Market Competition and Legal Aid in Norway

Professor Jon T. Johnsen, University of Oslo

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1 INTRODUCTION

During the last year, reform activity on legal aid in Norway has been more intense than for long. At the end of 2002 the Ministry of Justice proposed a bundle of reforms in the Norwegian Legal Aid Act of 1981.[1] The package contains revised goals for the civil schemes – emphasizing legal aid as a rationed, discretionary distributed welfare benefit, new rules emphasizing that legal aid is subsidiary to legal insurance, changes in the means and merits test and in the administrative powers to exempt from them. A majority in Parliament has instructed the present minority government to abandon contributions in legal aid. The government will implement the reform from September this year.

However, the unparalleled most an interesting document is a governmental expert report titled "Access to justice".[2] *(AJR-2002*) The commission's task was to evaluate competition in the legal services market and to propose measures that might improve access to legal services for ordinary and low income people. The government mandated it to map and evaluate conditions that impacted on the legal services market – including the legal aid schemes and LEI, since the purpose of both vehicles is to improve access to legal service for the less affluent part of the population. However, the government excluded general reforms of the legal aid act or procedural codes from the commission's agenda. The deadline for comments expired on May 20, 2003.

Paragraph 2-4 summarizes the report's analysis of the market conditions for legal service transactions with emphasis on legal aid. Paragraph 5-7 discusses its policy impact and relation to legal aid research.

2 COMPETITION IN THE LEGAL SERVICES MARKET

2.1 Legal needs in the perspective of economic theory

AJR-2002 draws extensively on market theory – especially on the principles for a fair and open competition. It presents "a simple market model" to show the dynamics in the legal service market. The model summarizes the Commission's approach to legal needs in a market perspective:

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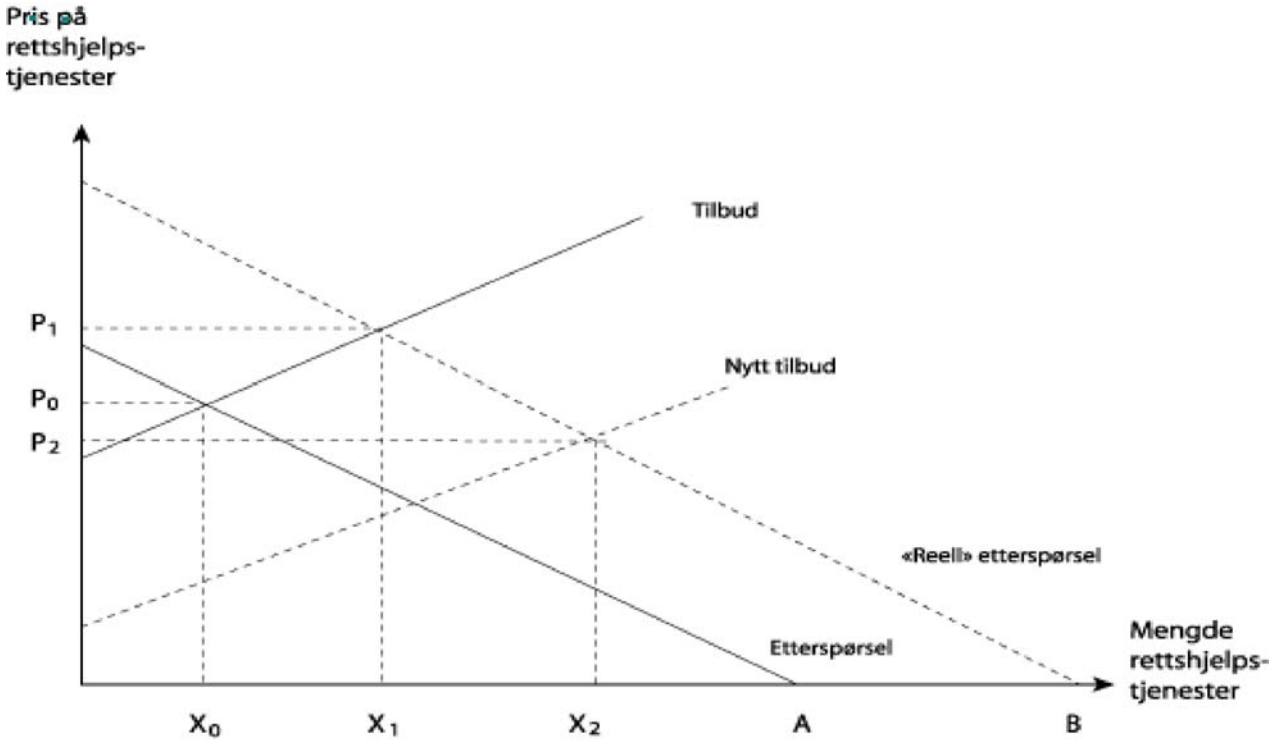
[1]Justisepartementet *Høring - endringer i lov om fri rettshjelp* Brev av 06.12.2002

[2]Norges offentlige utredninger (NOU) 2002:18 *Rett til rett*



NOU 2002: 18 Figure 4.2: Legal needs in an economic-theoretical perspective[3]

The starting point is the demand for and supply of legal services. Demanded and supplied quantity (amount of service) is measured along the horizontal axis, while prices are measured along the vertical axis. The solid *falling* line shows demand, which increases with falling prices. The solid *rising* line shows supply, which grow with increasing prices. Market balance is reached at the crossing point that is found at price P_0 and quantity X_0.

