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Court Fees: Charging the User as a Way to Mitigate Judicial Congestion

Rafael Mery Nieto*

Abstract: This paper studies the use of court fees on judicial litigation, which aims both to regulate access to courts and reduce the congestion of the judicial system, and cover part of the direct costs of the system. Moreover, it provides resources to finance the administration of justice, and enables equitable access to the court.

Assuming that the demand for legal services is not different of the demand for any other good or service, the paper show a simple model to explain why and under what conditions it is efficient to charge a court fee.

Keywords: Court fees, litigation, efficiency, court congestion.

I. INTRODUCTION

The judicial system is a very costly social institution, whose funds come almost entirely from public resources. The idea that judicial systems should be financed with public funds is justified because there is a belief that justice should be free and should guarantee the “right of access” to courts of all citizens. This fact and the existing environmental incentives could induce people to litigate on courts to suboptimal levels.

As shown in the comparative experience (Dakolias, 1999), the existing environmental incentives can induce people to litigate in courts, rejecting other substitute goods that could be socially preferable. This is especially true in civil litigation, so court fees analysis is more relevant in civil and commercial litigation. Therefore, our analysis focuses on this type of litigation.

The excessive litigation or court uses on suboptimal levels is a consequence of a difference between private and social incentives to use the legal systems (Shavell, 1997). This difference is attributable, according to Shavell (1997), to two externalities.

First, a negative externality occurs when an individual decides to bring a suit using the judicial system and does not take into account the legal costs he

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induces others to incur into. Indeed, when the plaintiff makes a decision to bring a suit he does not take into account -when assessing the choice of litigating to judgment or settling privately- the costs to be incurred by the defendant and the administration costs of justice.

Second, a positive externality because the decision about the bringing of suits, generates social benefits that the litigant does not take into account, for example, the associated effects of deterrence that makes the system more predictable and allows a more informed decision about going or not to courts.

Then, the main divergence between private and social incentives to use the judicial system is the difference between private and social costs and benefits associated with the use of the judicial system.

This is due, among other causes, to free cost litigation. Indeed, this practice generates levels of litigation that are not optimal from social welfare criteria, since the social costs are higher than the social benefits generated by litigation. In other words, a free cost judicial system encourages levels of litigation socially inappropriate, because people do not take into consideration all the costs involved in a litigation process when deciding to bring suit. When costs are underestimated, because they only consider private costs, the result is that people litigate more. Private incentives to sue are misaligned with what is socially optimal (Cabrillo & Fitzpatrick, 2008).

Excessive litigation increases congestion and delay in the resolution of conflicts. Thus, the larger number of cases that enter the courts, the greater the delay in the care of new claims and the proportion of cases solved decreases over time. Congestion and delay is -in economic terms, the cost of litigation- making it more expensive and excluding the poorest sectors of society who end up subsidizing with their exclusion wealthier litigants who can afford the costs of delays.

The duration of trials affect the individual's decision to litigate. Indeed, individuals decide to litigate if the expected benefits of litigation exceed the expected costs. The law and economics literature identifies the duration of trials as one of the factors affecting the individual decision to litigate. The duration is a result of congestion. In congested courts, like congested roads, the trials take longer to reach the end. Delay in a dispute reduces the present value of the potential judgment for a plaintiff thus decreasing the likelihood of litigation (Priest, 1989). Court delay also affects primary behavior. The longer the trials the greater the incentives to breach contracts, as court delay gives the breaching party the chance to postpone payments. Consequently, the number of potential cases will be larger¹ (Miller, 1989).

¹ Other variable that affecting the longer the trials and can increase or decrease the likelihood of litigation is the judicial interest rate. Acciarri & Garoupa (2013) show that the asymmetric opportunity costs for each party in a case, judicial interest rates may lead to improper delay of

Excessive litigation or excessive demand for judicial service, and congestion, results in a lower quality of judicial decisions. The probability of judicial errors is higher because over time damages the quality of the evidence.

To correct this situation, there are different mechanisms that can affect the demand or supply for judicial services.

Supply policies have focused on increasing the number of judges or improving management of courts. These measures are costly for the public sector and can increase the incentives for litigation: a more efficient judicial system is more attractive to potential litigants.

