Paper presented at the RCSL-SDJ Conference 'Law and Citizenship Beyond the States', Lisbon, 10-13 September 2018

Judicial Interference and Economic Development in Colombia

Juan Antonio Gaviria[1]

Cathalina Sánchez[2]

ABSTRACT

This paper mentions some figures about some possible excessive judicial activity in Colombia, measured through the proxies of both the number of lawyers and the number of cases, and shows how such trends might harm the Colombian economic development. Before explaining the particularities of the market for litigation in Colombia, the paper first summarizes the main theories explaining how an excessive judicial interference may be negatively correlated with economic development or may ben be in a cause-effect relationship. In any event due to some methodological hurdles, and besides some figures presented all along the text, this is not an empirical paper.

Introduction

The literature between judicial activity and economic development has been abundant during the last decades, especially in topics such as the importance of an independent judicial branch and the positive effects that a well-performing judiciary may spill on the economy.[3] However, not always the judiciary performs well and, as a result, it may not only fail to contribute to the progress but also harm economic progress and a typical example of this kind of situation is a judicial system that is used too much, with too many attorneys and interference in economic issues. In contrast to the abundant literature on the positive effects of the judiciary, there is still very few researches on the negative effects, and this paper intends to begin to fill this gap, at least regarding the Colombian case.[4] In this connection, and subject to a further confirmation through empirical analysis, we hypothesize that judicial activity in Colombia, measured through the number of attorneys and the amount of litigation, is nowadays at a level beyond its efficient and, therefore, harming economic development.

For the purpose indicated above, Section I summarizes the theories describing the interaction between the levels of judicial activity and economic development. Section II, in

---

[1] Tenured Professor and Researcher, Universidad Pontificia Bolivariana. PhD in Law from American University, the Washington College of Law.

[2] Professor and Researcher, Universidad Pontificia Bolivariana. PhD in Law.

[3] *See, e.g.*, MAGNUSSON, E. J. ET AL., The Economics of Justice, available at: http://www.dri.org/docs/default-source/dri-white-papers-and-reports/2014-economics-of-justice.pdf?sfvrsn=10.

[4] See generally PINHEIRO, A.C., Judicial System Performance and Economic Development, Rio de Janeiro, BNDES, 1996.

turn, provides some descriptive statistics about attorneys and litigation and, then, applies the theories of the previous section. Section III makes some concluding remarks.

Section I - Excessive Judicial Activity and its Relationship to Economic Development

Terms such as judicial activity, judicial performance or judicial interference are too broad, elusive and difficult to measure; consequently, the first step is two narrow them. Thus, this paper uses the number of lawyers and the amount of litigation as two proxies that are good approximations of the levels of judicial activities under the hypothesis that certain amount of them is good for than an economy but that too much of such variables might be harmful from an economic standpoint.[5]

A. The Number of Lawyers

While it is a term less ambiguous than judicial activity, the notion of the word lawyer must also be specified, especially taking into account that its role may widely vary across countries because cultural, educational and other reasons. What is a lawyer or what does a lawyer do? Lawyers usually work as legislators or lobbyists, participate in administrative rule-making or in private deal-making, are involved in counseling and planning activities through the interpretation of rules and norms for a client, participate in alternative dispute resolution systems or litigate before courts.[6] More generally, lawyers "*create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships and interactions … lawyers 'handle' the rules and norms that define rights and duties among people and organizations.*"[7]

Having defined the concept of a lawyer, the relevant question is whether there is an optimal number of lawyers regarding economic development and, if the answer is in the affirmative, which is such number. Regarding the first question, several scholars contend that countries with lawyers in excess grow at a slower pace than countries with a more efficient quantity of lawyers.[8] Thus, too many lawyers might have incentives to engage in

---

[5] *See* MAGEE, S., The Optimum Number of Lawyers: A Reply to Epp: [Commentary], Law & Social Inquiry, Vol. 17, No. 4 (1992), pp. 667-693 (using the number of lawyers in a country as proxy for the level of legal activity). See also CROSS, F.B., Law versus Economics?: [Commentary], Law & Social Inquiry, Vol. 17, No. 4 (Autumn, 1992), pp. 653-658 (admitting that "*[t]he total number of lawyers may serve as a rough proxy for litigation*" but cautioning that this surrogate may be imprecise and that the focus "*should be less on the absolute number of lawyers and more on what those lawyers do and how efficiently they perform these tasks*.").

[6] *See* CLARK, *supra* note __.

[7] *See* CLARK, *supra* note __.

[8] *See* MURPHY, K.M., SHLEIFER, A. & VISHNY, ROBERT W., The Allocation of Talent: Implication for Growth. Quarterly Journal of Economics 106, 1991, 506-530 and Magee, Brock and Young (1989), cited in Murphy (analyzing the number of lawyers in thirty-five countries and finding that places with more lawyers grow slower). *See also* DATTA, S.K. & NUGENT, J.B., Adversary Activities and Per Capita Income Growth, 14 World Dev. 1457 (1986); LABAND, D. & SOPHOCLEUS, J.P., The Social Cost of Rent-Seeking: First Estimates, 58 Pub. Choice 269 (1988); and MAGEE, S.P. ET AL., The Invisible Foot and the Waste of Nations: Lawyers as Negative Externalities, in Black Hole Tariffs and Endogenous Policy Theory: Political Economy in General Equilibrium (Cambridge: Cambridge University Press, 1989).

rent-seeking activities, like vampires sucking the wealth of economies in order to transfer it to other sectors not before appropriating some percentage.[9]

Put it another way, if the number of lawyers are represented in the X axis and their contribution to the economic development in the Y axis, the result might be an inverted U indicating that until some point an additional lawyer brings a marginal positive effect but, past such point, the marginal effect is negative.[10]

In words of Magee:

"*The data show that there is a world optimum number of lawyers per capita. The countries with the fastest growth rates are those with average numbers of lawyers per capita. Countries with only a few lawyers or those with a lot of lawyers do worse than countries in the middle. Below the optimum, additional lawyers contribute more benefits than harm. Once the number of lawyers passes the optimum, additional lawyers contribute more harm than benefits to a nation's economy*."[11]