If we define legal needs as demand at price zero, the quantity between X_0 and A constitute unmet legal need. However, since market transparency is imperfect, many needy do not understand their legal needs nor how to demand legal services. The dotted falling line to the right of the demand line shows how the demand line might look if all people knew their legal positions and wanted legal services for all of their needs. The amount of real (manifest and latent) unmet legal need will be found between X_0 and B at the amount axis.

The figure demonstrates different strategies for reducing unmet legal need. If market transparency increases, more service will be sold – but at a *higher* price. The balance point would then move toward the crossing between the solid supply line and the dotted real demand line. The amount of unmet legal need would now be found between X_1 and B and prices increase from P_0 to P_1.

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[3]Translations: Pris på rettshjelptjenester = Price on legal service. Mengde rettshjelptjenester = Amount of legal services. Tilbud = Supply. Nytt tilbud = New supply. Etterspørsel = Demand. <<Reell>> etterspørsel = Genuine, real demand (included latent demand).

New providers or new ways to provide legal services, might shift the supply line downwards. The dotted rising line below the solid supply line marked “Nytt tilbud (new supply)” illustrates this mechanism. The amount of unmet legal need might then become reduced. It will now be found between X_2-B on the amount axis. The price P_2 also is lower than P_0. However, as the figure shows, if the real *demand* line moves to the right, prices might also increase, due to more effective demand. A monopoly, for example, reduces supply, thereby increasing prices. Effective competition on the supply side might force ineffective producers out of business.

For legal needs covered through the market, the balance point P_2X_2 provides the most cost effective solution that presupposes market transparency between the buyers and effective competition between the suppliers. The main aim of the Report is to describe how the legal service market actually works, and to propose remedies that might move it toward the X_2P_2 point.

AJR-2002 also applies the model when analyzing the market effects of using measures as LEI and legal aid to remedy unmet legal needs. It shows that also an effective market system will leave legal needs uncovered. To what extent such needs ought to be met, is a political question. However, *AJR-2002* argues that the model also shows it possibly to *modify* the marked mechanisms to make them work also for these parts of the legal needs. If more of the needy can afford to buy service – for example due to public subsidies or cheaper provision – the demand line will move outwards in the figure, and the distance between X_1/X_2 and A/B on the amount axis that constitutes unmet need, will diminish.

The report views the costs of buying legal service as a rationing mechanism. They create a bottom limit for demanding legal services and function as a barrier toward the less important and unfounded cases. However, several negative welfare impacts appear when the cost barrier is high. We suppose the legal aid schemes to diminish them, but research shows both a considerable uncertainty among non professional users about their legal rights and an extensive unmet legal need.

However, lack of supply may not be the only explanation of the existing unmet need. Some might refrain, although they possess the necessary resources. Neither are costs the only barrier – insufficient information both about rights and legal services might also contribute.

AJR-2002 analyses the market mechanism for legal services both on the demand side and the provider side. It views legal aid and LEI primarily as vehicles for buyers with limited means to overcome economic barriers. On the provider side, it focuses on three aspects of the competition, namely market concentration, innovation and effectivity, and barriers against establishment as legal service providers.

3 MARKET CONDITIONS ON THE DEMAND SIDE

AJR-2002 distinguishes between professional and non professional buyers of legal services. Business and industry and wealthy individuals constitute the professional buyers, while the non professional buyers consist of ordinary and poor people. The Report also includes small firms and independent craftsmen, fishers or other self employed among the non professional buyers. Since I want to explain the report's perspectives on legal aid, I focus on the report’s analysis of the market conditions for the non professional buyers. It discusses three issues on the demand side,

namely market transparency and access to market information, economic barriers against necessary market access, and the market effects of tendering and auctioning out governmental legal service commissions.

3.1 Market transparency

3.1.1 DEFICIENCIES

The report asks how information about legal matters and legal services ought to be shaped if it shall secure market transparency for the non professional buyers. It begins with a discussion of the challenges that follows from the structure of legal services:

Legal service is an expert service. Clients want help to solve problems they lack capacity to handle themselves. Therefore, an asymmetric understanding of the service exists. The providers know more about the product and its quality and characteristics when they deliver it, than the buyer. This lack of transparency also means another and more general problem for the buyers. Since they have an incomplete knowledge of prices, quality and available supply in the market, they might not choose the best supplier. Therefore, market transparency is important to effective provision.

However, also information access has an effectivity aspect. At some level, more information appears unnecessary to decide, and more gathering mean extra costs.

For some products and services, the buyer might control price and quality *before* they are sold. For other products with a fixed price, buyers can first judge quality *after* the sale – for example a restaurant meal. However, frequent buying might diminish the quality problem. For some of products, however, judging both price and quality is difficult due to the complexity of the product's technical or managerial characteristics, the pricing system, or the type of expertise involved. Prices cannot be fixed on beforehand, and quality judgement is difficult, also after the service has been delivered. The buyers must rely on trust in the providers. The problem of effective buyer comparison increases if repeated buying rarely occur.

Legal services belong to the last group. Usually, the providers produce the service after the buyers have ordered it. Quality control *before* delivery seems difficult, perhaps except do-it yourself kits and standardized contracts – although such a control hardly will become thorough. Also an informed evaluation of the quality of the service *after* delivery, often presupposes a level of legal expertise that the non professional buyer necessarily lacks. Their main basis for judgement is usually the outcome, which might be unreliable since the risk of losing is often an inherent part of legal service.