Demand policies, meanwhile, seek to affect, directly or indirectly, the decision to use the judicial system. The most relevant demand policies are: promotion of Alternative Dispute Resolution, Mediation or Arbitration, minimum amounts of claimed liability in order to be able to litigate, "split-award" statutes (wherein the State takes a share of a punitive damages award), regulation of lawyer's fees, or court fees.

This article examines the relevance of court fees, like an efficient mechanism to affect indirectly the demand through variations in the price of the access to justice (and their impact in congestion levels), because it achieves the internalization by the litigant of all costs and benefits of litigation, and provides resources to the administration of justice.

This work is organized as follows. Section 2 describes the court fees, their objectives and critics. Section 3 discusses the economic justification for court fees. Finally, Section 4 concludes.

II. COURT FEES

The first news about court fees can be found in the 13th century in England with the enactment of the Statute of Gloucester during the reign of King Edward I in England. This Statute came to introduce a system of tariffs for use of courts. The reason for that was the need to raise funds for courts and discourage litigation (National Center for States Courts, 1975).

Through time, we can find different systems of court fees in many countries. Indeed, today most American and European countries have systems of court fees, and the same applies to some countries in Asia and Africa.

Design and system characteristics of court fees are specific to each country. Comparative experience shows that the design of the optimal rate requires a wealth of information for each particular case, which implies there is no simple and universal "magic formula" to get the internalization of social benefits,

proceedings or the decoupling of damages from recovery. These potential results -according to Acciarri & Garoupa- influence the number of settlements and suits.

and the appropriate corrective policy depends on the social value of each case, which is inherently complex (Esteller-Moré, 2002).

However, for these purposes, we understand that court fees are a monetary charge to which litigants are obligated for provision of judicial services, in order to contribute to cover the costs of the administration of justice.

As an example, in the U.S., the Superior Court of California for complaints or other first papers in unlimited civil cases (amounts over US\$ 25,000) charges a court fee of US\$ 435; US\$ 370 for civil cases with amounts over US\$ 10,000 up to US\$ 25,000; and US\$ 225 for cases with amounts up to \$ 10,000². Meanwhile, in Spain, the Law of Court Fees, approved on May 22 2012, established a court fee as the sum of a fixed fee plus a variable fee which will take into account the total amount claimed in the proceedings. The fixed fee will be € 300 for ordinary civil proceedings, € 800 when filing an appeal and € 1,200 for the cassation appeal. Meanwhile, the variable fee will be 0.5 per cent of the total claim for claims ranging from € 0 to € 1,000,000, and 0.25 per cent for claims € 1,000,000 onwards, with a ceiling of € 10,000³.

II.1. Court Fees Objectives

Both literature and comparative experience show that the objectives of court fees have been mainly two: First, to regulate access to justice, creating the correct incentives to achieve optimal levels of litigation, and to encourage or discourage the use of alternative dispute resolution. And second, to provide resources for the administration of justice. However, we can add a third objective or reason for incorporating court fees: fairness and social redistribution of costs of justice.

II.1.1. Generate optimal levels of litigation

The establishment of court fees seeks to regulate access to justice, get the internalization by the litigant of all costs and benefits of their decision to bring suit using the judicial system. A court fee is the price for the service. Thus, court fees make more expensive the access to justice by establishing an explicit price on the demand for justice. In this way, the number of cases should decrease, and avoid the excessive use of courts.

This implies the assumption that the demand for legal services is not different (in essence) of the demand for any other good or service, and is subjected to the law of demand, as the price of a good or service increases, *ceteris paribus*, consumer demand for the good or service will decrease, and vice versa.

² Superior Court of California, Statewide Civil Fee Schedule, January 1 2014.

³ Law 10/2012, November 2012, modified for Law 3/2013, February 2013.

Then, only the suits where court intervention is justified will enter the judicial system, and the frivolous suits will be left out.

In the words of Santos Pastor and Carmen Vargas (Pastor, S. & Vargas, 2001, pp. 45-46), the court fees are justified because:

"The general principle that operates in our societies implies that, if the enjoyment of a benefit by a user means a cost, the user must pay a price to offset that cost; that is socially appropriate, discourages excessive consumption and prevents the injustice that others should pay for it"

For Santos Pastor, the court fees play an administrator role, as a price does when managing scarce resources in a society.

