

ACCESS TO JUSTICE FOR A RESPONSIVE AND INCLUSIVE LAND GOVERNANCE

*A study developed by HFH Brazil and Cendhec
implementing partners of the ‘Empowering Women and Vulnerable
Groups to Exercise their Rights for Inclusion and Secure Land Tenure
and Property’, in Brazil; project funded by UKAID*



INTRODUCTION

- **Project:** Empowering Women and Vulnerable Groups to Exercise their Rights for Inclusion and Secure Land Tenure and Property project
- **Project aim:** a responsive, accountable. and inclusive land governance increases the access of women and vulnerable groups to secure land tenure
- **Project - key strategies**
 - Women empowerment
 - Specialized entities in municipal & state levels, policies
 - Full potential use of existing regulatory framework (Statute of the City, special collective usucapion, and others)

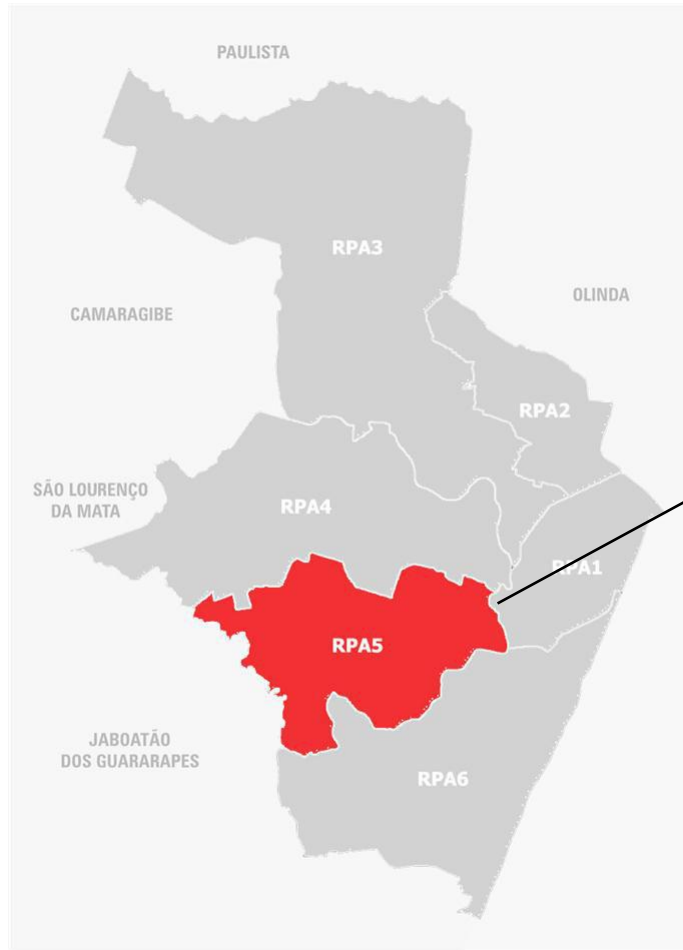
OBJECTIVE OF THE STUDY

To expose evidences of the obstacles that impact the time duration of proceedings in the Judiciary for the recognition of land tenure rights of the residents of poor settlements in Recife.

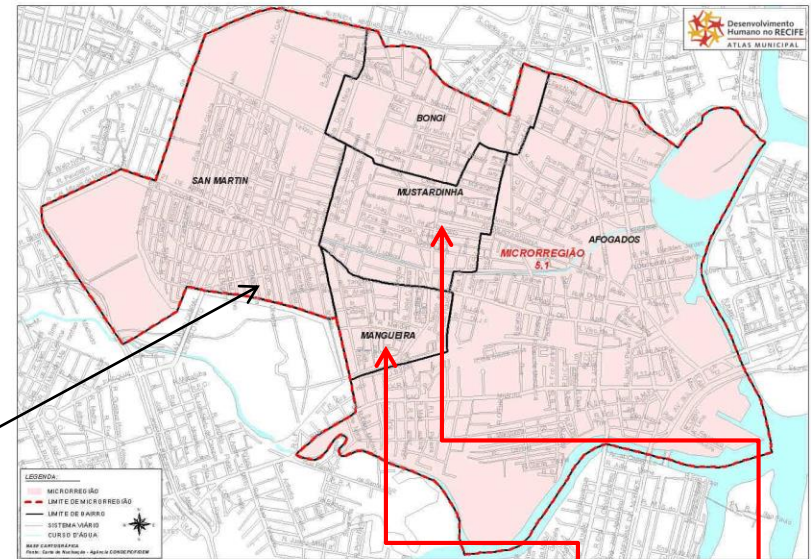
- 83% of the urban population in Brazil in poor living conditions
- 40% of families do not have security of land tenure or any legal document(s) to confirm possession of the land they live on