Uncertainty connects to other parts of the transaction than quality as well. At the outset, the final price on legal service usually appears uncertain, both to the provider and the buyer. The providers lack information for a precise calculation of costs before they have delivered the service. At the start, uncertainty might exist about several factors, like the legal and factual questions, the reaction of the counterpart, the development of the case, etc. Legal service providers rarely use fixed prices in their offers, neither is it common to agree on a set price before they have delivered the service. Providers usually set the price afterwards, although they might give some calculation criteria on beforehand. Largely, the lack of transparency

in the legal services market lays inherent in the characteristics of the service. Especially for non professional users, who rarely buy legal services, it appears as products typically bought from trust, not from product knowledge.

The report presumes the lack of market transparency to impact negatively on the provision of legal services. When the non professional buyers are unable to evaluate price and quality, providers who offer the poorest quality according to the price, might earn the most, and the buyers therefore risk receiving service below the standards that a transparent market would provide at the same price. The feature might also diminish demand compared with a transparent market.

3.1.2 REMEDIES

AJR-2002 discusses mechanisms that might compensate for the lack of transparency:

Warranties. Warranties, which secure the buyer against faulty services and goods, is one widely used mechanism. However, effective warranties for legal services seem hard to imagine, since quality is difficult to observe and evaluate – and buyer behavior might impact on the outcome. Outcome-based fees might constitute an exemption – especially in tort cases.

Service tests. Consumer tests and independent advisers might also help buyers to evaluate quality and price. Tests of legal service hardly occur. Ranking lists of law firms exist in some countries. However, they mainly concern business lawyers who are suppliers on the professional market. The lists tend to use observable criteria – like formal competence, experience, capacity, professionalism and extent of service. Peer ranking also happens. Such rankings appear as quite rough and subjective. The Report still argues that all the means mentioned might have an effect – although limited – on transparency in the non professional market. They might also provide a disciplining effect on the providers, if they think they always risk controls.

Professional responsibility. Dissatisfied buyers might complain to the disciplinary committees in the Advocates Association and sue for malpractice. The number of disciplinary complaints is rising, especially on fees. The disciplinary procedure is quite simple and the costs are low. Complaints probably have a disciplining effect whether substantiated or not, since most lawyers prefer not to get involved in such proceedings. Law suits on malpractice do not show a similar tendency. Costs are probably a prohibitive factor for damage actions from non professional buyers.

Reputation. The reputation of a provider might serve as an indicator on quality and as a correction mechanism for substandard services. However, this correction mechanism might not work efficient for non professional buyers in the legal services market, since their rebuying frequency appears low. On the other hand, a survey of non professional users, commissioned by the Report, shows that they frequently consult with others occur before approaching a lawyer, which might suggest that reputation is important to demand also among this group. Lawyers themselves also think it important with a better reputation than their competitors, se below, paragraph 4.1.

Although such correction mechanisms might remedy some deficiencies that result from the lack of transparency, they do not work efficient on the provision of

legal services. The Report finds a severe lack of market information among the non professional buyers of legal services which hampers rational demand. Referring to legal need research that shows a huge unmet legal need among non professional buyers, the report states that the lack of adequate market information constitutes one significant cause behind the unmet need. Sine legal services are complex products, market transparency is the more important to an effective market system. Providers ought to improve their information significantly both in quality and in volume.

Although the necessary market transparency primarily is a task for the service producers, public action also is needed. The government must make it possible for people with limited legal understanding and economic means to secure their legal positions. The importance of governmental information on access to justice and legal services seems grossly underestimated. The citizens must possess a significant amount of knowledge about the law that distributes benefits and duties among them to make the welfare systems work. Most people are far too poorly informed, both about their legal positions and the available legal services. Therefore, central and local government must significantly intensify its information aimed at non professional users. Vehicles are Internet, information campaigns and public service agencies. The Report supports the ongoing reform program of establishing a public advice service on the local level.

3.2 Economic barriers to market access

According to *AJR-2002* legal needs not covered by the market must be handled by other arrangements. How extensive such support systems ought to be, is a political issue. The report summarizes existing policy documents, and concludes that no major economic hindrance for public access to necessary legal services ought to exist. Such barriers do exist if a citizen lacks the means to buy necessary service.

Available research clearly shows that the policy obligations to provide legal service are not fulfilled. Therefore, significant barriers to market access should be remedied. Adapted market arrangements and techniques to influence the pricing mechanism might prove useful. *AJR-2002* focuses on legal insurance and judicare as the main vehicles to reduce the needs.

Legal Insurance. The existing legal insurance schemes appear insufficient and needs reform. Legal insurance is an important vehicle to access to legal service for non professional buyers by making it affordable to buy.

The government should require the insurance industry to improve their schemes to better the coverage for non professional buyers. To day, a limit of 11.000 euros exists on the ordinary legal insurance, and several limitations apply to the types of legal problems and services covered. Both limitations should be significantly lessened and the economic limitation consumer indexed. *AJR-2002* points to the savings from the reform in Sweden. Since the present LEI mainly comes as an obligatory part of other insurances, the government might also consider separate LEI arrangements.