Of course, and since this is a contentious topic in the literature, other scholars have considered that there is not enough evidence about the negative role of too many lawyers on economic development.[12]

As to the second question, finding such number seems an almost impossible empirical task. Nonetheless, economics Stephen Magee claimed some time ago, and not without fierce criticism regarding the methodology that he applied,[13] that the United States had 40% too many lawyers and that each lawyer in excess reduced the U.S. gross domestic product by one million dollars each year.[14]

Assuming that it is true that lawyers beyond an optimal number harm an economy, why would be the rational underlying such statement? One traditional and not necessarily satisfactory explanation has been that law, which under some circumstances might be a redistribute or rent-seeking activity, diverts human capital from productive activities such as engineering, science and technology.[15] In words of Murphy, Shleifer and Vishny, "*[b]y drawing people out of entrepreneurship and into rent seeking, it reduces the growth rate of the economy permanently*."[16] And some people might prefer study law rather than other professional paths under the assumption that "*talent goes into activities with the highest*

---

[9] Andrews.
[10] *See* CLARK, *supra* note __, and MAGEE, *supra* note ___.
[11] MAGEE, *supra* note __.
[12] *See* CROSS, *supra* note __, and EPP, C., Do Lawyers Impair Economic Growth? Law & Social Inquiry, Vol. 17, No. 4 (1992), pp. 585-623.
[13] *See* EPP, *supra* note __.
[14] *See* MAGEE, *supra* note __.
[15] *See* MURPHY, SHLEIFER, & VISHNY and BOK, D., A Flawed System of Law. *But see* SANDERS, R., Elevating the Debate on Lawyers and Economic Growth: [Commentary], Law & Social Inquiry, Vol. 17, No. 4 (1992), pp. 659-666 (cautioning that if this argument is true, we would need a long time to prove it empirically since their effects, for example the inventions not made or made late, would only be discovered in the long term).
[16] *See* MURPHY, SHLEIFER AND VISHNY, *supra* note __.

private returns, which need not have the highest social returns."[17] . This might be especially true for developing countries such as Colombia where both the opportunities and the profitability for some innovative activities are still limited.

The previous argument is strengthened under the view that legal services are less productive than other services because they are still very labor intensive since technology, supposedly, has not entered into this market as deeply and into other markets.[18] In any event, and given the growing and recent impact of technology in legal services in topics such as big data and smart contracts, this criticism might have had some basis decades ago but not nowadays.

A second rationale for contending that too many lawyers may harm the economy is that they may work in redistributive or rent-seeking activities and not in productive ones.[19] This might be done, for instance, by lobbying, creating overly complex or obscure laws and regulations that increase the uncertainty of the legal system, delaying litigation or, more generally, through any other action intended to inflate the demand for lawyers.[20]

For instance, Murphy, Shleifer and Vishny analyzed data from fifty-five countries with more than one hundred thousand students during the period 1970 - 1985 and found that "*countries with a higher proportion of engineering college majors grow faster; whereas countries with a higher proportion of law concentrators grow slower*" in order to conclude that the "*the most important effect of lawyers on growth is the opportunity cost of not having talented people as innovators*."[21]

As the reader would have anticipated, the theory that too many lawyers harm economic development has faced a strong reaction. Four kinds of criticisms have been made. First, strictly speaking and even if every individual in a country is an attorney, legal work adds up to the gross domestic product. Second, and contrary to what the original argument states, lawyers make a positive contribution to economic development. Third, scholars empirically claiming that too many lawyers are harmful have applied econometric techniques that are

---

[17] *See* MURPHY, SHLEIFER AND VISHNY, *supra* note __.

[18] *See* SANDERS, *supra* note ___ ("In the realm of legal services, increased productivity is very difficult because the principal functions are not mechanized; they are labor intensive. Theoretically, such innovations as word processing and electronic data bases (e.g., Lexis) could increase the productivity of lawyers; but in my observation, these technologies have tended to embellish legal work rather than speed it up. Thus, if we devote 2% of our GNP to legal services (as we do today) rather than 0.6% (as we did a generation ago), a larger fraction of our economy is unavailable for productivity improvements.")

[19] *See* MAGEE, *supra* note __ ("rent seeking is the use of the political and legal systems to transfer income and wealth among citizens"). Lobby is usually a traditional example of rent-seeking. Magee also states that "Lawyers could indeed be instruments of redistribution, both for other and for themselves" *Id.* Magee. *But see* EPP, *supra* note ___ (contending that lawyers not only engage in rent-seeking activities but also in productive activities such as facilitating business transactions and stating that even regarding rent seeking activities, lawyers are only the agents of the true rent seekers and, therefore, if the number of lawyers is reduced, such principals will look for other channels to seek their rents).

[20] *See* MURPHY, SHLEIFER AND VISHNY, *supra* note __ and MAGEE, *supra* note __.

[21] *See* MURPHY, SHLEIFER AND VISHNY, *supra* note __.

fatally flawed. Fourth, it might almost impossible to empirically or econometrically determine whether a given number of lawyers is good or bad for an economy. Each of these criticisms is explained below.

The first is the easiest one. Any dollar that an attorney bills is a dollar that a client pays and, therefore, is a dollar spent than contributes to the gross domestic product of an economy, either measured as consumption (most likely), as government expenses (if a government entity or agency hires attorney) or as net exports (if the customer is abroad). As Sanders rightfully states:

"*One might, for example, be able to show that malpractice litigation has contributed to the growth of health-care costs. But in the short run, this sort of effect produces an increase in total economic output rather than a decrease: higher expenditures for health care show up in higher national income figures. The more difficult task is showing that the effect of malpractice litigation drove up health care costs enough to place particular U.S. (or, say, New York) companies at a competitive disadvantage and consequently caused them to lower output. In the absence of such studies, we can only speculate on the effects of our burgeoning lawyer population*."[22]

So, it would be necessary to prove that the negative effect of too many lawyers outweighs the positive contribution of more economic output. It is, needless to say, an uphill task since it implies comparing something that occurs (the hours billed - apples) with something that might have happened and that, therefore, can be never precisely measured (the resulting output if the human capital during such hours would have been spent in another activity - oranges). This might be the typical case, using a litigation analogy, when one party is right but the other prevails at trail because the former was not able to adequately prove its case.

