

Funding Civil Justice in the Age of Fiscal Austerity: The Case of Zimbabwe

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This paper tackles the issue of civil court funding in Zimbabwe against a background of fiscal austerity. Having gone through a decade of economic meltdown and political transformation from 1999 to 2009, Zimbabwe has to fund a wide range of public services from a paltry public budget of less than 5 billion United States dollars each year. Fiscal constraints have meant that very few resources are available to fund critical public services such as defense and justice among others. This paper examines the pricing of civil court services in Zimbabwe with a view to determining the scope for improved user funding of the courts. Based on a survey of court accountants and magistrates, the study reveals that key court employees in Zimbabwe acknowledge, in principle, the need for enhanced measures to improve user funding of civil justice in Zimbabwe. It emerges that cost recovery rates of between 55% and 60% are attainable for Zimbabwe's civil courts, without significantly compromising access to justice. The inclusion of key court employees in the survey is a significant departure from previous studies, which have focused unduly on the views of court users. The study recommends realignment of incentives within the civil justice system in order to improve the sharing of litigation risk between lawyers and consumers of civil justice services, and open more space for user funding of courts.

Field of Research: Public Finance

1. Introduction

The decade from 1999 to 2009 goes down in the history of Zimbabwe as the most difficult period ever for the Sub-Saharan economy. Hyperinflation, catastrophically low levels of output and per capita income, as well as around 80% unemployment characterized the period 1999 to 2009. While the reasons given for the economic meltdown have been as varied as there are political opinions, it is undeniable that the economic collapse has had widespread reverberations.

The administration of justice has suffered significantly as government grapples with crippling budget constraints and allocations to ministries have become far inadequate to meet expenditure. The above challenges led to the constitution of the Court Administration Fund (CAF) to support the operations of the Chief Magistrates Court, the Administrative Court, the High Court, and the Supreme Court.

Income for the fund consists of a fixed percentage of all revenue collected by the courts on behalf of government, legislative allocations, donations, and interest on invested money. Currently, the retention rate is 60% of collected revenue. With the advent of dollarization, it has become increasingly difficult for the courts to rely on budgetary allocations, as the

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government can no longer fall back on seignorage revenue. However, expenditure levels remain high and the courts are failing to recoup expenditure from fines and user fees. The result is a critical need to improve efficiency in the management of the CAF to ensure self-sufficiency. It is not clear whether the 60% retention rate is adequate and it is also difficult to quantify the scope for increased revenue from traditional sources. What is obvious, however, is that the courts are severely under-funded and this is currently compromising the delivery of justice in Zimbabwe.

While there is some consensus in the literature that access to justice is a basic human right and that the taxpayer must bear a significant burden of the costs of justice administration, the recent move towards greater fiscal austerity worldwide has prompted governments to start discussing the possibility of shifting as much of the court administration costs as possible to private hands. Pradhan (1996) asserts that 'public expenditures should be concentrated first on goods and services that the private market will not provide or will provide too little, rather than merely substituting for or even marginally improving upon the private market outcome'. The role of the public sector in the finance and provision of goods and services is, therefore, residual. Pradhan's market analysis can assist in determining services that may be outsourced to the private sector, improve efficiency, and reduce pressure on the treasury. The introduction of cost recovery mechanisms in the public sector may be justified on the grounds that it creates an opportunity for alternative, more efficient private sector providers who are crowded out by the public sector, which often provides services free of charge. However, in practice, transactions costs, the concern for equity and targeting difficulties, make it difficult to realize these efficiency gains for low-cost services, particularly in poor rural communities, where the imposition of user fees can lead to the exclusion of the poor.

The cost recovery debate raises important theoretical and empirical questions within the context of the New Public Financial Management (NPFM) model. In the NPFM model, the distinction between public management and business management is blurred to the point where government bureaucracies turn into strategic business units competing with each other and citizens become customers. Government officials follow the universal practice of the market place: economy and efficiency. Accounting-based tools figure prominently in the NPFM, where the full costs of government services should be calculated as a basis for setting prices for both public and internal services.