Legal aid. The judicare schemes do not work satisfactorily. Although the civil schemes have undergone several evaluations the last fifteen years, showing significant deficiencies, no major overhaul has taken place. The Commission points to the Government's policy report to the Parliament on legal aid from 1999, which

states that judicare needs enlargement. Lawyers in private practice ought to be the main providers also in the future, and schemes for public funding of such service ought to be the main policy vehicles to secure that goal.[4]

Judicare ought to be shaped in a cost-effective way to secure efficient service. Large parts of the population depend on them for market access to legal services, and it is a governmental responsibility to see to that access is fair for all. However, *AJR-2002* does not regard it as its task to analyze thoroughly the implications of its policy statement, but the report points to issues that deserve special attention:

– The means test ought to become more liberal

– *AJR-2002* supports the Parliament's abandoning of the present contribution system, which appeared costly and encumbering for the entitled to legal aid, since they seldom had liquidity to pay the contributions. However, sensibly shaped, contributions might prevent excess consumption and support funding.

– A contribution system might also impact on the pricing mechanism and make more of the need solvable through the market. Contributions for applicants with incomes above five times the base sum of public insurance, (ca 35.000 euros) might fund both increased income limits and a more liberal merit test. Once more *AJR-2002* points to the Swedish system as a viable model.

– Legal aid schemes must also comprehend costs to the counterpart imposed by the courts. This barrier often amounts to a prohibition against well founded civil suits from people of limited means, since such costs might ruin their economy, which they cannot risk.

– The merits test should be liberalized to make it cover a wider specter of legal problems.

– The space for discretionary exemptions from the means and merits' test ought to become enlarged.

– All who qualify on the means test ought to be entitled to one and a half hour of advice independent of subject matter.

– To day, the legal aid schemes lack coordination with legal insurance. (LEI) Effective legal insurance might reduce public expenditure on legal aid. The report again points to the Swedish system as a model.

Value-added tax. A majority of the Commission claims that a newly imposed V.A.T of 24 percent on legal services has worsened the market position of non professional buyers significantly. They must carry the full burden of the tax, while it has no bearing on the professional buyers, who are allowed to deduct incoming V.A.T from the outgoing. Besides increasing the price on legal service, the V.A.T reform also significantly widened the gap in buying power between professional and non professional buyers. The reform might weaken the non professional in legal conflicts with the professional buyers, and produce a strong incentive for the service providers to accept commissions from professional buyers over non professional. The majority argues that the V.A.T drastically shrank the legal service market for the non professional buyers, who therefore ought to be exempted from it.

The minority of the Commission thinks an exemption less targeted. It is not obvious that the V.A.T has increased prices similarly, neither that an exemption will

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[4]See below, paragraph 6.1.2.

reduce them to the previous level. They opt to remedy possible negative market effects through legal insurance and legal aid.

3.3 Tendering

AJR-2002 discusses methods for public purchases of legal services. Tendering appears as an important vehicle for securing public buys at the best price. However, when applied to legal services, the tendering conditions ought to secure an effective competition. To day they often focus too much on the per hour price instead of the quality and the total costs. Therefore, the procedures for tendering are in need of improvement.

The report also mentions that legal aid commissions might be subject to market competition by call for tenders on the provider commissions or by auctioning them. A bit surprisingly, it does not develop on the use of tendering in public legal aid and advice schemes.

3.4 Conclusions

AJR-2002 concludes that market transparency to day work unsatisfactorily for the non professional buyers. Legal service is a complex product, rarely standardized and the price is often set after the service has been delivered. Non professional buyers also shop rarely, which makes it difficult for them to make rational choices. Complex fee calculations and low occurrence of set prices hinder their access to information on pricing. Non professional buyers market behavior show low price-consciousness - they seldom check prices although they think legal services are too expensive. Their attitude hamper demand for price competition – they do not shop around for the best offer according to their preferences about price and quality – and result in under consumption. Lack of market information appears as one probable cause behind the unmet legal needs. Competition might also become twisted due to poorly informed buyers.

Some correctional mechanisms exist. *AJR-2002* uses tests, complaint suits for non professional conduct and professional reputation as examples. However, these vehicles do not appear sufficient to secure effective market information and competition within the legal services market. In addition, the knowledge of non professional users about their legal positions, the market alternatives, legal insurance and the existing legal aid schemes, also seems insufficient. The report recommends information measures both for buyers and suppliers in the non professional market.

4 MARKET CONDITIONS FOR THE SERVICE PROVIDERS

4.1 Restrictions on competition

Providers of legal service are controlled by numerous regulations, mainly justified from quality reasons. *AJR-2002* distinguishes between entrance regulations mainly aimed at securing that the service providers are competent, structural regulations to protect their independence, market behavior regulations to secure the service quality standard, tort provisions securing personal economic responsibility for non professional conduct and provisions for public surveillance and control.

Entrance regulations. From the point of market effectivity, all who possess an actual competence for providing legal services, should be allowed to practice. The Report does not propose changes in the conditions for becoming a lawyer except for

some minor adjustment in the practice requirements. However, the report asks for a significant liberalization in the conditions for non lawyers to become providers of legal services outside court. One fraction of the Committee wants to abandon all requirements for legal education, while another thinks that several educations might qualify in selected legal areas. Court representation ought to stay reserved for lawyers, also in the future. However, a majority propose significantly more liberal exemptions for non lawyers to appear before courts on the district level, or in special types of cases – as labor or zoning cases. A minority – the members from the Advocates Association – opts to upheld the present monopoly.

