country. One can observe that the largest proportions of rural households blocked from the use of the court system belong to the African continent, with Benin at the top, while the lowest levels of exclusion are situated all in Latin America (with Venezuela ranking among the most accessible). The data analyses also show that the percentages of exclusion for each country are not correlated to measures of national GDP *per capita* or to the Human Development Report. [73]

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70 Edgardo Buscaglia: «Acces to Justice and Poverty», cit.

71 Edgardo Buscaglia and P. B. Stephan: «An empirical assessment…», cit.

72 Edgardo Buscaglia and P. B. Stephan: «An empirical assessment…», cit., at pp. 234-278.

73 See the successive *Human Development Report*, United Nations, New York, NY., 2002, 2003, 2004, 2005, and 2006

**Table 2 Percentage of Households Lacking Access to Public Institutions**

| *Country* | *Health and Education Services* | *Judicial Sector* |
|---|---|---|
| ARGENTINA | 27 | 39 |
| BENIN | 79 | 83 |
| BOLIVIA | 29 | 22 |
| BOTSWANA | 52 | 62 |
| BRAZIL | 38 | 29 |
| CHILE | 19 | 23 |
| COLOMBIA | 21 | 20 |
| GUATEMALA | 49 | 25 |
| HONDURAS | 23 | 29 |
| MOZAMBIQUE | 77 | 81 |
| NICARAGUA | 24 | 18 |
| NIGERIA | 62 | 61 |
| PARAGUAY | 45 | 26 |
| PERU | 31 | 24 |
| SOUTH AFRICA | 45 | 68 |
| URUGUAY | 23 | 18 |
| VENEZUELA | 17 | 25 |

NOTE: The samples are described above were interviewed. These samples were drawn from the poorest rural households accounting within the lowest 20 percent of each of the countries´ income levels in order to assess the barriers faced when aiming to access justice and other public services. Refer to website with data base at *http://derecho.itam.mx/facultad/facultad_invitados_buscaglia.html*

Table 2 shows clearly two patterns where the majority of rural households interviewed within Africa (Benin, Botswana, Mozambique, Nigeria, and South Africa) experience the largest proportion of households experiencing barriers linked to direct monetary costs, either due to direct costs (lawyers and/or court fees) and corruption. On the other hand, the largest proportions of rural households interviewed in Latin America experience barriers to access mostly linked to the lack of legal information (about rights, obligations, and proceedings).

**Table 3** **The Main Governance-Related Obstacles to Court Access. Percentage of Households interviewed in each country identifying each of the main barriers that blocked their access to court services**

| *Country* | *Direct Costs of Access (Lawyers´fees, court fees)* | *Corrupt Practices* | *Geographical Access* | *Information on Rights and Obligations* | *Information on Legal Proceedings* |
|---|---|---|---|---|---|
| ARGENTINA | 1 | 28 | 1 | 28 | 42 |
| BENIN | 11 | 67 | 3 | 9 | 1 |
| BOLIVIA | 2 | 18 | 2 | 29 | 22 |
| BOTSWANA | 31 | 28 | 17 | 12 | 12 |
| BRAZIL | 15 | 7 | 38 | 1 | 39 |
| CHILE | 9 | 2 | 9 | 23 | 57 |
| COLOMBIA | 7 | 3 | 19 | 34 | 37 |
| GUATEMALA | 1 | 17 | 21 | 1 | 5 |
| HONDURAS | 4 | 10 | 1 | 2 | 29 |
| MOZAMBIQUE | 30 | 41 | 14 | 7 | 8 |
| NICARAGUA | 5 | 16 | 7 | 35 | 37 |
| NIGERIA | 49 | 48 | 1 | 1 | 1 |
| PARAGUAY | 2 | 7 | 23 | 45 | 21 |
| PERU | 9 | 14 | 17 | 28 | 32 |
| SOUTH AFRICA | 37 | 26 | 20 | 5 | 12 |
| URUGUAY | 2 | 7 | 3 | 47 | 41 |
| VENEZUELA | 2 | 19 | 2 | 21 | 66 |