FOCUS AND CASES OF THE STUDY

The study focusses in the Special Collective Usucapion tool
ZEIS Mangueira and Mustardinha cases
City of Recife, State of Pernambuco, Brazil



Map 1: Political Administrative Region N.5, City of Recife



Map 2: The Micro-region 5.1 City of Recife

ZEIS Mangueira

ZEIS Mustardinha

PRESENTATION

REGULATORY FRAMEWORK IN PLACE

- Statute of the City Law
- Special Collective Usucapion
- Special Zones of Social Interest – ZEIS
- Social Function of Property

METHODOLOGY

1st stage of the study: random selection of 63 cases out of 472 usucapion cases (1506 beneficiary families) filed in the Court of Pernambuco from 2005 to 2010 - 19 cases Special Collective Usucapion

2nd stage of the study: a sample of 45 cases (50% of a universe of 89 Special Collective Usucapion) filed between 2005 and 2006 in ZEIS Mustardinha.

FINDINGS, CONCLUSIONS & RECOMMENDATIONS

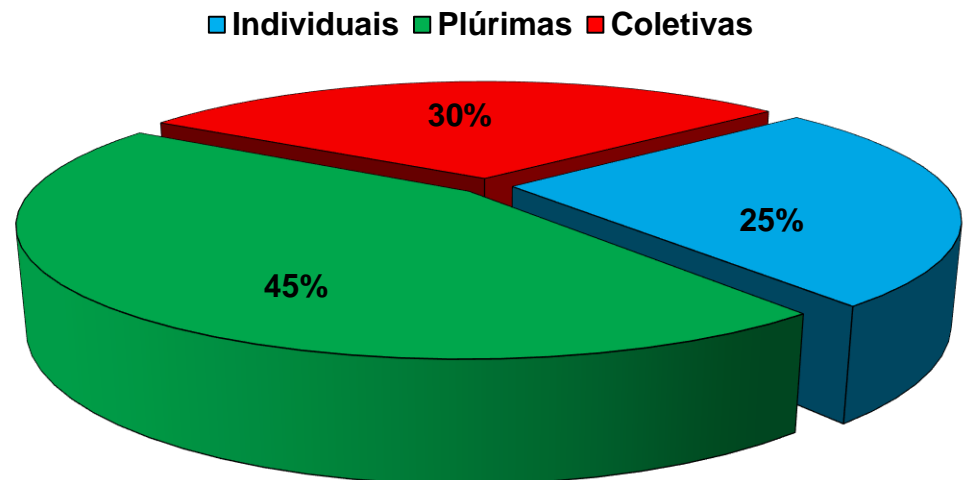
FIRST STAGE OF THE STUDY

Communities ZEIS Mustardinha e Mangueira

Sample: random selection of 63 (13,5%) cases out of 472 usucapion cases (1506 beneficiary families) filed in the Court of Pernambuco from 2005 to 2010

Composition of the usucapion sample:

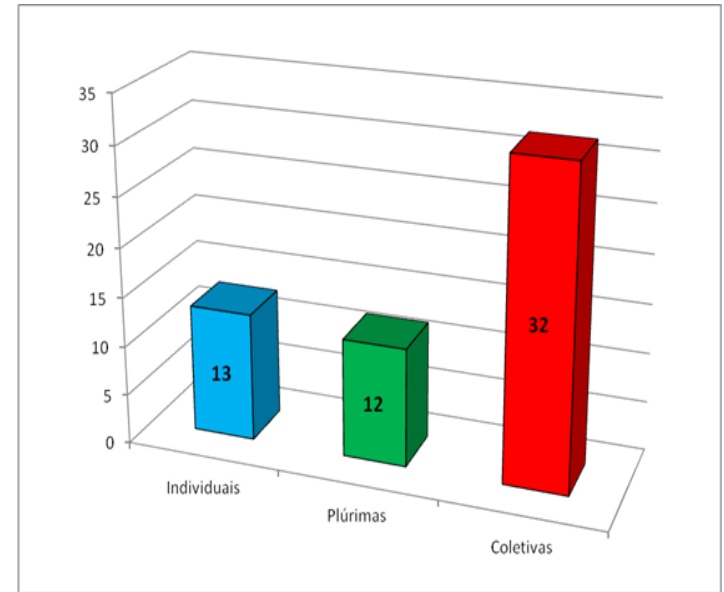
- 16 individual cases
- 28 Plurimas cases;
- 19 special collective cases



FINDINGS

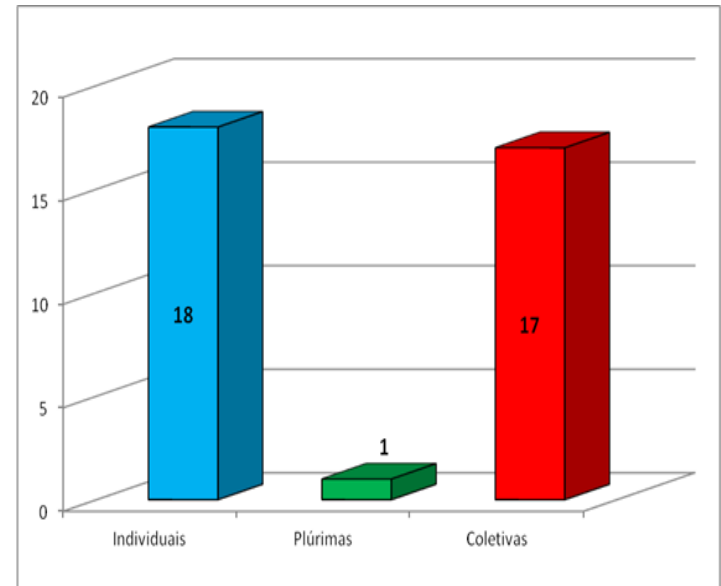
TIME INTERVAL BETWEEN FILING THE USUCAPION ACTION AND THE JUDGE'S FIRST DELIBERATION (32 MONTHS)

- Intake verify all documents in place; preference given to the elderly
- case is taken for review by the judge responsible of the Court, according to the order of arrival, competing with several other issues judged by civil courts.
- lack of a deadline for the judge to assess the case and take the first deliberation,
- greater difficulty of the judiciary in dealing with the special collective usucapion. Difficulties that may be linked to the classical individual private property approach in the civil law, which favors the individual actions.



TIME INTERVAL BETWEEN THE JUDGE'S FIRST DELIBERATION AND THE INITIAL CITATION OF THE DEFENDANT (17 MONTHS)

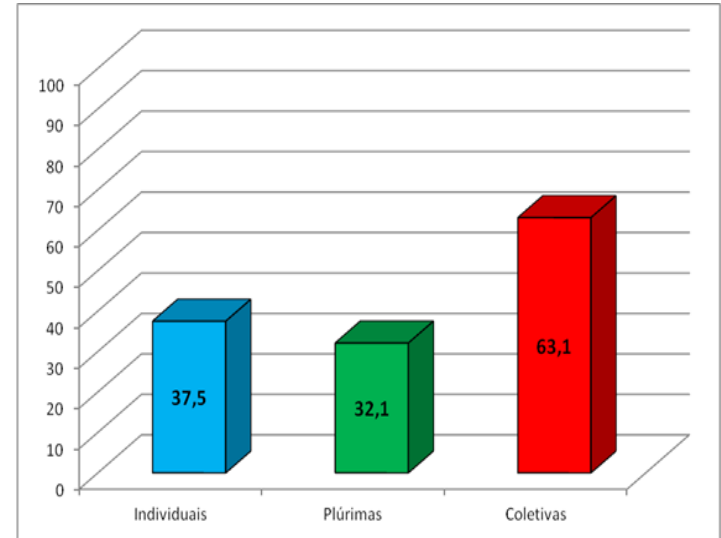
- Time required for the judge to declare “not sufficient information” and for the author of the case to solving the gap.
- The absence of some of the requirements can lead to the termination of the action before the citation of the defendant.