Structural regulations. *AJR-2002* thinks that restrictions on law firm ownership hampers competition. Broad access might stimulate innovation and development on the provider side. It does not make proposals on multi disciplinary partnership (MPD), since that issue is handled by other authorities, but discusses the existing prohibition against external and foreign ownership of legal service firms. Although limited liability now is allowed in lawyer firms, all shareholders must also perform most of their work for the firm. The report proposes that law firms and lawyers – also from other countries – might own shares in other law firms. External members might constitute a third of the board. A minority wants to open for up to 50 percent external ownerships – and also for foreign investment – which might stimulate innovation and the establishment of new services.

Market behavior regulations. According to the Commission's evaluation, the existing code on professional ethics for lawyers does not unduly hamper competition. The Advocates' Association issues the code and updates it. Since membership is voluntary and approximately 10 percent of the lawyers in private practice have declined to join, the Ministry of Justice approves it as guidelines for all providers of legal services – also for the non lawyers. The Ministry cannot issue changes in the ethics code without approval by the Advocates' Association. The majority propose this limitation removed, fiercely opposed by a minority consisting of the members from the Advocates Association and the accounting industry.

Price information needs improvement. *AJR-2002* will oblige legal service providers to present a written cost estimate with upper and lower limits. The estimate must explicitly state the limitations of the services included – for example that it only covers legal assistance to reach an agreement, and that a possible court handling must be calculated separately. The providers must notify in writing about overruns. If not, they cannot charge above the estimate's limit. The report wants to introduce conditional fees according to standardized contracts up to the double of an ordinary calculated fee and limited to 25 percent of the client gain. They will keep the ban on contingency fees.

Since no significant restrictions on advertising exist to day, there is no need for further deregulation on marketing**.**

The report advocates the establishment of a specialist system, since it might improve market transparency. They also vision specialists in legal aid fields like poverty law, immigrant law, child welfare law and housing law etc.

A minority wants to abandon the present prohibition on commercial legal service procurement, since it hampers market transparency. Procuring might reduce the costs to find the best service offer for the buyers. The members from the Advocates Association do not support that reform.

Malpractice and public control. The report generally stresses explicit and clear rules on damage responsibility and disciplinary sanctions for inferior services and independent and active public control authorities as vehicles both to secure an effective and fair competition and to improve transparency.

AJR-2002 concludes that concentration in the legal services market still is low in Norway, although the number of lawyers has risen with more than 40 percent in the last decade, and although the five biggest firms in the country count for more than one fifth of the total lawyer turn over. However, turnover in these firms stems from business clients at the professional market. Lawyers do not emphasize price competition, probably partly due to the lack of price consciousness among the buyers which in its turn may be caused by limited price information from the lawyers who tend to emphasize quality – especially their good reputation.

The innovation speed in the legal services market does not appear as especially high. Few new business concepts are developed, neither are chain formation nor low-price offers widespread. A significant potential for more cost efficient service production exists.

Informal barriers for new providers mainly consist of the need to build up a client portfolio and a good reputation. They do not significantly hamper establishment. The need for capital investment in production equipment and instruments for market access seems limited. However, non lawyers face formal barriers to an extent that make the establishment of new providers hardly to occur.

5 POLICY IMPACTS

Although the Norwegian competition authorities some years ago banned the restrictions on advertising in the ethical rules of the Advocates' Association, *AJR-2002* appears as the first serious public policy attempt at analyzing the economic mechanisms of lawyering in a wide context. It focuses on the business ideology of the legal profession from a market perspective with an analytical strength not previously seen in a governmental document, and attack in a convincing way many of the traditional lawyer defenses for their market position and behavior. It also integrates legal aid in its evaluations of the legal services market. I think their reasoning supports many of the approaches used in legal aid research aid in Norway – at least at the general level.

Needless to say, the members from the Advocates' Association in the Commission strongly oppose many of the ideas of the majority, and defend the existing system. The competition between two ideologies also colors the report. Parts of the analyses have a contradictory character, and the specific proposals do not always confirm convincingly with the general ideology. However, independent of practical outcomes, it might provide a significant improvement in the foundations for a realistic debate on the market mechanisms in legal service.

I will explore on the tension between the report's view on legal aid and the dominant legal aid policy in Norway, and try to spell out some main differences. I will end with remarks on the reports general understanding of the legal services market and its operation, and the approach and perspectives that emerge from Norwegian legal aid research.

6 TENSIONS BETWEEN THE ACCESS TO JUSTICE APPROACH AND THE DOMINANT LEGAL AID POLICY

6.1 Trends in Norwegian legal aid policy

6.1.1 The 1989 policy report

More than two decades have passed since the present legal aid act went into force. Two major governmental attempts at reform have taken place since then. In 1989 a Labor government forwarded a policy report on legal aid to the Parliament.[5] (*PR–1989*) It contained a bundle of proposals both to reform the judicare schemes and to expand the salaried sector. The Labor government wanted to:

– liberalize the means and merits test

– develop a system for contracting, including other types of remuneration than per hour fees

– support lawyers willing to serve outlying districts

– allow non practicing lawyers and employed jurists without a lawyer's license to deliver legal advice and bill the legal advice scheme.

– support legal advice centers established and run by the local bar associations and served by volunteering members.