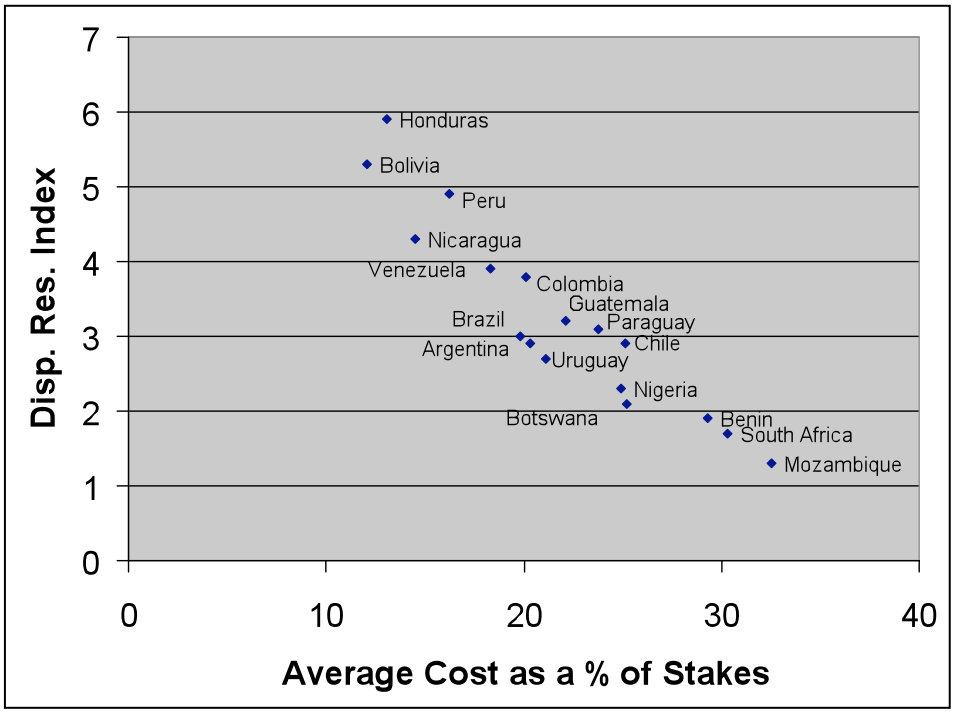
NOTE: The samples of the poorest rural households described above were interviewed in order to assess the barriers faced when aiming to access justice. As mentioned above, all the households indicated on Table 2 had experienced approaching the courts in order to resolve their land-related conflicts. The percentages shown above for each category of main obstacle was explained to rural household by asking them which barrier in fact blocked their access to the justice system and forced them to seek resolution of conflicts through other alternative channels or none at all. Refer to website with data base at *http://derecho.itam.mx/facultad/facultad_invitados_buscaglia.html*

If one had to ask for the cause explaining the roots of these two clear patterns, a discipline known as law and economics (i.e. economic analysis of the law and justice systems) could provide a useful hypothesis. Namely, that those countries lacking effective alternative dispute resolution mechanisms generating decisions enjoying subsequent legal validation/enforcement within the formal justice domain will generate a formal court environment characterized by a monopoly in the provision of dispute resolution. In these cases, court and lawyers would be in a better position to abuse their market position by charging higher prices (i.e. court fees, legal fees, or high levels of corruption) than in other countries where rural households face a whole range of alternative dispute resolution mechanisms that are recognized and later enforced by the formal justice system domain. In this context, the next section will address the aforementioned hypothesis. For this purpose, data accounting for the existing range of alternative dispute resolution mechanisms within each national jurisdiction will be linked to the costs of accessing the justice system within the same jurisdiction.