The purpose of this study is to evaluate the scope for improved user funding of civil justice delivery in Zimbabwe. Using a survey of accountants and magistrates in Zimbabwe's main courts in Harare, this study seeks to gather the opinions of court officials on reforms that target increased user charges and privatization of some court services. The specific objectives of this study therefore include the determination of the extent to which user funding of courts can be improved without compromising access to justice by the economically disadvantaged. The study also seeks to summarize and present the contemporary academic and policy debates on the funding and provision of civil justice services in the age of austerity. The guiding hypothesis of the study is that there is scope for increased user funding of civil courts in Zimbabwe.

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Given the limited published literature on the economics of civil justice globally, and in Africa in particular, this paper contributes to existing knowledge by providing the first documented academic study on the funding of civil justice in Zimbabwe. Researchers interested in contributing to the debate on civil justice reforms around the world currently have limited academic sources that directly tackle civil justice funding. To a great extent, they have to rely on literature related to public goods theory and the theory of government to gain insights into this crucial subject. The few studies conducted hitherto have been either theoretical or have focused on the needs of court users, and have not adequately examined the views of key court employees, who live the effects of austerity in the courts on a daily basis. Court employees are a vital supply chain link in the civil justice system, yet their views have been neglected by earlier studies. To this end, this study adds the opinion of key court employees to the on-going debate on civil justice reforms. In view thereof, the study is a notable contribution to a balanced dissemination of information pertaining to civil justice reforms, which allows stakeholders to make informed evaluations of the desirability and impact of reforms on access to and quality of justice.

The rest of the paper is organized as follows: Section 2 reviews literature on the funding of civil courts; Section 3 gives a brief outline of the methodology; Section 4 presents an analysis of the key findings and implications of the study, and Section 5 concludes the paper.

2. Literature Review

2.1 Public Goods Theory and the Role of the State in Civil Justice

In a perfect market, the forces of supply and demand will achieve an efficient allocation of resources through the price mechanism without the need for public intervention. However, public intervention may be justified in cases of market failure, where the price mechanism results in an allocation of resources that diverges from the social optimum (Buchanan, 1965). Musgrave (1969) argues that the level of public spending on a particular intervention should correspond to the cost of the public goods it generates. However, he notes that since users will only pay up to the value of the private benefits they receive, the additional costs of public benefits will have to be met by the state. This argument is consistent with the Samuelsonian public goods theory, which justifies state intervention in production on the basis of externalities and market failures.

Samuelsonian publicness is defined by the joint consumption and non-excludability criteria (Gramatikov 2009). Technically, this means that a public good is one for which an additional consumer can enjoy the good at zero marginal cost, and simultaneously it is also not possible (or exorbitantly expensive) to exclude others from consuming the good. In such a case, free riders can enjoy the good at zero cost, and it would be inefficient to exclude them since they can be included at no additional cost. The result is a violation of Pareto efficiency since at zero marginal cost an additional member of society can enjoy a non-zero benefit without making others worse off (due to non-rivalry in consumption). Since allowing free-riders to enjoy the good at zero cost is a Pareto improvement, everyone wants to be a free-rider and therefore no one will supply the good, or if supplied, it will be in inefficient quantities. The state therefore has to intervene to correct this market failure and force

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everyone to contribute to the funding of the public good by levying tax.

Gramatikov (2009) acknowledges that civil justice does not meet the Samuelsonian criteria for public goods, suggesting that it can be provided by the market. However, the author hastens to argue that the Samuelsonian criteria, if applied to civil justice, tend to run against the rule of law paradigm. On the basis of positive externalities of civil justice, through contribution to the common law via judicial precedent, pronouncement of judgments (which gives certainty as to the outcome of the law for those engaging in contracts), and the dissemination of public values, civil justice has been defined by some as a public good (Genn 2013, 2012, 2010; Gramatikov 2009, Robel 1993). Those that insist that civil justice is a public good argue that the coercive force of the state is critical for attainment of justice (Genn 2010, 2012, 2013; Robel 1993), and the perception is that if privatized, judge incentives will be affected (Robel 1993) or citizens will be forced to trade their rights in exchange for a settlement (Genn 2013). In the latter regard, privatization does not contribute to justice.