Regarding the second criticism, some scholars contend that there might be a positive correlation between the number of lawyers and the economic growth all along the spectrum or even a cause-effect relationship in one or both ways.[23] Clark, for instance, states that lawyers decrease transaction costs by facilitating deals contributing to economic wellbeing.[24] Gilson and Epp agrees with Clark by stating, respectively, that "*business lawyers function as transaction cost engineers, devising efficient transactional structures that facilitate the ex- change of capital assets*"[25] and that "*[r]ather than increasing the costs of businesses, then, lawyers may well increase business efficiency*."[26] Thus, lawyers, far from being parasites involved in redistributive activities or being drains on growth, create wealth by participating in positive and non-zero-sum games.

---

[22] SANDERS, *supra* note ___.
[23] CLARK, *supra* note __.
[24] CLARK, *supra* note __ (lawyers "perform numerous economically facilitating functions").
[25] GILSON, R., How Many Lawyers Does It Take to Change an Economy?: [Commentary], Law & Social Inquiry, Vol. 17, No. 4 (1992), pp. 635-643.
[26] No. 4 (1992), pp. 585-623.
[26] *See* EPP, *supra* note __.

Clark also states that lawyers grow because the economy grows and that law services may be a luxury good since only countries that have satisfied their basic needs may focus on legal issues and spend time litigating over non-crucial issues.[27]

A corollary to this second criticism goes direct to the heart of the assumption that it is bad that people study and practice law rather than presumably other areas of knowledge such as science and technology. As Epp put it:

"*The final possibility is that rent seeking diverts talent from more economically and artistically productive pursuits into the legal profession. That view depends on the twin assumptions that the work lawyers less productive than many other forms of work, and that most lawyers, they not entered law work, would have chosen a more productive form work. Standing alone, the assumptions are somewhat oversimplified largely untestable. In their starkest form-that lawyerly work is uniformly unproductive-the assumptions are somewhat implausible. Stated monolithically, the assumptions become matters for empirical investigation, yet proponents of the theory have conducted no such research, do not know what occupations most lawyers would have chosen had they not entered law, nor could we easily determine whether the alternative occupations are more productive than law*."[28]

The third criticism consists of fatal flaws that several scholars have found in the methodologies and data used to empirically contend that a given economy has too many lawyers.[29] In particular, it has been said that such studies focus exclusively on the growth of the gross domestic product overlooking the broader and perhaps more relevant notion of economic development,[30] and that they overstate the negative contributions of too many lawyers and understate positive effects such as the provision of some social or public goods.[31] In words of Cross "*[l]awyers produce many valuable goods that are not monetized and valued in GNP. For example, lawyers are fundamental to production of civil liberties, open democracy, distributive justice, and environmental protection.*[32]

The final criticism may be a fatal blow for empirical attempts to prove that too many lawyers harms an economy. To begin with, many benefits that the job of lawyers bring to an economy are intangible and, consequently, very difficult to measure. The same Magee, the scholar who asserted that the United States had 40% too many lawyers, admitted this.[33] Thus, while it is possible to assert that a country with zero lawyers would be a failed state since it would lack the people to enforce the minimum laws required to secure property and contract rights and that a country where every individual is a practicing lawyer would also

---

[27] CLARK, *supra* note __.
[28] *See* EPP, *supra* note __.
[29] *See* EPP, *supra* note __ and CROSS, *supra* note __.
[30] *See* GILSON, *supra* note ___.
[31] *See* GILSON, *supra* note ___.
[32] CROSS, 70 Tex. L. Rev., at 676-78.
[33] *See* MAGEE, *supra* note __ ("Most of these benefits and costs are intangible and cannot be sured by any reasonable additive procedure.").

be a clear recipe for economic disaster since there would not be people available for other productive activities, it is very difficult to estimate the right amount of lawyers.[34]

It is also very difficult to compare the productivities of lawyers and other professionals within the same country, being even more difficult to relate the productivity of lawyers across countries.[35] In words of Sanders:

"*Different legal systems have widely different ways of distributing legal work among judges, advocates, technicians, and scriveners, and often exclude entire groups, or parts of groups, in compiling national data. Lawyers perform very different services across the world. Cross-national comparisons are, therefore, quite dubious and particularly susceptible manipulation*."

For instance, law is a graduate program in the United States while it is a graduate program in all civil law countries, such as Colombia. More importantly, the role of a lawyer in a given economy deeply varies among countries and depend on too many factors, such as the features of a market, the number of lawyers itself and cultural factors.[36] To take one example, it might happen that some people study law in Colombia to climb the social ladder or just to have a respectable undergraduate title but without the real expectation to be involved in lawyering activities. Indeed, and acknowledging the lack of figures to support this intuition,[37] many people who have obtained a degree in law may work as corporate managers, journalist or just stay at home raising their kids. Summing it up, Thus, to learn in deep detail how lawyers impact economic growth would require "*a careful study of the micro-structure of legal services*."[38]

The final methodological problem is that it seems very difficult to estimate the impact of the number of lawyers, as the exogenous variable, on the gross domestic product of a country, as the endogenous variable. There might be many issues of endogeneity, multicollinearity and omitted variables. Endogeneity means that it is very difficult to control for the level of social and economic development.[39] As stated before, more

---

[34] *See* DJANKOV, S. ET AL., Courts ("A fundamental proposition in economics holds that the security of property and the enforcement of contracts are essential for investment, trade, and ultimately economic growth to come about.").

[35] *See* CLARK, *supra* note __.

[36] *See* CROSS ("*Cultural differences perforce obscure or confound any association between lawyers and economic growth. The vast majority of cross-national studies on other economic variables has proved not to be robust and to depend more on the interactive artifact of other study variables than on any true association with growth*.").