FINDINGS

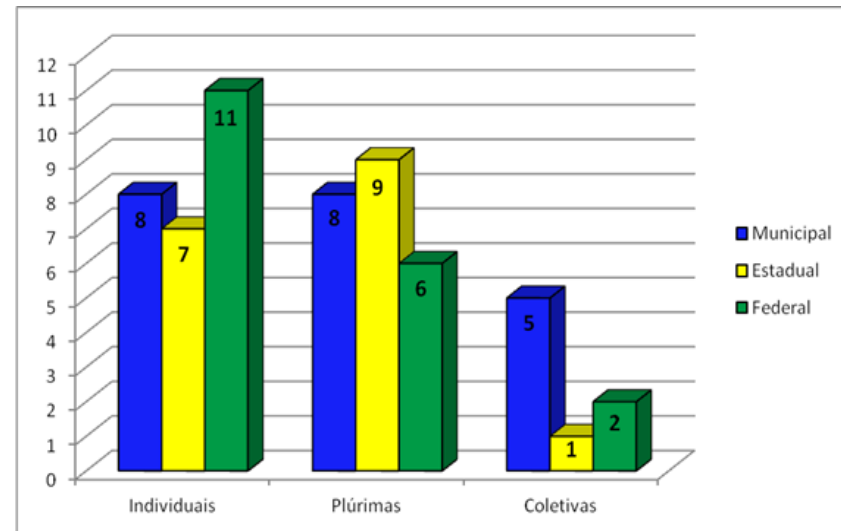
PERCENTAGE OF USUCAPION ACTIONS WITHOUT THE JUDGE'S CITATION OF THE DEFENDANT (63%)

- This result strengthens the hypothesis that it becomes very difficult for judges to declare a Special Collective Usucapion -SCU is ready to proceed and declares “not sufficient information”.
- The judge gives a deadline to the author of the case to comply with the submission of documents; if the deadline is surpassed the case is declared closed.



TIME INTERVAL (MONTHS) BETWEEN A JUDGE'S FIRST DELIBERATION AND THE RESPONSE FROM RELEVANT PUBLIC ADMINISTRATION ENTITIES AT FEDERAL, STATE AND MUNICIPAL LEVELS (2.5 months on average)

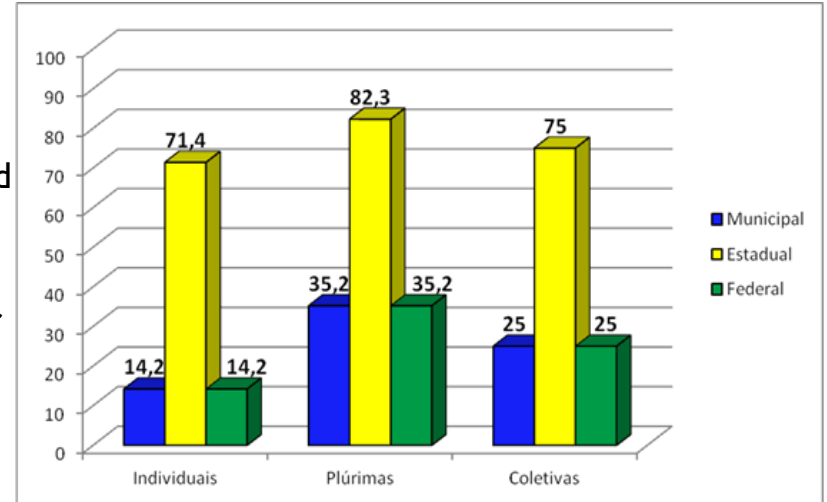
- While the land owner is called for appearance, another legal requirement is to consult the Public Administration (at Federal, State, and municipal levels); the judge queries these governmental entities to identify if the property is part of public area or interest. If it is, the case cannot proceed.
- Judges do not always consult public entities in SCU action.