Yet another school of thought questions the usefulness of Samuelsonian public goods theory in explaining public funding of civil justice. Marmolo (1999) dismisses efficiency considerations as the basis for public provision of 'public' goods. Instead, public provision is manifested as a constitutional choice, driven by subjective opportunity costs and not objective costs as espoused in the efficiency literature. In Marmolo's view, the rationale for public involvement is in the existence of significant utility interdependencies across consumers. The choice precedes market interaction and is not motivated by market failures. Efficiency concerns are relegated to the post-constitutional choice, regarding the least cost mode of provision. If cost savings can be achieved by private contracting while ensuring public access through adequate regulation and/or subsidy, then privatization should be preferred. Marmolo refocuses public goods theory from allocative efficiency to distributive equity, and labels Samuelsonian public goods theory 'an empty box'. Contrary to Marmolo (1999), Main and Peacock (1999) emphasize efficiency concerns ahead of distributional concerns in the delivery of civil justice. They favor market responsive pricing of court services but however acknowledge the need for some public funding due to positive externalities on other parties. Main and Peacock (1999) cite Gravelle (1996) who advocates for market pricing due to the complexity of determining cases where a subsidy is justified. In their view, "...if pricing for access to courts adjusts flexibly to demand, in a way that reduces unwanted waiting, then the entire system of dispute resolution will benefit from an increase in competition." They refer to Bowles (1996) on legal aid, arguing that the system exacerbates supplier-induced demand problem. Moreso, the policing mechanisms to curb abuse of the system are not regarded as having been successful (Gray et al 1996).

The distributional equity perspective to public provision of civil justice as implied in the constitutional economics approach of Marmolo (1999) differs from Holcombe (1997), who argues that public provision of public goods is not explained by altruism but rather by the desire by those in government to legitimize their power. Holcombe (1997) develops 'a theory of the theory of public goods', which gives a totally different view of the state and challenges theories of the state founded on both efficiency and distributional arguments. The theory, which is also referred to as the exchange theory of government, explains government involvement in the provision of 'public' goods as a deliberate attempt by those

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in government to legitimize their control of economic power, by creating a system that conveys nationhood and altruism, and hence ensures compliance by those governed. Otherwise, there is no reason to believe that the state can produce goods more efficiently than the private sector. Instead, state provision is associated with administrative costs, excess burden of taxation, and informational imperfections associated with democratic decision making (Bergstrom et al 1986, Gramatikov 2009).

The debate on the role of the state in provision of civil justice via the public budget continues into the 21st century. Pro-market researchers have argued for reforms that promote more user-funding of civil courts (Ware 2013, Talekar 2011, Barendrecht & van Nispen 2008). On the other hand, pro-state researchers have vividly criticized privatization, citing the threat of privatization to the development of common law, the unregulated nature of private dispute resolution, and potential adverse effects of high user charges on access to justice by the poor (Genn 2013, 2012, 2010; Greenberg & McGovern 2012; Farrow 2010; Gramatikov 2009; Friedman 2004). Barendrecht and van Nispen (2008) have mooted the idea of micro-justice as a solution to access concerns raised in the literature. They argue that the question of private provision of civil justice should not be the issue, since many legal needs are met via alternative dispute resolution services. Instead, justice reforms targeting the poor should aim for solutions that cost a fraction of the cost of Western courts (below 10%). Thus there is room for the private sector, non-governmental organizations, and the state to work together to enhance access to civil justice by the poor.