[37] *See generally* Epp ("*For some countries, the figures are reliable and count all lawyers working in a country, because they are membership figures for national bar associations with compulsory membership. All other data contained in the directory must be used with some caution. Some countries report bar association membership, but such membership is not compulsory and thus is not a reliable indicator of the total number of lawyers. Other countries report estimates of the number of lawyers in the country*.").

[38] *See* GILSON, *supra* note ___.

[39] *See* EPP, *supra* note __ ("*Presumably, higher levels of economic Development produce larger lawyer populations, all other things equal*"). Epp criticizes attempts to control for the level of development of an economy by calculating lawyers as a ration of other occupational categories since the latter might be inadequate measures of development.

developed countries usually have more lawyers,[40] an unsurprising figure since people have more access to education, but without being clear whether (i) it is just correlation, (ii) economic development increases the number of lawyers,[41] (iii) vice versa, or (iv) both.[42] On top of that, the own lawyers, in accordance with the famous Jean Baptiste Say's law, may create their own demand, either demand that society requires or artificial demand. [43]

B. Litigation

The amount of litigation in a country is another good proxy of judicial activity and of its possible interference in a given economy. Indeed, litigation may be a better proxy than the number of lawyers since this last number includes many people who never or only occasionally go to court.

Which is the economically efficient amount of litigation? It seems that neither too little or too much.[44] On the one hand, too little litigation may suggest that individuals and companies do not trust the judicial system or, even worse, that the economy is not working well by not encouraging enough transactions, especially complex and long-term ones that may trigger disputes regarding their interpretation and performance.[45] Such scenario may arise, for instance, when litigators consider that courts do not handle well some legal matters and as a result the risk of filing a claim rises considerably or when the amount at stake does not justify litigation costs, as happen in some consumer law cases.

In any event, the big issue nowadays seems to be too much and not too little litigation. As Shavell put it, "*[t]hat so much effort and expense are devoted to the legal system and that its use has been increasing over the years have contributed to a widespread belief that the amount of litigation is socially excessive*."[46]

---

[40] For instance, the number of lawyers in the United States grew from 250.000 to over 800.000 in a quarter of century. *See* SANDERS, *supra* note ___.

[41] For instance, an empirical study of litigation in India found evidence that higher litigation rates are not necessarily evidence of an overly litigious society or a drain on the economy but the natural consequence of economic development. According to such study, more prosperous states in India, and more urban states as well, have had during several decades higher litigation rates than less prosperous States. *See* EISENBERG, T ET AL. (2013). http://polis.unipmn.it/pubbl/RePEc/uca/ucaiel/iel015.pdf Litigation as a measure of well-being. IEL paper in comparative analysis of institutions, economics and law No. 15. This does not mean that more litigation entails more development but the opposite, that increased well-being may give rise to more litigation since there is an increased reliance on formal institutions and since the higher the gross domestic product, the higher the number of transactions and, as a result, the higher the number of them but not necessarily the percentage that trigger a dispute.

[42] *See* EPP, *supra* note __.

[43] *See* CLARK, *supra* note __ (stating that one lawyer can breed work for another). Put it another way, a lawyer alone in a town will starve while if another lawyer arrives, both will thrive.

[44] *See* PINHEIRO, *supra* note ___ ("*A well-functioning judicial system is not necessarily one that is constantly in use [and it] should not lead to either too much or too little litigation." See also MAGEE, supra note __ ("Disputes are inevitable in society, but too many disputes often hinder progress*."). *But see* Shleifer & Vishny (contending that the quality or efficiency of a judicial system depends on the frequency with which people resort to it; thereby, if people use it much, it is working well).

[45] *See* PINHEIRO, *supra* note ___.

[46] SHAVELL, S. The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System. The Journal of Legal Studies, Vol. 26, No. S2 (June 1997), pp. 575-612.

Too much litigation may be economically harmful on at least three grounds.[47] First, it inefficiently uses up scarce resources to allocate rights between claimants and respondents.[48] Second, excessive litigation may contribute to a greater uncertainty of rights triggering more litigation in a vicious circle.[49] Third, too much litigation inevitably entails that the time required to settle dispute will be longer. Each of these statements is explained below.

Regarding the first ground, the resources that too much litigation may waste, among others are the time of both litigators and judge and the costs to train them,[50] the legal fees and expenses related to document production and to the obtaining of other kinds of evidence, increased budgets to fund in-house legal departments and the opportunity costs of the previous items since it entails fewer resources available for activities required to produce other goods and services (i.e., the benefit that would have resulted if the resources would have been spent in more productive activities).[51] In words of Sanders: "*the tendencies to engage in superfluous, combative discovery activities and to devote substantial resources to research on remote legal questions are com-mon examples of how wasteful activities may have increased over time.*"[52]

On top of that, too much litigation entails larger judicial bureaucracies and, *ceteris paribus*, more opportunities for rent-seeking or redistributive activities or even for corruption, which in this case would be decentralized.[53] And it is a well-accepted statement that corruption and economic development are negatively correlated, especially when such corruption is decentralized.[54]

Too much litigation is also a waste of resources since the success of a party depends not only on the absolute amount of resources that it spends but on the ratio of this amount and the litigation expenses of the other party. Thus, in a typical prisoner dilemma scenario, if both parties spent huge but equal amounts of money, time and effort, they will end up without having a procedural edge over each other.[55]

---

[47] *See* LORIZOA, M. AND GURRIERIA, A.R., Efficiency of Justice and Economic Systems.
[48] *See* PINHEIRO, *supra* note ___.
[49] *See* PINHEIRO, *supra* note ___.
[50] *See* PINHEIRO, *supra* note ___. *See also* Excessive Private Litigation, the Impact on Business and Consumers, available at: www.ibanet.org and LORIZOA, M. AND GURRIERIA, A.R., Efficiency of Justice and Economic Systems.
[51] *See* PINHEIRO, *supra* note ___. *See also* Excessive Private Litigation, the Impact on Business and Consumers, available at: www.ibanet.org.
[52] SANDERS, *supra* note ___.
[53] *See* PINHEIRO, *supra* note ___.
[54] EASTERLY, W., The Elusive Quest for Growth.
[55] SHAVELL ("*As a general matter, many of parties' litigation expenditures are fully offsetting in the sense that the two litigants would be in the same position had neither made their expenditures. A classic instance is when both parties devote effort to legal arguments of roughly equivalent weight but in support of opposite claims, or when both hire experts who produce equally convincing reports favoring opposite assertions*."