## 4. EMPIRICAL ACCOUNT OF ACCESS TO JUSTICE IN DEVELOPING COUNTRIES

The data described in the previous Section shows that a regional pattern emerges whereby the poorest 20 percent of rural households in African countries face higher direct and corruption-related barriers to access the court system. Section II presented a supply analysis of judicial performance. In both sections we observed that Latin American rural households within the lowest 20 percent of the income range face other types of barriers linked to lack of information (lack of legal advice) on rights and procedures. One could delve into the main factors explaining these patterns. Yet, there is a clear pattern experienced by countries with poor judicial performance. In these countries, such as Bolivia and Venezuela, court users tend to bypass the official judicial system when seeking to resolve their disputes. The bypass takes place through alternative dispute resolution mechanisms (such as mediation and arbitration). In this way, court users in Bolivia, Honduras, Nicaragua, Peru, and Venezuela, tend to reduce their average costs. Paradoxically, poor judicial performance provides incentives for the development of alternative mechanisms used by the poorest segments of the rural populations covered in this empirical study. The graph below shows the relationship between the average cost of access to court systems, as a proportion of the litigation-related stakes (i.e. value of the land) faced by the rural households sampled for the seven teen jurisdictions accounted for in Tables 1 and 2. The vertical axis accounts for the availability of formal and informal dispute resolution mechanisms available. Larger values account for a wider range of alternative dispute resolution mechanisms. The indicator measured on the vertical axis only includes those informal mechanisms (rural mediation and arbitration systems or community

councils) where the decisions are later validated by some kind of formal authority (courts or municipal governments)




The graph above shows that those national jurisdictions experiencing the lowest levels of costs to access any kind of dispute resolution mechanisms aimed at solving land-titling disputes is explained by the presence of a larger range of options to solve disputes (i.e. a wider range of informal dispute resolution options for rural households, in this case). Not all informal dispute resolution mechanisms are the same. Our surveys show that the informal dispute resolution mechanisms that offer a possibility of having their decisions validated by formal authorities, at the municipal or court levels, are the ones with comparative advantages. Our index measured on the vertical axis of the graph above accounts for the existence of alternative dispute resolution mechanisms with a history of having their land-titling decisions later reflected in public registries at the municipal level of validated by the courts at a later stage. In this case, Bolivia and Honduras rank at the top. Countries such as Mozambique and South Africa, where direct costs are on average more than 30 percent of the land values at stake (i.e. very high, compared to the other fifteen countries), are also jurisdictions within which the range of alternative dispute resolution mechanisms, providing legally-validated decisions, are

very scarce (ADR Index 1.1 and 1.7, respectively) Buscaglia [74] and Buscaglia and Stephan [75] have shown this relationship without delving into the details of the reasons behind the higher costs of access to justice presented in Part II above. The 2003-2008 interviews with the poorest quintile of rural households shown in Table II above show that the largest source of direct and indirect costs of accessing justice systems are due to legal and court fees (including corruption-related costs). The lack of legal information on rights, obligations, and legal proceedings (more prevalent as a source of costs within Latin American justice systems) constitute a minor source of barriers in comparison to African jurisdictions within which the rural households within the lowest levels (bottom quintile) of income find themselves excluded from the formal justice system due to the direct costs of legal fees and illegal payments to court personnel that are required from them. Moreover, in countries where. Yet, the analysis shown here also points at the reaction of rural households when faced with these costs. [76] This and the previous Buscaglia [77] study find that an average of 78 percent of the sampled rural households in Latin America (and 21 percent in Africa), who previously sought access to formal court systems, are later able and willing to seek alternative dispute resolutions through community-based mechanisms. The findings emerging from surveys also show that 97 percent of the rural households seeking alternative mechanisms and 99 percent of the African households seeking alternative mechanisms, only prefer arbitration and mediation when they produce decisions that are legally homologated (validated) by formal authorities at the municipal level. In this context, informal dispute resolutions do provide clearer title to property rights held by rural households only if the decisions reached tend to be later recognized by municipal registries and court systems. One can also assess the average changes in the rural households net worth after dispute resolution mechanisms (formal and informal) are used. We show the results below for each country.