FINDINGS

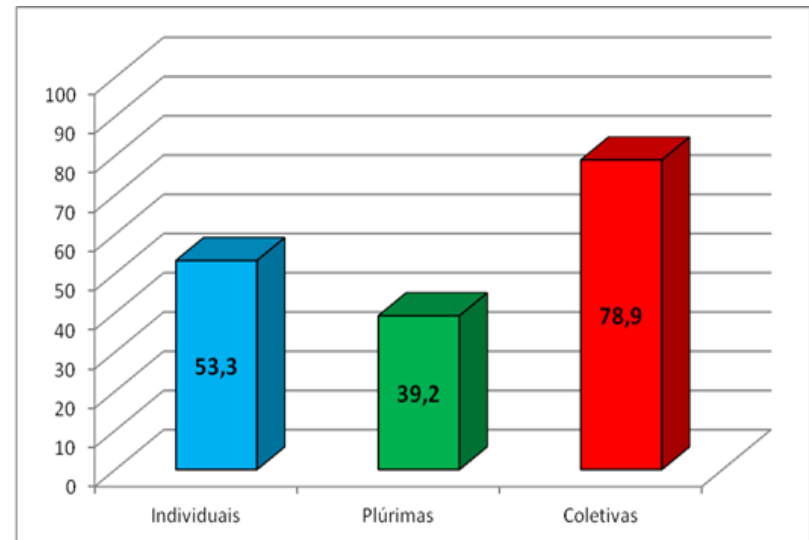
PERCENTAGE OF JUDGE'S CONSULTATION WITH NO ANSWER FROM THE RELEVANT PUBLIC ADMINISTRATION ENTITIES AT FEDERAL, STATE AND MUNICIPAL LEVELS (75%)

- the State is the most inefficient entity, by failing to respond to 75% of the SCU.
- Some judges show excessive care while waiting for the response from the public entity highlighting another factor that contributes to lengthy State Judiciary processes..
- According to Law if there is an absence of response from public entity (positive silence), the process should not be paralyzed waiting for the response.



PERCENTAGE OF USUCAPION ACTIONS WHERE THE JUDGE HAS NOT CONSULTED THE RELEVANT PUBLIC ADMINISTRATION ENTITIES AT FEDERAL, STATE AND MUNICIPAL LEVELS (79%)

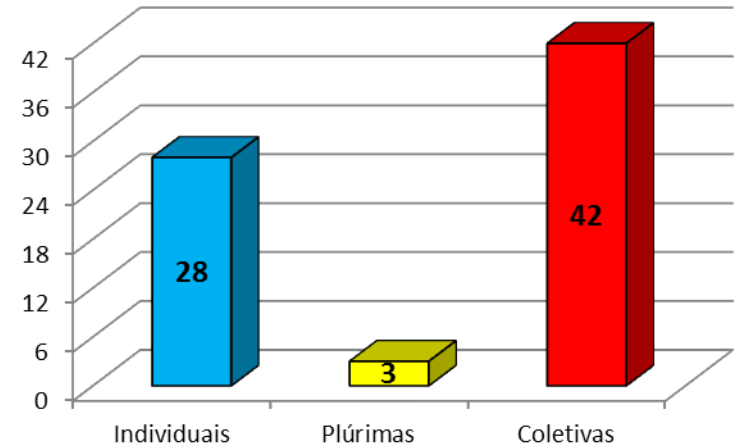
- There is a legal obligation for the state to be contacted and express its interests this could be a possible violation of the law.
- Non-compliance with this legal obligation not only hurts the interests of the public entities, but also generates delays in the legal process.



FINDINGS

TIME INTERVAL BETWEEN THE JUDGE'S FIRST DELIBERATION AND THE FIRST HEARING IN COURT (42 MONTHS)

- first hearing in the Judiciary takes place when the land owner and the claimant's neighbors are cited, consulted public entities have responded, and the Judge consider the requirements are completed
- This is not compliant with the summary process that corresponds to the SCU.