Some studies have attempted to measure the negative effect of too much litigation.[56] For instance, the U.S. government estimated in 2002 that the cost of wasteful legal expenditures was US$136 billion, the equivalent to a 2.0% tax on consumption or a 3.3% tax on wages.[57]

In spite of its social cost, spending too much resources may have some rationale for the parties themselves if the amount at stake is substantial or, for society, if the outcome becomes a landmark judicial precedent deterring similar future claims. Nonetheless, too much litigation usually leads to an opposite scenario, the one where there are so many cases that some of the conflicts with other so there is anything but certainty about where the rights and duties of individuals and business organizations lies. Thus, uncertainty regarding the outcome of some litigation generates similar effects to uncertainty regarding property rights: companies may refrain of making investments such as expanding to new territories or hiring people until there is more trust on legal institutions.[58]

And such uncertainty regarding the rights that parties have increases the resources that individual and companies spent in substitutes of legal enforcement, such as drafting longer and more complex contracts with the subsequent increase in transaction costs or being more careful before hiring new personnel in cases where labor litigation is intensive.[59]

Too much litigation, in turn, may also encourage people observing that everybody else do something similar to use the judicial system for even the least significant case, leading to frivolous claims or to settle through courts disputes that are socially irrelevant or that the parties themselves might have been settled amicable or through less expensive and more expeditious methods than litigation.

The third reason why too much litigation is bad is that increases the disputes' delay and it is not rocket science the premise by which delayed settlement of disputes harms economic development.[60] After all, the more time litigation takes, the higher the expenses and the greater the uncertainty for the parties themselves and for third-parties interested in the outcome of the case as well.

Since courts are usually a public good, meaning that everybody has a fundamental right to access them and that taxpayers but not parties pay the time of judges, they are an example of the so-called tragedy of the commons[61] and, therefore, usually overcrowded everywhere. But the delays may vary across countries. It seems that civil law countries, such as Colombia, are more formalist and, thereby, suffer more delays than common law countries,

---

[56] *See* Excessive Private Litigation, the Impact on Business and Consumers, available at: www.ibanet.org.
[57] *See* Excessive Private Litigation, the Impact on Business and Consumers, available at: www.ibanet.org.
[58] *See, e.g.*, MAGNUSSON, E. J. ET AL., The Economics of Justice, available at: http://www.dri.org/docs/default-source/dri-white-papers-and-reports/2014-economics-of-justice.pdf?sfvrsn=10.
[59] *See* PINHEIRO, *supra* note ___.
[60] *See, e.g.*, MAGNUSSON, E. J. ET AL., The Economics of Justice, available at: http://www.dri.org/docs/default-source/dri-white-papers-and-reports/2014-economics-of-justice.pdf?sfvrsn=10.
[61] *See generally* HARDING, GARRET.

without such increased length resulting in better standards of justice.[62] "*[H]igher procedural formalism is a strong predictor of longer duration of dispute resolution. Higher formalism also predicts lower enforceability of contracts, higher corruption, as well as lower honesty, consistency, and fairness of the system. These results hold both in ordinary least squares regressions, and in instrumental variable estimates where legal origin is used as an instrument for formalism.*"[63]

Consider the case of Italia, where Lorizioa and Gurrieria show that the excessive length of judicial procedures, by reducing legal certainty and increasing the risk of economic activities has harmed economic growth.[64] As a second example, García Posada y Mora Sanguinetti found that a lower overcrowding of the Spanish judicial system is related to a bigger size, growth and entrance of companies.[65]

If litigation has too much costs, why are there lawsuits? In other words, and besides the fact that most part of disputes settle before trial,[66] why are courts overcrowded? After all, parties to a dispute may be better off cooperating and thus saving litigation expenses.[67]

Traditional explanations under standard economic theory are information asymmetries (both parties believe that they will prevail at court), bilateral monopoly (one party can only settle with the other party and vice versa) or human errors (parties wrongly believe that litigation is more profitable than settlement). Some other reasons, explained below, are the fallacy of sunk costs, externalities, and the incentives to litigate.[68]

In respect of the fallacy of sunk costs, litigation resembles a famous experiment in behavioral law and economics consisting of the auction of a $100-dollar bill where the highest bidder exchanges his/her offer for the bill while the second highest bidder shall also pay its offer but without receiving anything. Since the individual who, at some point of the game, is the runner up has the incentive to increase its offer to obtain the bill, and since the other person has also the same incentive, this experiment usually ends up with bids much higher that the amount at stake, making both parties and especially the loser worse off than before starting the auction.[69]

---

[62] DJANKOV, S. ET AL., Courts ("Does procedural formalism, at the cost of longer proceedings, secure better justice? The answer … is no.").
[63] DJANKOV, S. ET AL., Courts.
[64] LORIZOA, M. AND GURRIERIA, A.R., Efficiency of Justice and Economic Systems.
[65] GARCÍA POSADA Y MORA SANGUINETTI, Evidencia reciente sobre los efectos económicos del funcionamiento de la justicia en España. Boletín económico del Banco de España.
[66] *See generally* COOTER, R. & ULEN, T., Law & Economics.
[67] *See* GILSON, *supra* note __ ("*Both litigants would be better off if they cooperated, but unless the parties can credibly commit to cooperate, conflict is the dominant strategy. In the game theory literature, the possibility of cooperative strategies arises when the parties expect to play repeated prisoners' dilemma games with each other. The role for lawyers to facilitate cooperation arises from their potential to allow clients to credibly commit to a cooperative strategy. While clients are by definition one-round players, lawyers play the litigation game repeatedly*").
[68] *See generally* COOTER, R. & ULEN, T., Law & Economics.
[69] *See* ARIELY, DAN & KREISLER, J., Dollars and Sense, How We Misthink Money and How to Spend Smarter.