In this sense, Alejandro Esteller-Moré (2002, p.527), says:

"The rate must discourage those trials unlikely to be favorable for the litigant, in exchange for others to suffer a shorter delay or for the whole of society to subsidize, through taxes, the access to justice for cases whose social benefits are lower than their social costs, or for which there are cheaper extrajudicial processes"

A court fees system is a potential deterrent mechanism that causes a reduction of litigation by increasing the costs to the litigant, and so reducing court congestion. Court fees are necessary to deter frivolous litigation or to channel different types of cases to appropriate courts or other non-judicial dispute resolution forms, such as counseling, mediation, or arbitration.

2.1.2. Provide funding for the administration of justice

A second objective of introducing court fees is to provide resources to finance the administration of justice.

Court fees can help to increase the budget of the administration of justice, without diverting funds from other items in state budgets or raise taxes on citizens.

Given that courts are a limited and expensive public resource to operate, it is appropriate to seek recovery from users of some of the costs of their operation. Almost every country levies some charge for the use of its courts. Table 1, in APPENDIX A, shows the percentages of contribution of court fees to judicial budget for some European countries in 2008 or 2010, based on information published by the European Commission for the Efficiency of Justice, and show that the average of all countries of the Council of Europe is at 28.3%, and the median at 27.9%.

II.1.3. Equitable access to the courts

A system of administration of justice funded from public resources, without discrimination of any kind, is benefiting the legal defense of big users (firms,

banks and financial institutions), that go to courts with thousands of cases every year, mainly for the payment of their debts.

Gratuitousness of justice can be seen like a benefit to rich users. Public spending on justice would be an unfocused and/or regressive expenditure, because it finances the richest sectors of society with public resources. The underprivileged users are left out of the courts. They can't pay and the excessive use of court produces congestion and delay, putting them at the end of the line.

Enabling equitable access to the court is a key consideration in structuring court fees. Under principles of equity, the judicial system should be fair and accessible for all, including those facing financial and other disadvantages. For a well-functioning judicial system, access to the courts should not be dependent on capacity to pay and vulnerable litigants should not be disadvantaged⁴.

Therefore, a system of court fees should consider matters that, for reasons of fairness, should not pay fees. This occurs, for example, in cases of constitutional protection, family law or criminal trials.

II.2. Court Fees Problems and Critics

Court fees have problems.

First, there are problems in the design of the optimal rate for the difficulty in assessing or estimating the social costs and benefits of litigation. The estimate of the social benefits requires lots of information about each case. The main problem is to estimate the "deterrent effect" that a suit produces. Each case is different, and different cases consume different amounts of the court system's resources.

Second, there are problems of social acceptance. However, the court fee has an effect of discouraging frivolous lawsuits, reducing congestion and making faster the administration of justice. In addition, court fees can achieve a more equal distribution of income. This, because the higher the income, the lower risk aversion is, and -*ceteris paribus*- more likely to access justice, and therefore, resorting to justice is positively correlated with income.

Finally, it is often said that court fees result in a price structure which acts as a barrier for entry to potential litigants who cannot afford it, making it incompatible with the guarantee of "right of access" to the courts. The idea is that the provision of judicial services is not on a cost-recovery basis. It is a fundamental element of maintenance of the rule of law in a civil society that citizens have fair and reasonable access to the courts.

Therefore, from a constitutional perspective, incorporating court fees requires to answer the question about the compatibility of this measure with

⁴ The court fee system is not incompatible with legal aid provided by public funds for those that cannot afford the necessary legal advice and representation in litigation proceedings, besides court fee's exemption.

certain fundamental rights such as the "effective judicial protection" and equality before the law. In other words, the main question is: are court fees a limitation or restriction on the guarantee of right to effective judicial protection?

The "right of access" to free justice, internationally recognized, is not an absolute and unlimited right. It's a state obligation and a legal right, whose content and specific exercise is conditioned and therefore, delimited by legislature, taking into account public and private interests involved, and budget availability.