2.2 Civil Justice Funding and Reforms in the UK and USA

The UK Ministry of Justice conducted a series of consultations in 2008 in which various proposals were being made to increase court fees in the civil courts to ensure full cost recovery. The contention was that Court fees should be set, so far as possible, at levels that reflect the full cost of the process involved. According to the UK Ministry of Justice (2008), full cost pricing, together with a system of waivers for the less privileged, is the best way of targeting the taxpayer's contribution to where it is most needed. In their view, this is in the best interests of people on low incomes and of taxpayers and is the right balance to ensure fair access to justice, fairness to the taxpayer and proper funding of courts now and in the future.

Contrary to the case submitted by the Ministry of Justice, about two thirds of the respondents to the consultation questions were of the view that the principle of full cost recovery in a democratic society is wrong, arguing that any fees or increases to them will mean people who have legitimate grievances will be unable to obtain justice. They further contended that a fee policy of full-cost recovery is inefficient and likely to narrow access to justice and that the court service should be a resource of the state and funded by taxation.

The latter view is consistent with the report and recommendations of The Joint Committee to Study Court Costs and Filing Fees in the State of Ohio, USA (2008). The Committee's mandate included a study into the determination, assessment, collection, and allocation of court costs and filing fees in criminal actions and in civil actions and proceedings in the State. In the Report, the Committee notes that courts provide a forum for the fair, just, and peaceful resolution of disputes and as such there should be no cost to accessing justice

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other than a nominal fee to cover expenses of administering the case. The Committee further asserts that court costs and fees cannot and should not be considered “income” to a court and any requirement for a court to fund itself through the levying of fines, fees, or costs to operate can only encourage corruption.

Furthermore, the Committee contends that if a court is forced to be self-reliant, then either heavier penalties will be imposed or courts will be required to increase costs and fees in order to pay for operations, which would lead to a system inaccessible to all but those who can pay.

Despite the foregoing however, the Report recommended that courts may determine that additional funds are necessary to acquire and pay for special projects of the court, including but not limited to, the acquisition of equipment, the hiring and training of staff, community service programs, mediation or dispute resolution services, the employment of magistrates, the training and education of judges, acting judges, and magistrates, and other related services. Upon a determination that the project is necessary, the court may charge a fee, in addition to all other court costs, on the filing of each criminal cause, civil action or proceeding.

Notwithstanding the strong case against full cost recovery in the UK Court System, the UK Ministry of Justice (2008) submits that the civil and family courts are principally concerned with resolving private disputes between individuals or companies. These are not criminal cases therefore it is not right for the taxpayer at large to continue to provide a general untargeted subsidy for resolution of these disputes in courts. Besides, although the term 'full-cost recovery' is often used, the target is not literally 'full-cost recovery'. The taxpayer makes, and would continue to make, a significant contribution to the cost of running the civil and family courts. Therefore, a better way of describing the policy is 'full-cost pricing'. In other words, fees should be set at levels calculated to cover the full cost of the system if paid in full in every case.

They further contend that court fees ensure that the civil courts are properly funded to provide justice for those who need it in years to come. Court fees are recoverable from the defendant if a claim is successful, and they ensure that ultimately defendants who are in the wrong pay the cost of being pursued rather than the taxpayer. A protective system called fee remissions is in place in the UK to ensure that the taxpayer subsidizes applicants on low income, but otherwise (particularly in the case of companies) the costs of court processes are met by claimants.

3. Methodology

The study sought to examine the adequacy of accounting and budgeting systems in Zimbabwean courts by surveying key court officials involved in the budgeting activities of the courts. Both primary and secondary data were used in the research. Primary data consisted of data gathered for the sole purpose of addressing the problem of this research, while secondary data were existing data collected by other researchers for reasons apart from addressing the problem of this study. Qualitative primary data comprised various opinions on, and attitudes towards full cost recovery in the courts and general issues on

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court budgetary administration. Quantitative primary data consisted of fees retention ratios and budget shortfalls for the courts, among other data. Secondary data included public and expert opinions on court funding and cost recoveries in other countries such as the UK and the USA, as well court fees and court funding levels.