Where are the similarities to litigation? Once a legal action is filed and under the assumption that the party spending the most wins the case, it makes sense for either party to outspend the other party. The result may consist of litigation costs being very close or even higher than the disputed amounts.[70] There is, however, at least one difference between litigation and the auction of the 100-dollar bill. In the latter, both players voluntarily enter into the game while, in litigation, the defendant usually have little choice to avoid litigation, unless it accepts some early and perhaps disadvantageous settlement.[71]

Regarding externalities, and generally speaking, these are benefits (positive externalities) or costs (negative externalities) that parties to a transaction spills over third-parties without paying any sum in the former case or receiving any payment in the latter case. Negative externalities arise in judicial procedures since litigators do not bear all the costs; on the contrary, tax payers, or society bears the costs of courts.[72] Negative externalities, of course, encourage overusing the legal system.[73] Positive externalities, in turn, happen when litigation ends up with sound and stable judgments deter third parties of filing similar claims or when litigation contributes to social goods such as a better environment or the protection of human rights.[74] While positive externalities, since the claimant cannot internalize all the benefits, leads to too low litigation, it seems, at least intuitively, that negative externalities outweighs positive ones. Consequently, the amount of litigation does not have the optimal size for the social standpoint and, indeed, such amount is higher or even much higher than the ideal one.[75] Summing up, and because of the size of its externalities, the market for litigation is far from the features of a purely competitive market.[76]

---

[70] HADFIELD, G., The Price of Law: How the Market for Lawyers Distorts the Justice System, Michigan Law Review, Vol. 98, No. 4 (2000), pp. 953-1006) ("Once a legal action is started, it costs money to keep going. In most cases, if you stop participating in the action, you suffer a default judgment against you, losing the entire amount at stake. As with the $20 auction, at any given point in the litigation, it doesn't matter how much you've already spent on legal fees if the next increment - the cost of going to trial one more day, for example, or responding to one more motion - maintains your chance of winning. And as with the $20 auction, the amount at stake is no limit to what you may end up spending to keep in the game.").

[71] *See* HADFIELD, *supra* note ___.

[72] *See* SHAVELL, *supra* note ___ (stating that there are "fundamental differences between private and social incentives to use the legal system").

[73] *See* SHAVELL, *supra* note ___.

[74] *See* SHAVELL, *supra* note ___ ("If the private benefit from suit exceeds the social, the tendency toward socially excessive suit owing to plaintiffs' bearing only a part of social costs will be reinforced. If the private benefit falls short of the social benefit, however, there may be too little incentive to bring suit. private parties are not usually concerned, or are not exclusively concerned, with the social purposes of litigation, whatever may constitute these purposes."). LORIZOA, M. AND GURRIERIA, A.R., Efficiency of Justice and Economic Systems.

[75] *See* SHAVELL, *supra* note ___ ("The legal system is an expensive social institution, raising the question of whether the amount of litigation is socially appropriate. The thesis developed here is that it is not—because of fundamental differences between private and social incentives to use the legal system.").

[76] *See* HADFIELD, *supra* note ___ ("[E]ven the best, most ethical, judges are unlikely to produce a body of law that results in a level of complexity that, like the production of goods in a competitive market, optimally balances the costs and benefits of increasing the amount of lawyers' time necessary to re- solve a legal matter."). Other reasons for litigation being far from a competitive market, or more generally, law services, are that lawyers may enjoy market power resulting from the fact that legal services other than the most basic ones are credence goods and that clients face high sunk and switching costs when pondering whether to change its attorney or just to not use such kind of services anymore. *See id.*

The third ground is the incentive that lawyers may have to litigate.[77] After all, attorneys whose practice focus on lawsuits prosper when there are many of them and, the longer the trial, the higher the number of billed hours. As Shavell puts it: "*The bar has a strong economic interest against social policies that would curtail demand for legal services. Thus, where there is an excessive private incentive to bring suit and the called-for social policy is to discourage suit, we can expect the bar to resist*."[78]

The previous statement is not just an economic intuition. There incentive theory, as its name suggests, states that the efficiency of courts depends on the incentive that judges, lawyers and other related parties have. Thus, "*courts work poorly when the participants have weak or wrong incentives: judges do not care about delays; lawyers are paid to prolong proceedings; defendants seek to avoid judgment.*"[79] Such theory is in accordance with more general theories on economic development. William Easterly, in his famous book The Elusive Quest for Growth, affirms that "*[i]n an economy with excessive government intervention, the activity with the highest return to skills might be lobbying the government for favors*."[80] Something similar happens when litigation is one of the most profitable activities: most people decide to become lawyers and most lawyers decide to litigate.[81]

Section II - Judicial Interference in Colombia

As the previous section indicated, too much judicial interference measured through the number of lawyers and the amount of litigation may negatively contribute to economic development. Sadly, these both factors are present in Colombia.

Regarding the first factor, Colombia has 437 lawyers for every 100.000 inhabitants (for a total of around 220.000),[82] which is the second highest figure in the world, only behind Costa Rica and much higher than the figure of countries such as France (72) or Japan (23). On top of that, the number of lawyers has a growing, almost exponential trend since there are currently more than 100.000 people enrolled in more than 150 law schools.[83] Given such high amount of law students, the number of lawyers grows every year in nearly