III. ECONOMIC JUSTIFICATION FOR COURT FEES

According to economists, the user charge on judicial litigation (court fees), is justified for the existence of negative externalities that each user (litigant) generates to society. This is generated by the existence of incomplete markets, where the private benefits of litigation differ from social benefits. The charge has to match both benefits (private and social) and reach a social optimal equilibrium.

III.1. Incomplete Markets, Not Exclusion and the Tragedy of the Commons

A market system is considered to work as a set of competitive markets that generate an efficient allocation of resources. This efficiency is defined as Pareto optimality, which implies that it is impossible to allocate resources without hurting someone. However, by empirically studying the markets it is possible to verify that on many occasions this does not happen. If so it is said that the market fails. Economic theory has identified three sources of market failures: market power, information asymmetries and incomplete markets.

In the latter case the problem arises because it is not possible to establish property rights. As a result, activities that generate positive externalities for society will be provided in a less than socially optimal amount, and those that generate negative externalities will occur in more than the socially optimal quantity. This is because in the first case, those that produce positive externalities cannot enjoy all of its benefits, while those producing negative ones do not internalize costs.

Some markets fail due to the nature of the goods being exchanged. The problem is when it is impossible (or very expensive) to exclude any individual from consuming the good.

Hardin (1968) identified that problem and introduces the notion of the "Tragedy of the Commons". The idea is that when there are common resources, for which there is no private owner; the incentive among rational users of that resource is to exploit it to its fullest potential in order to maximize their own self gain before the resource is depleted. A similar tragedy of the commons is

inevitable whenever self-interested individuals have free and unlimited use of a finite commonly held resource.

In technical terms, it is said that when the social marginal benefit diverges from marginal private benefit, private agents have no incentive to internalize the marginal social cost.

Access to the courts can be framed within this type of problem. This is a service guaranteed to every member of society, so in principle, exclusion is not possible, but as more people come to these, the smaller the possibility of access for the rest of the citizens. Consequently, over-consumption, or excessive litigation, would clearly be a problem in incomplete markets, specifically, it would be a problem of the so-called "tragedy of the commons", where the agents do not consider the costs they cause to society, either through the administrative costs generated by the judicial system or congestion costs imposed by each new process to resolve the remaining lawsuits.

III.2. Justice, Efficiency, and Court Fees

Alejandro Esteller-Moré (2002) develops a simple model to explain why and under what conditions it is efficient to charge a court fee. The argument is that when private litigation costs are less than the social costs, there will be an inefficiently high level of litigation. The opposite can happen if the private costs outweigh the social costs. Therefore, the court fee can be positive or negative, i.e., it may be a bill to lower the levels of litigation, or it may be a subsidy, in order to increase it, if they are inefficiently low from the social perspective. Whatever the case, the court fee has always the same goal: to reconcile the social and private incentives to litigate.

To illustrate this argument, consider next model, where a risk-neutral litigant and without congestion costs, decides to bring suit if and only if:

$$p(W - M - C_L + \delta M) + (1 - p)(W - M - C_L) \geq W - M + n(W) \quad [1]$$

where p is the probability of winning the case; W is the litigant income; M is the recovery on the claim; C_L is the litigation costs; $\delta \leq 1$ is the congestion costs (higher congestion cost, lower recover on the claim); and, $n(W)$ is the risk aversion. The expression (1) establishes the private condition for litigation. The left side is the expected value of litigation, and the right side is the value not to litigate. This, if the expected value of litigation is greater than not, will be held.

The social condition will be given by:

$$p(W - M + \delta M) + (1 - p)(W - M) + K - C_j - (t_l + t_D) + (\Delta\delta)\theta \geq W - M \quad [2]$$

where t_l and t_D are the opportunity cost of litigation for the plaintiff and defendant; $(\Delta\delta)\theta$ is the economic assessment of the overall effects of increased congestion in the judicial system; C_j is the marginal cost of the new suit; and K is the social benefits of the precedent effect.

If we cleared the probabilities values from expressions (1) and (2), we obtain the limits from which it is profitable -privately and socially- to initiate a suit, like equations (3) and (4):

$$p' = \frac{C_L + n(W)}{\delta M} \quad [3]$$

$$p'' = \frac{C_j + (t_l + t_D) - (\Delta\delta)\theta - K}{\delta M} \quad [4]$$

There will be an excessive litigation if $p'' > p'$. To solve this inefficiency a tax can be charged on the suit, which is derived from expressions (3) and (4).