This research combined the survey design and document analysis. The survey method involved the examination of a sample and was largely preferred because it is less time consuming, less expensive and yields results in a short space of time to facilitate drawing of conclusions and making recommendations. Furthermore, the survey design would provide insight into the thinking of key court employees regarding fees revisions, an issue that affects their day-to-day functions. Previous studies have relegated the views of court employees and focused on views of court users only. Document analysis involved the analysis of findings of other studies as well as various documents on court fees and court funding in order to provide both theoretical and empirical foundations for the research and also further augment the findings of the survey. Document analysis was considered not only convenient but also more informative as it allowed incorporation of various other findings from previous research.

The target population consisted of 33 magistrates and 24 accountants and assistant accountants, who are the key players in the budgeting and accounting process in the Ministry of Justice, Legal, and Parliamentary Affairs. Due to busy schedules of most magistrates, a sample of 30 respondents was selected using judgmental sampling from a target population of 57 potential respondents. The sample constituted about 53% of the target population (which is way above the standard minimum of 5% for inferential statistics) and it was deemed adequate and representative of the target population. Judgmental sampling is a non-probability sampling method whereby the researcher uses his understanding of the characteristics of the target population to construct a sample. The sampling method was chosen for its convenience and also to ensure a high response rate. The risk of sampling bias was considered insignificant in view of the relatively homogenous and balanced nature of the target population.

The research used structured questionnaires and personal interviews to collect primary data relevant for the study. Questionnaires were chosen to allow respondents enough time to respond to the questions and give reliable feedback. The structured nature of questionnaires would also allow more robust and quicker analysis of data. Interviews were added to complement the structured questionnaires and provide more granular details, particularly on broad policy issues.

Secondary sources of data included the Treasury Instructions Manual, various Acts of Parliament, and other documentation relevant for the study. Journals, textbooks, and the Internet were also used for the review of existing literature.

The whole process of data collection was designed to ensure that responses were not only usable but also valid and reliable. The data from wide consultative processes in other developed economies were considered highly reliable due to the very high public awareness of the justice system and the employment of more reliable methodologies in the consultations.

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4. Analysis and Discussion of Findings

Based on the evidence from this study, the costing system used by the courts is generally adequate for identifying costs of offering various services within the court system. However, the same cannot be concluded regarding the adequacy in allocating overhead costs and pricing services to recover costs. Almost all court services are severely underpriced regardless of the fact that quite a number of civil court users have the financial capacity to meet the costs of legal proceedings, especially in commercial cases.

The study revealed that ancillary services within both civil and criminal courts contribute very little to the CAF due to underpricing of services and provision of chargeable services free of charge (see Table 1 below). Some of these services consume a lot of time and court resources. Evidence from the UK shows that close to 80% of civil court costs are recovered by court fees and only 20% is met by taxpayers yet in Zimbabwe only 20% is met by court fees and the rest is sought from the taxpayer.

Table 1: International comparison of fees for some common court services

Court service	Fees Charged		
	Zimbabwe	UK	USA
Divorce Application	\$5.00	£100.00	\$32.00
Application for division of property	\$5.00	£100.00	\$32.00
other applications	\$5.00	£100.00	\$32.00
Writ of execution	\$5.00	£50.00	\$40.00
Warrant of arrest	free	£75.00	\$10.00
Warrant for unpaid child support	free	£90.00	\$10.00
Reproducing marriage certificate	free	£60.00	\$10.00
Issue of summons	\$5.00	£90.00	\$10.00

Source: Primary and Secondary (<http://www.justice.gov.uk/publications/cp0507.htm>.)