---

[77] *But see* GILSON, *supra* note __ (contending that lawyers may reduce the amount of litigation by preventing their clients to file claims whose likelihood of success is low and facilitating cooperative behavior conducive to settlement during the process; thus, some lawyers might act as gatekeepers of litigation).
[78] *See* SHAVELL, *supra* note ___. *See also* HADFIELD, *supra* note ___ ("Lawyers face much stronger incentives than do judges to behave in accordance with the standard economic model of self-interest.").
[79] *See* DJANKOV, S. ET AL., Courts.
[80] *See* EASTERLY, WILLIAM, The Elusive Quest for Growth.
[81] *See* MURPHY, KEVIN M., SHLEIFER, A. AND VISHNY, ROBERT W., The Allocation of Talent: Implication for Growth. Quarterly Journal of Economics 106, 1991, 506-530. Cfr. CROSS ("Some types of litigation may impair economic growth and other types of litigation facilitate wealth creation.").
[82] *See* GARCÍA VILLEGAS, M. (2014), Centro de Estudios de Justicia de las Américas, Reporte sobre la justicia en las Américas 2008-2009. Comisión Europea para la Eficiencia de la Justicia, Sistemas Judiciales Europeos: Eficiencia y calidad de la Justicia- Edición 2010. http://www.cej.org.co/index.php/todos-justi/2586-tasa-de-abogados-por-habitantes-en-colombia-y-el-mundo
[83] *See* GARCÍA VILLEGAS, M., https://www.bluradio.com/111282/es-colombia-un-pais-de-abogados, 2015. *See also* https://oxford.academia.edu/JuanDavidGuti%C3%A9rrezRodr%C3%ADguez (2011).

10.000.[84] If it is true that lawyers create their own demand, part of which may be artificial or at least redistributive and not productive, the high number of attorneys signals too much litigation and rent seeking in incoming years.

On the other hand, and in respect of the amount of dockets, it is necessary to distinguish between the stock and the flow of claims. As to the first one, such figure was 2.491.714 in 2011.[85] The following table, in turn, shows the main figures of incoming and outcoming claims for the period 1993-2012. [86]

UNIQUE TABLE

YEAR	INCOMING	OUTCOMING	COURTS	AVERAGE DEMAND	AVERAGE PRODUCTION
1993	748.049	566.827	3.945	190	144
1994	980.522	524.092	3.945	249	133
1995	861.554	535.068	3.945	218	136
1996	992.362	789.579	3.972	250	199
1997	1.572.530	1.346.489	3.953	398	341
1998	1.402.263	1.289.819	3.948	355	327
1999	1.678.428	1.489.843	3.936	426	379
2000	1.718.987	1.640.713	3.944	436	416
2001	1.589.885	1.545.631	3.937	404	393
2002	1.380.504	1.413.703	3.930	351	360
2003	1.270.563	1.375.420	3.915	325	351
2004	1.471.707	1.442.321	3.913	376	369
2005	1.459.749	1.425.126	3.955	369	360
2006	1.755.426	1.798.821	4.229	415	425
2007	1.980.333	1.828.034	4.249	466	430
2008	2.126.396	1.972.478	4.396	484	449
2009	2.356.828	2.512.386	4.561	517	551
2010	2.303.378	2.562.371	4.569	504	561
2011	2.281.402	2.711.840	4.529	504	599
2012	2.243.689	2.559.655	4.989	450	513

These figures are telling in several ways. First, and despite a small decline in the last three years of the sample, there is a clear growing trend of incoming dockets. The average growth per year is 7.19%, much higher than the average growth of the gross domestic product in Colombia during the same period.[87] At such rate, the number of incoming claims duplicates around every ten years. Second, the number of courts have also grown, with an increase of around 20% in the last twenty years. While such increase may be good since

[84] *See* GARCÍA VILLEGAS, M. *See also* GUTIÉRREZ.
[85] *See also* ANIF (the number of pending dockets has been around 2.6 million during the last two decades and more than ninety percent of them relates to civil cases), available at http://www.anif.co/sites/default/files/investigaciones/librojusticia-11.pdf
[86] *See* Rama Judicial, https://www.ramajudicial.gov.co/web/consejo-superior-de-la-judicatura/portal/historico-de-noticias/-/asset_publisher/OvWQxnKbfVA5/content/id/4637226
[87] Pending source.

there are more judges to settle disputes, it may also be bad in the sense that more courts may encourage more litigation. Third, since Colombian population is around 50 million and the number of incoming dockets was 2.243.689 in 2012, one of every 22 individuals has some interest in at least one case, either directly or through a juridical person. Given such amount of cases, Fernando Carrillo, the Colombian ombudsman, has recently said that "*Colombia is a paradise for lawyers*."[88] After all and assuming that around 40% of lawyers litigate (100.000), two million claims per year means twenty cases for litigator.

Tutelas, actions intended to protect fundamental rights, accounts for nearly a quarter of all incoming judicial actions since nearly five hundred thousand are filed every year.[89] Since the number of courts is close to 5.000, every court receives an average of 100 tutelas per year or one every three or four days.[90] However, such figure does not take into account the tutelas that are rejected; otherwise, the number might be close to one tutela per day per court.[91] While tutelas have been filed since 1991, when the Colombian Constitution allowed them, they are not uniformly distributed along the last twenty-seven years. On the contrary, the number of tutelas per year is growing. [92]

Tutelas have priority over any other claim;[93] thereby, the higher their number of them, the longer the delay in the settlement of other cases. Thus, and given the high number not only of tutelas but also of other kinds of claims, it is unsurprising that the time between the filing of an action and the final decision is too long. According to the World Bank, ____ days, ___ procedures and expenses accounting for ___% of the amount at stake are required to enforce a contract just in the first instance.[94] Another figure, this time from a local source,[95] estimates the average duration of a judicial process in 732 days or almost two years. A rule allowing tutelas against other judgments, even if they come from high courts other than the Constitutional Court, makes this scenario worse because, in such a case, up to three instances in the tutela process are added to the original three instances of ordinary cases. At the same time, the almost incredible fact that Colombia has the staggering number of five high courts (yes, five) naturally increases the changes of contradictory judgments among