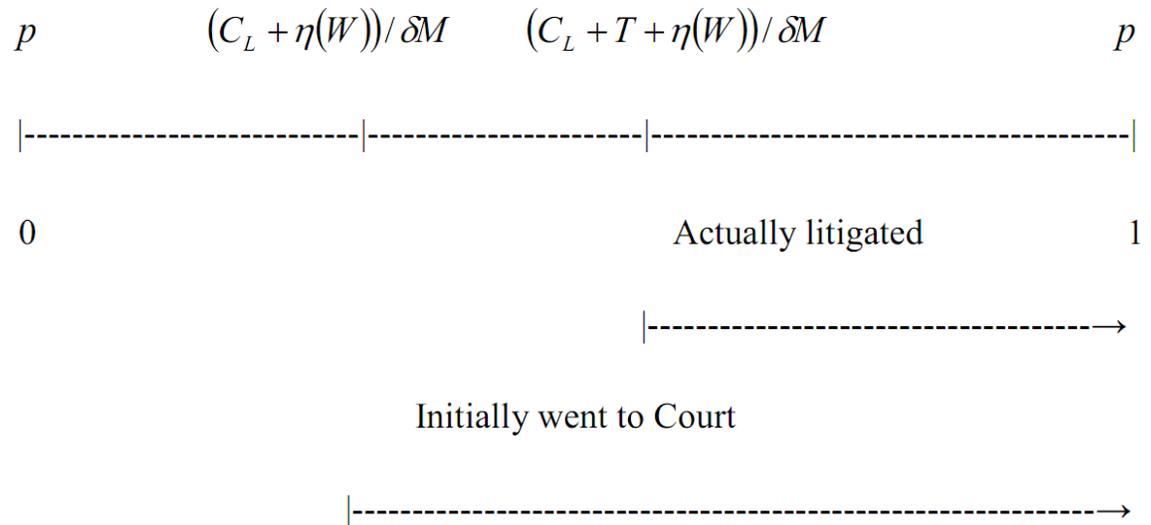
$$C_j + (t_l + t_D) - (\Delta\delta)\theta - K = C_L + n(W) + T \quad [5]$$

where T is the court fee. Solving equation (5), the value to be charged as court fee is:

$$T = C_j + (t_l + t_D) - (\Delta\delta)\theta - K - C_L - n(W) \quad [6]$$

Although this is the ultimate goal of a court fee, it also has desirable side effects, like the decrease in incentives to initiate frivolous lawsuits.

We understand by frivolous lawsuits those who have a very low probability of winning. This occurs when the expected benefits are much higher than the legal costs, and it is convenient to risk. So then, court fees would reduce the level of litigation, as can be seen in the next graph:



The graph shows that with court fee (T) only cases that have a higher probability of a win go to court. In other words, the court fee will discourage frivolous lawsuits, unfounded, and with low probability of success, that in the absence of court fees initially would go to courts.

In short, the court fee has the effect on litigation of discouraging frivolous litigation; it must incorporate the marginal cost of the judicial service, and negative externality valuation caused by the trial. Also, the court fee must incorporate the social benefits (K), excluding the costs incurred by the plaintiff (C_L).

However the difficulties of assessing the social benefits, a good approximation is the monetary amount claimed (M). Thus, the court fee will be a function of M and other variables such as trial characteristics, plaintiff characteristics (firm or person), etc.

IV. CONCLUSIONS

In a judicial system without court fees, the litigants only cover their private costs and the State finances the system's costs. That generates excessive litigation, increased congestion and delay in conflict resolution. The charges of court fees permit the internalization of litigation costs, and serves as a barrier to entry into litigation. This is achieved by approximating the social costs to the private costs. In general, there are good reasons for using court fees: First, to achieve internalization by the litigant of all costs and benefits that their decision causes on

society. Secondly, it regulates access to justice and helps avoid excessive litigation. Thirdly, it provides monetary resources for the administration of justice. In fourth place, it provides incentives for the use of substitutes, like Alternative Dispute Resolution, Mediation or Arbitration. Last, in fifth place, when the rate is determined as a percentage of the claim, the litigants' claims are more truthful and the judge's decision is easier.