FIRST CONCLUSIONS

- SCU appear to have the biggest barriers among the different types of usucapion
- "Time" as a serious obstacle to guaranteeing the right of the poor to access justice.
- This is not only a factor that makes litigation more expensive, as it is also a discouraging factor for the population to seek the judiciary. The sample points unequivocally to
- As a result of the analysis, the complete process could easily take a decade. T
- The cases studied have already been in process for seven years and have not reached the point of receiving a final decision.
- Two types of obstacles are identified:
 - i) structural (bureaucracy and conflicts of competences among State institutions); and
 - ii) a restrictive interpretation of the existing legal norms by the judicial authorities.

SECOND STAGE OF THE STUDY

Community: ZEIS Mustardinha

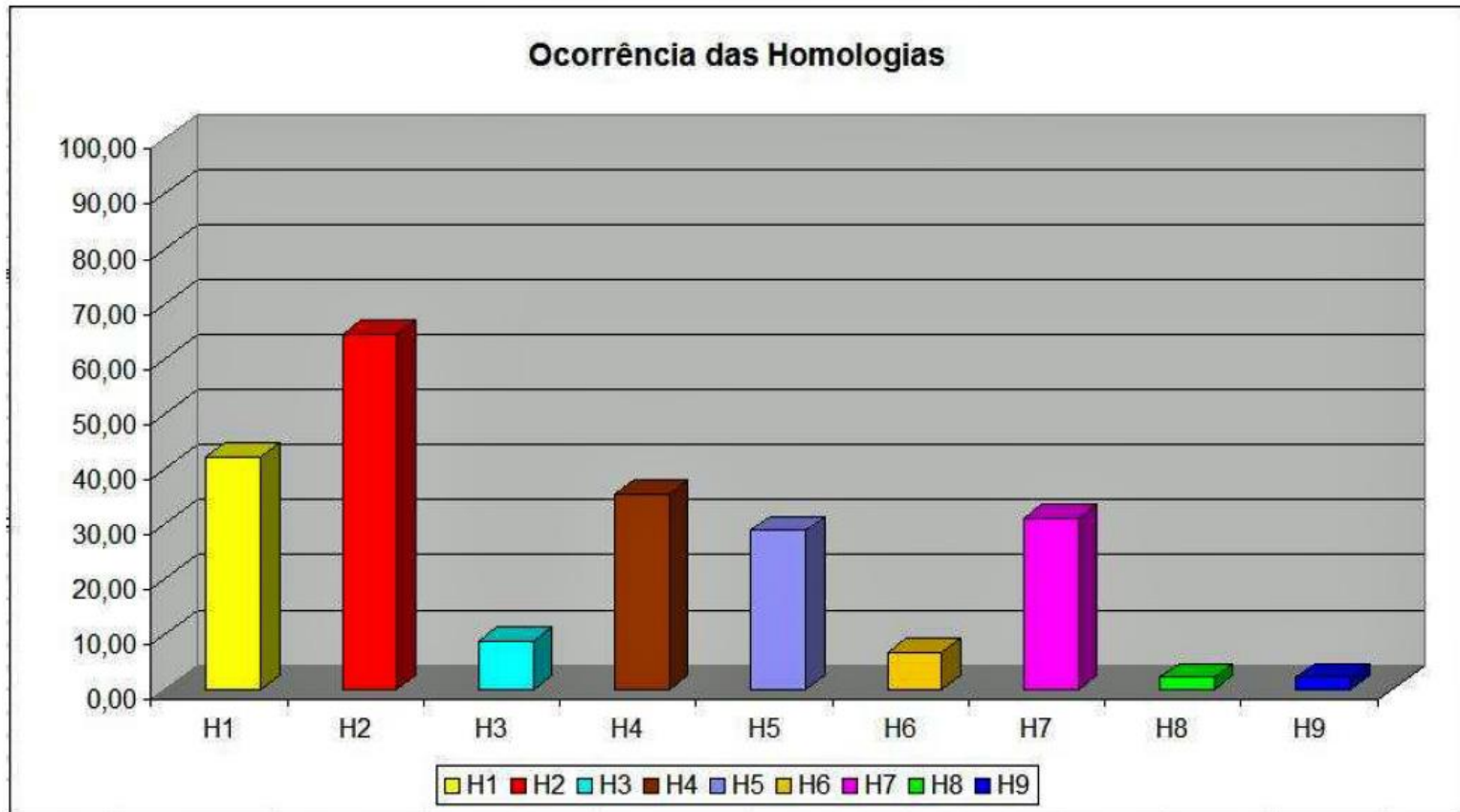
Sample: 45 cases (50% of a universe of 89 Special Collective Usucapion) filed between 2005 and 2006 by ZEIS Mustardinha.