---

[88] Financial Times.
[89] OTÁLORA, J.A., La tutela y los derechos a la salud y la seguridad social, 2013.
[90] The reader should notice that tutela actions might have up to three instances: the lower court, the court of appeals and an eventual review by the Constitutional Court, which has reviewed an average of 720 tutelas per year. *See* https://www.asuntoslegales.com.co/actualidad/en-25-anos-la-corte-constitucional-ha-resuelto-mas-de-18000-tutelas-2555181
[91] Pending source.
[92] *See* https://www.semana.com/nacion/articulo/cuatro-millones-tutelas-han-sido-interpuestas-20-anos-aplicacion/233716-3. Most of them are related to health care, petition rights, pensions, and labor rights. Néstor Osuna, professor of constitutional law at Universidad Externado (Bogotá) says that over seven million tutelas have filed since the 1991 Constitution allowed this kind of actions. *See* Financial Times.
[93] *See* Colombian Constitution Art. 86 and Decree 2651 of 1991.
[94] *See* World Bank, Doing Business.
[95] *See* CSJ Encuesta de profundización "tiempos procesales."

them in the colloquially so-called clash of trains,[96] with the consequent rise in both uncertainty and, needless to say, litigation.[97]

After learning of the factors indicated in the previous paragraph, the foreign reader should have anticipated that Colombian and particularly its judicial system is very formalist. In words of Rodrigo Uprimny, a former Constitutional Court Justice and member of the International Commission of Jurists, "*[t]his is an extremely legalistic country. It's the most legalistic in Latin America and one of the most legalistic in the world*."[98]

Given the above-mentioned high amount of litigation it is unsurprising that some cases are frivolous, although this term may be an understatement.[99] Some anecdotical examples of frivolous claims are: (i) an action whose claimant intended to rejoin a WhatsApp group from which he has been expelled for reasons, according to such claimant, related to his political views, (ii) an action where a woman asked a judicial warrant ordering his alleged unfaithful husband to arrive early all days to home, (iii) an action where the claimant nun had been expelled from a convent and ordered not to use the habit again,[100] (iv) an action where an individual requested the supply of inflatable dolls to deal with his addiction to sex, and (v) a case where a woman claimed that her 15 years old daughter felt rejected by her pairs in the high school because of her appearance and requested a breast surgery.[101] What is worse, some of these actions were successful at least partially: the former nun prevailed at trial and the court ordered the archdioceses to change the sanction for another less restrictive one while claimants on the doll and the breast surgery cases prevailed at the first instance.[102]

As a final comment, the rules to restrict litigation are scarce.[103] This is paradoxically since, in such a case, the law seems to hope that the market itself would autocorrect without any governmental intervention, and despite the already mentioned fact that litigation is far from being a competitive market. Restrictions to litigate are very rare mainly because access to justice is a fundamental right and, therefore, any limitation might be unconstitutional. This was one the reasons that the Constitutional Court considered to hold unconstitutional Law 1653 of 2013 that had levied a tax on some claims.[104] At the same time, public policies

---

[96] a Constitutional Court; a Supreme Court; a State Council, which adjudicates on public/private disputes; an Electoral Court; and a National Judicial Council to investigate judges. as of this year, Colombia has yet another court system, the Special Jurisdiction for Peace tribunals, or JEP.

[97] "Often [all] these courts end up working at cross-purposes," said Ramiro Bejarano, a leading civil and commercial lawyer. "https://www.ft.com/content/0b833ef8-9c81-11e8-9702-5946bae86e6d

[98] *See* Financial Times.

[99] *See* Comisión de expertos para la reforma a la justicia.

[100] *See* Ámbito jurídico.

[101] *See* Revista Dinero.

[102] Id.

[103] *See generally* SHAVELL, *supra* note ___ ("Where private incentives to use the legal system are excessive, restrictions on its use may be desirable. Such restrictions should be expansively interpreted to include all manner of policies discouraging suit (including its outright prohibition in some areas), policies promoting settlement, and policies intended to reduce litigation expenditures (such as procedural rules limiting discovery, the time allowed for the filing of motions, or the number and qualifications of experts").

[104] *See* Sentence C-169 of 2014. In any event, there are still two taxes in legal force: Law 1394 of 2010 who imposes a tax on some claims, and Law 1819 of 2019, imposing a tax on arbitral awards. *See generally*

discouraging meritless or even frivolous are almost non-existent. For instance, and while such topic is hotly debated,[105] the American rule by which each party pays all trial and legal expenses regardless of it wins or loses at trial, might discourage more claims than the European rule that Colombia applies and by which the losing party bears all costs.[106] On the contrary and as a developing country, Colombia is usually recipient of foreign aid intended to strengthen the judicial system. And regarding the growing number of lawyers, the only and recent limit is Law 1905 of 2018, requiring the passing of an exam for those who have completed legal studies and intend to litigate.[107]

Section III - Concluding Remarks

This paper summarized the literature linking the negative effects of excessive judicial interference, measured through the number of lawyers and the amount of litigation, on economic development. As a second step, it showed that Colombia suffers both from too many lawyers and too much litigation which, in accordance with the first and theoretical section, may be bad for Colombian economic purposes.

In this regard, this paper was intended to begin to fill a gap in the literature on judicial interference and economic development, specifically regarding its negative effects applied to countries such as Colombia. In any case, the paper had some limitations. On the one hand, and in spite of few figures spread along it, this paper was mainly theoretical. Further studies may complement such analysis with empirical methodologies.[108] On the other hand, identifying in more detail how lawyers impact economic growth requires a deeper study of the micro- structure of legal services.[109]

GAVIRIA, J., La nueva contribución especial para laudos de contenido económico - un obstáculo más para el arbitraje colombiano, Revista del Instituto Colombiano de Derecho Procesal, No. 46 (2017).

[105] Pending source.

[106] *See* General Code of Procedure, Section ___. Perhaps the only exception is Article 206 of the Code of General Procedure. See also Sentence C-157 of 2013.

[107] *But see* HADFIELD, *supra* note __ (arguing that enacting barriers to the market for lawyers may deepen the current anticompetitive forces in it). *See also* Easterly, W., *supra* note __ (referring a common conception by which restricting the number and quality of lawyers would be similar to allow only Cadillac cars).

[108] *See* PINHEIRO, *supra* note ___.

[109] *See* GILSON, *supra* note ___.