– expand the services offered by the county consumer offices to comprehend complaints against public services, especially services that had features common with consumer goods and services offered through the market.

– expand the use of salaried offices by experimenting with first line institutions modeled from the Dutch Buros voor Rechtshulp and the English Citizen Advice Bureaux, and with second line law centers on the county and the municipality level.[6]

However, an incoming conservative government withdrew the report before the Parliament had begun handling the issues. Still, several of the singular reforms it proposed in the judicare schemes were carried out during the nineties. None of the succeeding Labor governments has shown any interest in implementing the more far reaching proposals.

6.1.2 The 1999 policy report

A non socialist minority government issued a policy report on legal aid in December 1999.[7] (*PR–1999*) Contrary to its predecessor, *PR–1999* received broad parliamentary approval. Also, contrary to its predecessor, it mainly contains limited adjustments of the existing judicare schemes.

As a matter of principle, *PR–1999* favors judicare over salaried offices and will not expand the salaried sector. However, it opts to keep the two salaried offices that

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[5]Stortingsmelding 16 (1989-90)

[6]See Jon T. Johnsen (1999) *"Progressive legal services in Norway?" International journal of the legal profession* Vol 6 No. 3, pp 261-310 for a comprehensive analysis.

[7]Stortingsmelding 25 (1999-2000). See Jon T. Johnsen "Legal Aid in Norway". *ILAG Conference Papers 13-16 June 2002* compiled by Don Fleming and Alan Paterson pp 34-38 for a more comprehensive description.

already operate. The report offers no policy for the advice services run by the local bar associations, probably because the government regards the scheme as an internal matter for them.

However, it acknowledges that experiences from the bar associations' advice scheme and the salaried office in Oslo, justify a more extensive short time advice service. *PR–1999* therefore promises a one hour consultation scheme as part of judicare with a liberalized merits and means test and without contributions.

On the other hand *PR–1999* wants to phase out the twenty-year old scheme that supports lawyers in establishing practices in outlying and remote areas that *PR–1989* opted to expand. The argument is lack of efficiency.

According to *PR–1999,* it cannot be a public responsibility to provide legal services to all citizens when needed. Limitations must be made concerning type of case, its importance, the applicant's economy, and the citizen's possibility to receive aid from other sources than public schemes. However, government has an obligation to organize all legal services – not only legal aid – in a way that make access easy. A varied service offer aimed at broad segments of the population, is emphasized.

To receive aid, the applicant's interest in aid must be well-founded. Legal aid has no mission in supporting unfounded claims or obstructing legitimate claims from counterparts. The main principle for prioritization should be the welfare importance of the problems – or the individual needs – of the applicant. The main task for the public schemes is to support cases that – from a general point of view – have the greatest personal and welfare importance to the applicant.

As a main rule, it is a public responsibility to secure acceptable legal services to people loaded with cases of great welfare significance if the person in question lacks sufficient means or cannot cover the costs elsewhere. However, the public must presuppose some level of activity from the citizen both to solve the problem by other means and to document their needs to the authorities to receive legal aid. The responsibility to apply had to rest with the citizen. It cannot be a public responsibility to map legal needs independently and offer service to needy people.

Still, *PR–1999* finds the existing means test satisfactorily, and does not propose changes.

A policy report tries to flesh out an overall plan for public activity in a field. Contrary to statute drafts, Norwegian policy reports seldom go into detail about their proposals. Many are sketchy and needs further development.

PR–1999 was followed by the 2002 proposals for reform of the Legal Aid Act that I mentioned in paragraph one. The main structure of judicare prevails. The emphasis is put on technical and administrative changes with limited impact on service provision and accessibility. The merits test will become significantly more detailed with less space for discretion. The Ministry perceives an explicit and exhaustive specification of the categories of cases covered by the schemes as an important improvement, both to increase predictability – *transparency* in the *AJR-2002* terminology – for the entitled and to reduce the administrative costs. However, the changes do not mean much expansion.

The traditional means test will mainly stay in force – although somewhat enlarged. The space for discretionary exemptions from the test will diminish. As

mentioned, the existing stiff contribution system will be abandoned due to a Parliamentary vote from the opposition, which at present constitute the majority.

6.2 Some comparisons

There are obvious tensions between *RP–1999* and the 2002 reform package, and the approach to legal aid in *AJR -2002.* I will focus on six questions, namely the over all legal aid ideology, the means and merits test, judicare remuneration, expansion of the supply side and the attitude toward the salaried sector.

6.2.1 *Ideology*

While *PR–1999* views legal aid as a rationed benefit, and upholds limitations that seem arbitrary from a principled point of view, *AJR–2002* agrees with *PR–1989* that the government has a general obligation to organize legal services to make it easily accessible to all citizens who have legal needs of significant welfare importance. *AJR-2002* depicts a wider scope for the public responsibility than *PR–1999.* Accessibility must correspond to people's actual capacity for buying legal services. Non use must depend on rational choice, not on insufficiency. All citizens are entitled to an effective remedy to secure their legal positions.

AJR-2002 does not specify the singular criteria for legal aid and advice subsidies. However, its general approach means far more flexible criteria for access to legal aid than in the 2002 reform package. The criteria must reflect the strength of the needs, the seize of the costs and the market power of the buyer.