Objective: Analyze the obstacles in the judicial process

Steps:

- Reconstruction of the process
- Identification of the obstacles
- Identification of categories (Homologies) of obstacles
- Analysis of categories (Homologies) of obstacles

CATEGORIES (HOMOLOGIES) OF OBSTACLES



TYPES OF OBSTACLES

- STRUCTURAL: linked to bureaucracy in the judiciary (time and conflict of competences)
- INTERPRETATIVES: linked to the interpretation of existing laws by judges

CATEGORIES (HOMOLOGIES) OF OBSTACLES

STRUCTURAL

H1-conflict of competences within the Judiciary about which court should undertake SCU proceedings; this has resulted in 28.88% of cases studied being closed without legal analysis.

H2-time taken by the administrators in the proceedings.

INTERPRETATION OF NORMS

H3-restrictive interpretation of the Art. 12 III of the SCL. It is legally established that representatives of a community and those explicitly authorized can represent the SCU's claimants in the Judiciary, however judges do not accept this type of representation.

H4-unrecogniton of the ZEIS, the designation of the settlement as a ZEIS is not mentioned in the judge's decisions.

H5-restrictive interpretation of the Art 10 of the SCL (no-individualization of land parcels).

H6-restrictive interpretation of the Art. 10 of the SCL (records of ownership). According to this Law, a signed document from the claimant is all that is necessary to prove that no other property is owned by the claimants; however, the judge requires each claimant to present a certificate issued by each one of the Land Property Registry Offices throughout the country .

H7 - restrictive interpretation of Art 12 of the SCL (economically vulnerable families should have all court benefits and free legal assistance but instead NGOs such as Habitat for Humanity and CENDHEC and others deliver free legal support)

H8 –Even though the SCL Art 14 establishes that the legal action of SCU is a summary action; the practice is slow and bureaucratic (as an ordinary action)

H9 –Requirement of authenticated copies of personal documents proofs of property and possession time.

CONCLUSIONS

- Rights are conceived formally however practices from law operators, entities of justice, the public defender and even sometimes the acting prosecutors place obstacles which require institutional adjustments and capacity building.
- Delays in the Judiciary discourage families and create a lack of trust in the Judiciary.
- The non- compliance of the State with its legal obligations act as an impediment to the full enjoyment of the right to access justice.
- As a result of the reforms and changes in public policy a greater welfare is expected for the economically vulnerable population. However, the economically most vulnerable are not able to access the justice needed to regularize the security of land tenure and a huge demand exist which calls for fair inclusive and equitable institutions and practices.
- Time is a serious obstacle to guarantee the right to justice. =

CONCLUSIONS

- Difficulties in the Judiciary to visualize and understand collective land tenure regularization, social function of property, the right of access to justice, and the right to adequate housing, highlights that the Statute of the City Law has not gained legitimacy in all of society and especially in the Judiciary.
- Need to overcome common difficulties faced by fundamental institutions such as, prosecutors and the Ombudsman; difficulties as: economic weaknesses; neglected by the Executive branch; lack of financial resources for the creation, installation or operation of existing public defender offices; small number of defenders to meet the demand; low quality of the service for the needy; the lack of a structure of entities and specialized centers to address the land issues.
- Civil society organizations are filling the gap of the shortage of public defenders in the state of Pernambuco, especially in the city of Recife by providing legal advice services to needy families who request legal support for land tenure regularization.