While the discrepancy may be explained partly by economic differences, it is also clear that very little research and consultation has been made in Zimbabwe to improve the ability of the courts to sustain themselves without compromising access to justice by the low income groups. Based on the comments of respondents in the study, it is reasonable to conclude that cost recovery rates of between 55% and 60% are attainable for most civil court services. The case is different for criminal courts where the state is the user of services and hence should meet the costs using taxpayers' money.

The primary evidence in support of the hypothesis that there is scope for increased user funding of the civil courts in Zimbabwe is substantial. The user fees discrepancies above, along with affirmative respondent comments give credence to this notion. Upward revision of civil court fees based on a full cost pricing methodology is possible without significantly compromising access to justice. Officials within the Ministry of Justice generally agree with the concept of full cost pricing, not surprisingly given huge court budget deficits caused by paltry Treasury budget allocations to the CAF. Evidence from the UK and the USA is however mixed, with the UK government advocating full cost pricing while the USA prefers a

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heavily subsidized system of court fees. There is evidence from research in the UK that court fees are not a significant deterrent to justified court action. At the same time, court fees set at cost recovery levels tend to encourage creditors to pursue alternative channels for recovering their money before approaching the courts.

The evidence on private provision of some ancillary court services is mixed. However, the study concludes that there is scope to allow the private sector to offer some of the ancillary services currently provided by the courts.

Respondents highlighted the need for a full computerization of court activities to ensure that costs are correctly allocated to cost centers and services are fairly priced based on cost. While not all court users will be able to meet the court fees at these levels, those who have the ability to pay will contribute fairly to the cost of providing the service. Suggestions were that fee concessions and risk-sharing clauses could be put in place to address access concerns for the less privileged.

Further implications of the survey results are that, since the provision of justice is a constitutional right of citizens, there is need for wide consultations with the general public and advocacy groups, as well as experts to explore potential measures to improve the efficiency of the courts in view of current fiscal constraints. This would involve the Ministry of Justice coming up with a draft of wide-ranging fees reviews based on consultation of other court systems in the region. The proposals could include proposals to increase civil and family fees, particularly those for enforcement processes, in order to maintain full-cost recovery for civil business and keep the relevant family fees aligned with the civil equivalents. In the context of enforcement, it is particularly important to charge the true cost of the particular process. Charging the true cost enables creditors to weigh the appropriateness of taking enforcement action against a possibly vulnerable debtor, and the realistic likelihood of recovering their money. Equally, where enforcement is successful and the court fee is added to the amount enforced, this ensures that debtors, who can pay, face the full cost of their default.

In view of the severe underfunding of the courts, appropriate financial targets for the courts should be set to ensure that the system is fair to the taxpayer and that so far as is reasonable, the actual users pay for the service they receive. Better matching the income from specific fees with the cost of associated processes will both help ensure that the system is sustainable because funding levels can reflect workload changes over time, and make the system fairer between different categories of court users.

This study is limited by the lack of access to a wide range of literature to adequately inform the debate on civil justice reform. Furthermore, data on court user fees in neighboring countries such as Botswana, Zambia, and South Africa could not be accessed, limiting the regional comparability of user fees in Zimbabwean courts. However, the study relied instead on the opinions of key court officials who have a respectable appreciation of the reasonableness of user fees.

Areas for further research include studies on the impact of court fees on the decision to go to court, exploring the idea of micro-justice to ensure access to justice by disadvantaged

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groups, and assessing the scope for outsourcing services such as transporting prisoners to court in order to improve efficiency in the court system.

5. Conclusion

The provision of civil court services for free or at a fee unrelated to cost is not sustainable in Zimbabwe. The courts are heavily dependent on Treasury for funding, but with a stagnant economy, it will take years for funding to be adequate. User-funding of the civil courts is a contestable issue from a constitutional perspective, but there is need to ensure the courts continue to function by allowing them to charge cost-related fees. The first step towards sustainable funding of courts is ensuring that court activities are computerized and costs correctly identified and allocated. Finally, further research should be undertaken to assess the scope for private provision of some court services.

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