6.2.2 *Merits test*

AJR-2002 view on legal aid presupposes that the main criterion for the merits test must focus on the welfare meaning of the problem. Detailed criteria with no space for discretion as proposed in the 2002 reform package, does not seem to fit well with that goal. Detailed, set criteria seem bound to become intricate if they shall adapt properly to the complex structure of the legal needs. A system that limits coverage to the statistically most important categories of cases, will produce inadequate coverage. Needs that are fully comparable on a welfare scale, will fall outside the scheme . . .

Experience tells that such criteria are bound to grow in complexity, due to the inherent injustice. New categories will be added to compensate, while others are modified to counteract misuse. Norway abandoned a discretionary merits test that covered all types of legal problems of a certain welfare significance in 1984. Still the bureaucratic wish to develop new set categories is rampant.

AJ–2002 argues both that the merits test ought to cover a significantly wider specter of problems, and that the legal aid authorities' discretionary power to exempt from the merits test needs enlargement. The thinking appears in line with *PR–1989* which proposed to return the merits test to its original discretionary fashion, only demanding that the applicant had a "well-founded interest" in receiving legal aid,

6.2.3 *Means test*

Contrary to *PR–1999, AJ-2002* thinks the means test needs enlargement, although it does not specify any income or property limit. It also appears from it reasoning that

all citizens ought to possess enough buying power to satisfy well-founded needs. Such a criterion presupposes a more flexible criterion than the present one.

It seems a safe to infer that the *seize of the costs* for adequate service must constitute a significant element in the test. In the present system – which *PR–1999* upholds – the seize of the possible costs has limited importance for the entitlement. When an applicant passes the means and merits test, in principle all cost will be covered except for costs to the counterpart in trials.

At present, the legal aid authorities have a limited discretionary power to cover such costs, which the Ministry wants to abandon. It means that the applicant always carries the risk for litigation costs to the counterpart, which usually amount to considerable sums. Except for the litigation costs to the counterpart, a legal aid grant will carry no costs or economic risk for the entitled.

On the contrary, needy who fail the legal aid tests, have to carry all legal service costs themselves – whatever the seize might be. Some legal problems of vital welfare importance, might carry costs that are prohibitive to market solutions for most income earners. According to *PR–1999,* Norwegian legal aid will not contain a system for covering parts of the costs for the better off – even when they become exorbitant. The system is an either-or system.

AJR-2002 proposes a contribution system similar to the Swedish one. The main point is progressive contributions. The more the needy earn, the more legal service they can afford themselves. For the better off, legal aid might primarily serve as a protection against exorbitant legal costs. Ordinary needs must be covered through market transactions. The proposal conforms with *PR–1989* which forwarded the idea that applicants should pay a reasonable share of the total costs, judged from their economic capacity and the seize of the costs.

Such a system might be shaped in different ways. Minimum contributions, percentage contributions, progressive contributions and maximum contributions are all vehicles that might be used.

However, a fair system seems bound to become complex. A common objection is the deterrent effect on the needy due to the lack of predictability of the seize of the contribution. However, in the computer age such challenges seem manageable. Social insurance and other social benefits also need complex calculation that the entitled themselves are unable to perform. Liberal access to check entitlement and the possible contribution with legal aid authorities, lawyers and advice centers might suffice.

6.2.4 *Judicare remuneration*

PR–1999 sticks to the present remuneration system, with a set per case fee for the great bulk of legal aid cases, and a set hourly fee for the rest. Fees have amounted to 40 – 60 percent of the market average.

The Advocates Association has repeatedly complained that judicare cases pay too poorly compared to market commissions. Still it wants to keep judicare, since it means a reserve market that lawyers might use when their access to paying clients is less than their capacity. Especially for young lawyers, judicare commissions might reduce the risks of failure when establishing a practice.

AJR-2002 does not explicitly discuss the remuneration level for judicare, which I perceive as a weakness. However, its arguments presuppose a state subsidy

that make all citizens effective buyers when their legal needs substantiate it. Neither does it rule out fees at the market level for complex legal aid commissions. It also proposes a specialization scheme for lawyers which might include specialities in poverty and welfare law.

According to simple market theory, a low price offer will attract suppliers who lose in the competition for market commissions. In a non transparent market it also means service of lesser quality. *AJ–2003* does not comment specifically on this issue, but it forwards remedies as call for tenders and auctioning for legal aid commissions Due to judicare commissions' lower profitability, *RP–1989* assumed that lawyers accepted them when they had too few paying clients. Such unused capacity existed primarily among new lawyers that had not worked themselves sufficiently into the market of paying clients and among established lawyers that had few paying clients due to reasons as competence, unreliability, unpopularity, ideology or ethical choice. Judicare therefore did not recruit the most competent lawyers.

PR–1989 deemed it important that judicare provided incentives that made the lawyers prioritize the most urgent problems among the eligible. The existing schemes had obvious defects in this respect. Lawyers that worked considerately and efficient on judicare commissions received no special economic incentives. Neither did the schemes provide incentives to the lawyers for helping as many clients as warranted within their available capacity, although huge unmet needs existed. Per case fees without proper quality control might promote substandard service, since the profit increased when the amount of work decreased . . .