However, it is not only on the grounds of efficiency that court fees should be preferred. It is also possible to find equity reasons for this. Indeed, it has been shown that the main effect of free access to justice is that the underprivileged are excluded from this service. Gratuity generates an unintended effect: exclusion. This is a result of understanding justice as a public good and so the marginal cost of providing an additional consumer is not zero. Instead, a new user prevents others from using it and demanding justice.

So, when thinking about making more efficient the judicial system, we must look not only at the supply of judicial services (better process rules, more judges, advances in management of courts, etc.). We must face the problem of the demand for justice. The main incentives for people to use the courts and not other mechanisms of dispute resolution must be identified. Just from this, it's possible to design a set of public policies that lead litigation (and congestion) to socially optimal levels.

Any judicial system must provide the right incentives for all those demanding justice and that require effective protection of their rights. It should also discourage frivolous litigation, whose aim is not justice, but a different objective whose satisfaction must not be resolved in the judicial system.

Therefore, court fees are a good public policy. However, this must be done without forgetting other relevant issues about incentives to use the judicial system. For example, the rule for allocation of legal fees, the method of compensating lawyers, and the promotion of Alternative Dispute Resolution.

CONFLICT OF INTEREST

The author confirms that this article content has no conflict of interest.

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APPENDIX A

Table 1. Annual amount of court fees received by the Country and the approved allocated budget for the Courts (Euros)

Country	Total annual approved budget allocated to the courts	Annual income of court fees received by the State	Share of court fees in the court budget
Austria (2008)	572.013.000	614.000.000	107,3%
Belgium (2008)	823.600.000	31.249.127	3,8%
Bosnia e Herzegovina (2010)	75.206.736	26.576.744	35,3%
Bulgaria (2010)	112.211.184	58.354.136	52,0%
Croatia (2010)	211.304.301	25.168.311	11,9%
Cyprus (2010)	33.546.827	9.802.960	29,2%
Czech Republic (2010)	346.497.809	37.452.793	10,8%
Denmark (2010)	216.795.693	95.933.236	44,3%
Estonia (2010)	26.979.340	12.909.414	47,8%
Finland (2010)	243.066.350	31.284.003	12,9%
Georgia (2008)	11.760.558	1.580.572	13,4%
Germany (2008)	8.731.000.000	3.977.000.000	45,6%
Greece (2010)	332.875.000	141.950.000	42,6%
Hungary (2010)	259.501.133	11.217.800	4,3%
Iceland (2008)	12.300.000	671.176	5,5%
Ireland (2010)	148.722.000	47.325.000	31,8%
Italy (2010)	3.051.375.987	326.163.179	10,7%
Moldova (2008)	3.002.838	2.091.212	69,6%
Montenegro (2010)	19.943.898	6.239.721	31,3%
Netherlands (2010)	990.667.000	190.743.000	19,3%
Norway (2010)	207.841.410	21.736.632	10,5%
Poland (2010)	1.365.085.000	530.161.000	38,8%
Portugal (2010)	528.943.165	217.961.874	41,2%
Romania (2010)	355.246.737	46.177.039	13,0%
Russian Federation (2010)	2.912.743.823	426.511.157	14,6%
Serbia (2010)	111.016.635	85.137.114	76,7%
Slovakia (2010)	138.493.788	57.661.794	41,6%
Slovenia (2010)	178.158.919	50.858.000	28,5%
Spain (2010)	2.983.492.000	173.486.000	5,8%
Sweden (2010)	557.260.358	4.469.274	0,8%
Switzerland (2010)	916.146.809	276.870.194	30,2%
Turkey (2008)	522.486.876	279.094.188	53,4%
UK-England and Wales (2010)	1.182.000.000	394.600.000	33,4%
UK-Northern Ireland (2010)	83.154.000	34.556.372	41,6%
UK-Scotland (2010)	146.420.820	26.681.850	18,2%

Sources. CEPEJ (2010), p. 58 and CEPEJ (2012), p. 78.