There is again a clear pattern reached through statistical analysis showing that those countries that enjoy a wide range of alternative mechanisms to resolve land titling disputes among the poorest segments of the population, will also enjoy higher increases in net worth among those same rural households. For example, 14 percent of the increase in net worth enjoyed by the poorest rural households sampled in Argentina was caused by the use of informal mechanisms to resolve disputes, while in Benin, 10 percent of the decrease in the net worth of rural households sampled was caused by the use of formal mechanisms to resolve disputes (in Benin, informal mechanisms to delineate property rights do not enjoy any kind of subsequent legal value or validation). In Bolivia, 31 percent of the

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74 Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor», cit.

75 Edgardo Buscaglia and P. B. Stephan: «An empirical assessment…», cit.

76 Refer to website with data base at *http://derecho.itam.mx/facultad/facultad_invitados_buscaglia.html*

77 Edgardo Buscaglia: «Economic Analysis of Access to Justice by the Poor», cit.

increase in the rural households' net worth is directly caused by the informal dispute resolutions reached (that are later admitted in courts and public registries).

**Table 4**

| *COUNTRY* | *% Change in General Net Worth (One year Alter)*[78] |
|---|---|
| ARGENTINA | 14 |
| BENIN | -10 |
| BOLIVIA | 31 |
| BOTSWANA | 3 |
| BRAZIL | 11 |
| CHILE | 6 |
| COLOMBIA | 8 |
| GUATEMALA | 27 |
| HONDURAS | 29 |
| MOZAMBIQUE | - 3 |
| NICARAGUA | 17 |
| NIGERIA | -4 |
| PARAGUAY | 15 |
| PERU | 10 |
| SOUTH AFRICA | 5 |
| URUGUAY | 7 |
| VENEZUELA | 8 |

Source: *http://derecho.itam.mx/facultad/facultad_invitados_buscaglia.html*

[78] In order to obtain the changes in net work above, a log regression analysis was performed by taking into account a dummy variable (0-1) accounting for the existence of formal (0) and informal (1) dispute resolution to land disputes. The other variables obtained through the survey accounted for all other types of incomes and debts contracted by the rural households.

When one observes the results of Table 3, a clear pattern once again emerges. The Latin American countries enjoying a higher frequency of use of informal mechanisms to resolve disputes that are legally validated in courts and municipal registries, not only produce the lower costs to solve disputes shown in Graph 1 but also produce higher increases in the rural households' net worth. The reason is clear. When the property rights to land held are better delineated and formalized, one should expect that land values will be enhanced in the marketplace and access to the formal/informal credit systems will follow. The general effect of better delineation of property rights on poverty was discursively predicted by several authors [79] but never tested in the context of dispute resolution mechanisms and never even considered in their effect on the net worth of the poor segments of a large sample of countries.

## 5. CONCLUSION

From the analysis above, a few public policy prescriptions may turn out useful for future antipoverty and judicial reform programs.

First, despite that limited number of case types can benefit from the use of informal dispute resolution mechanisms (excluding, for example, constitutional and criminal case types that have greater effect on the public interest), the wider range of options provided by informal dispute resolution mechanisms –when applied to land disputes– do reduce the costs of access to formalized and better delineated land titles if government institutions later validate the agreements reached. In this framework, public registries and courts could exercise a more refined quality control of the resolutions reached by incorporating the latest titles and land boundaries to the formal domain only if constant concern exists and public authority verification is implemented.

Second, the capital linked to land and the productive capacity of land still represent the two main potential sources of net worth for the poorest segments of the population worldwide. Finding out that dispute resolution mechanisms have a powerful effect on the growth of the net worth in the hands of the poorest segments of the population, provides one more powerful reason to enhance the quality and speed of judicial reforms. Judiciaries worldwide resist and sometimes even deny the existence and effectiveness of informal community-based dispute resolution frameworks. Yet, these mechanisms should be considered an opportunity to guide judges in the search for a better reading of uses and customs capable of enhancing wealth among the poorest segments of the population.

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79 Hernando de Soto: *The Mystery of Capital*…, cit.