PR–1989 accepted the claim from the Advocate Association that reasonable fees were important to secure a satisfactory standard on judicare. However, studies had shown that most of the lawyers that accept legal aid cases, only did so sporadically. Since most lawyers seemed only to accept judicare commissions when they lacked enough paying clients, it meant that the market was unwilling to pay average prices for the capacity in question. Then, it did not appear reasonable that judicare should pay average market fees. *PR–1989* therefore proposed to differentiate between lawyers who only accepted judicare clients randomly when capacity allowed it, and lawyers who agreed to allocate a significant part of their capacity to judicare for a notable period.

It opted to keep the existing remunerations for the first group to utilize left over capacity. Since such lawyers received their main income from paying clients, they could not expect to cover their permanent expenses from judicare fees. The fee level therefore could remain moderate.

PR–1989 promised better arrangements for lawyers who would commit themselves to a significant amount of judicare work and accepted ramifications according to priorities laid down by the legal aid authorities. The report proposed to develop a system of contracting for the second group that would give them a higher level of remuneration than the existing judicare schemes. It forwarded different methods for remuneration. The government could pay per hour, per case or assign a set sum for a certain bulk of work. They might also use standardized per case fees for statistically important types of cases like family cases, tenant cases and public insurance cases. The plans seem to fit well with *AJR -2002's* proposals of tendering out judicare commissions

The purpose of contracting was to make legal aid commissions a more distinct part of selected lawyers' practice and securing them a stable and reliable income. Although judicare fees had to remain low compared with remuneration from paying clients, the government could offer lawyers quick, reliable payment and opportunities for a significant, stable and calculable income from judicare.

The working tasks might become more challenging and rewarding through plans for professional developments and participation in the overall planning of legal services. Contracts might contain provisions for professional upgrading on legal services subjects. *PR–1989* mentioned the possibility of making such education an obligatory part of the contract.

Contracts would allow private lawyers to develop legal aid and advice work as a specialty, comparable to other fields of specialization, and promote competence and efficacy. Contracts might also allow for higher fees for lawyers that could document a special competence in certain fields of legal aid work. Its thinking on lawyer specialization also seems to fit well with *AJR-2002's* proposals for a formal specialization scheme in the market behavior regulations for lawyers.

6.2.5 Increase market supply

PR–1999 does not discuss if other professionals than lawyers might provide legal aid. As proposed in *PR–1989,* the large group of jurists without a lawyer's licence now has become entitled to deliver legal advice over judicare. However, few actually do so.

Social workers, family advisers, consumer advisers and medical professionals etc., might also contribute. However, the existing entrance regulations make it difficult for them to practice. *AJR-2002* appears open to such alternatives, and wants actual, not formal competence to become the main criterion. It thinks that non lawyers to day face formal barriers to an extent that make the entrance of new providers from other professions a very rare event.

6.2.6 A salaried sector?

PR–1999 favors judicare over salaried legal aid, and appears unwilling to expand the salaried sector. However, it admitted a need for a more extensive advice service, and wanted to cover it by expanding judicare. *AJR-2002* also favors judicare, but does not forward any in-depth-discussion of the possible impacts of a salaried sector, neither in legal aid, nor in other segments of the legal service market. However, it finds the governmental information on access to justice and legal service far too weak to secure effective use from non professional buyers, and suggests a variety of measures to improve it.

Only *PR–1989* offered a developed strategy for covering the needs for legal advice. It argued a significant expansion of the salaried sector, not only concerning advice, but also for second line aid, and emphasized an experimental design, testing out different delivery models.

7 THE ACCESS TO JUSTICE REPORT AND LEGAL AID RESEARCH

*Legal need*s. *AJ –2002* uses research on legal needs to evaluate the efficacy of the legal service market. Its reasoning follows a well-established pattern. To evaluate if demand is effective, one needs some sort of independent standard. If not, the social

desirable use will tend to correspond to the actual use. The turnover in a well working legal service market might also become the policy standard for access.

AJR-2002 avoids this line of thinking. The report adopts the reasoning behind the research strategy of using a broad need concept, and finds that only parts of the need among non professional buyers are covered at the existing legal service market. Like legal aid research, *AJR-2002* states that a huge gap between actual needs and market demand exists.

However, also like legal needs research, *AJR-2002* accepts it as a policy issue to what extent registered needs ought to be covered. The report then points to and analyses existing policy statements on the level of coverage. It finds that some categories of registered need fall outside the scope of legal service policy. However, huge unmet needs still exist among non professional buyers, that deserve service according to the agreed policy standards. *AJR-2002* then discusses how much of the viable needs that might be covered by market transactions without any state intervention, and to what extent public subsidy is justified.

*The legal services market. AJR -2002'*s analysis also corresponds to the approaches in research that try to understand the operation of legal aid in a market context. The report draws on previous findings. Due both to its general approach to the legal service market and its well developed understanding of market theory, the analysis also adds to the understanding of how the legal service market functions – what its weaknesses and strengths are, and how they influence on the legal aid schemes. However, it is worth noting that research primarily designed for understanding and developing legal aid, also serves as an important source for an analysis of how the legal services market generally works.

What *AJ – 2002* does not use, is legal aid research's analysis of the economics of *salaried* legal services. Research provides ample examples of salaried legal services to non professional buyers that are produced far cheaper than the average market price. It also contains examples of salaried models that deliver service both significantly cheaper and better targeted to the needs than judicare. Legal aid research does not substantiate private producers as the sole providers on the legal service market. A significant public sector might mean both healthy competition, and a more effective use of public means than subsidizing private producers through judicare.