Governmental means for limiting judicare costs

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1 INTRODUCTION

My paper analyses a selection of cost limitation means used by government in judicare schemes. Norway is my prime example, but I try to generalize my analysis.[1] I focus on judicare schemes that offer lawyers singular commissions. Hiring lawyers for larger quantities of cases – also labelled contracting -- falls outside my analysis.

In Norway and other countries, legal aid appears as an *entitlement* when an applicant qualifies. Ordinary applications cannot be denied for budgetary reasons. Such legal structures make budget control complicated, since legal need according to research appear widespread, and the actual use limited in comparison. Large unmet legal need among poor people who qualify, therefore represents a danger of budgetary exceedances that governments like to control.

Increased use of legal aid by poor people also might increase costs of other public budgets due to more effective utilization, for example of welfare benefits. Public interventions like housing rehabilitation might become more complicated due to legal protests and resistance from poor people and expenses on administrative complaint systems, conflict solution bodies and courts might increase. I only focus on the legal aid costs.

Governments have several means that enable them to keep judicare costs down. My discussion focuses on the following selection:

- Poverty criteria
- Contributions
- Legal problem criteria.
- Legal aid supply
- Legal aid information
- Other sources for financing legal aid
- Other costs than lawyers' fee
- Application process

Other means also exist but not analysed here.

Governments might apply different cost control measures simultaneously. I analyse each selected strategy separately and focus on interference effects mainly at the end of the paper.

2 POVERTY CRITERIA

Poverty forms a main term for access to legal aid, although schemes might offer legal aid without any poverty criterion in a few case types. Examples from Norway are defenders in serious criminal cases, legal assistance to patients in cases about involuntary medical treatment and to victims of serious crime like violence, sexual

[1] I supplement with some selected experiences from Bulgaria and draw upon Barlow's findings from other the Nordic countries and the jurisdictions in the United Kingdom and Ireland in Anna Barlow *The Machinery of Legal Aid. A critical comparison, from a public law perspective of the United Kingdom, the Republic of Ireland and the Nordic countries.* Åbo Akademi University Press 2019 Abbreviated *Barlow* 2019.

assault and enforced marriage and trafficking. I limit my analysis to legal aid in civil and administrative cases according to a poverty criterion.

The level of poverty demanded to qualify is one factor that might influence the actual use of a scheme and thereby its costs. The criterion might be *absolute* in the sense that everyone below set sums for income and property qualify, or *relative* to the income standard in society – for example that the scheme covers the poorest ten percent of the population independent of how affluence develops.

Governments might adjust both absolute and relative poverty criteria as a measure to control costs. They might lower the income and property limits or reduce the percentage of the population covered.

An independent definition of poverty for legal aid might not be the only way to organize a poverty test. Governments might also connect it to poverty tests for other benefits that shall counteract poverty. Examples are rates for social assistance and the national insurance's basic amount. Such benefits are often adjusted regularly according to the living costs of the poorer part of the population.

Using the official poverty line, which they update yearly, for adjustments is one option. The point is to make the poverty criterion a dynamic instrument that automatically adapts to the continuing developments in the distribution of poverty and wealth in society. Bulgaria uses a discretionary poverty criterion "unable to pay the ordinary costs" of a case. Rules are complicated, but people living on and beneath the dynamic poverty line for Bulgaria is usually supposed to qualify.[2]

However, their flexibility also makes such instruments less attractive to governments because costs become more difficult for governments to influence and predict, and budgeting more complicated and uncertain. In times of austerity, governmental demands on cost reductions might be difficult to meet.

Inflation impacts on the poverty criterion's function also without adjustments. Keeping the poverty criterion nominally *unchanged* over time might shrink the share of the population that qualifies. This mechanism makes governments reluctant to use dynamic poverty criteria that automatically adjust coverage according to inflation and other changes in the poverty population's affluence.

Until now Norway has discretionally adjusted the poverty requirement with uneven intervals – often combined with estimates of the population share covered. According to a governmental report (NOU 202:5) the poverty criteria remained practically unchanged from 2004 when 18 percent of the population qualified until 2020 when only 9 percent qualified.[3] The report therefore developed on an old reform proposal of connecting the poverty criterion to multipliers of the National insurance's yearly adjusted basic amount. When in force,[4] adjustments of the poverty criterion will happen automatically, and government will lose the opportunity of through

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[2] Jon T. Johnsen *Bulgarian legal aid and Roma women*. Norwegian Courts Administration 2024. (Johnsen 2024) Nedlastbar fra: https://www.domstol.no/NCA/legalaidbulgaria . ISBN 978-82-693471-1-1 (printed version) ISBN 978-82-693471-0-4 (digital version) Abbreviated *Johnsen 2024* p. 19.

[3] Norges offentlige utredninger (NOU) 2020:5 Likhet for loven. Lov om støtte til rettshjelp (rettshjelpsloven) (Norwegian governmental reports: Equality before the law. Statute on support for legal costs) Abbreviated *NOU 2020:5* p.16-17.

[4] NOU 2020 p. 138-151 esp. p 148-151. Parliament has adopted the proposal, but government has not yet put it into force.

passivity to reducing costs from a diminishing number of eligible. Reductions must be done by downscaling the present multipliers or reintroduce limits independent of the National insurance's basic amount.[5]

Statistics Norway found that 10,9 percent of the Norwegian population lived beyond the poverty line in 2023. NOU 2020:5 suggests that coverage ought to include 25 percent of the population, or more than twice the Norwegian poverty line.

Governments might think that increasing the poverty limit means that the use and costs of the scheme increase since more people become covered, and that the effect is opposite if they reduce the limit. However, changes in coverage do not by necessity mean changes in use. Effects might differ due to influence from other cost control means.[6] As advertised, I will develop further on this issue below.

3 CONTRIBUTIONS

Poverty criteria might include provisions on contributions - meaning that the entitled must pay parts of the total costs. Such obligations grade legal aid coverage. The poorest receive legal service free or for a small fee, while the better off, when covered, pay a larger share of the costs themselves. Bulgaria's scheme does not use contributions, since only people living on and beyond the Bulgarian poverty limit qualify.[7]

Governments use different methods to calculate contributions:[8]

Basic contributions cover all costs up to a numeric ceiling and users usually pay them before the public responsibility to cover costs starts running. When costs pass the ceiling, government has the responsibility for covering all exceeding costs.[9]

Percentage contributions oblige the user to pay a share of the costs. One percentage rate might be common for all costs and users – for example 30 or 40 percent -- or progressive and adapted to the affluence of the user or the seize of the costs. Percentage contributions might be combined with cost ceilings *or maximum contributions.*

Cost considerations form a major justification for governments' use of contributions. Utilizing the payment potential of the users reduces public costs per case. The money saved can be used to liberalize the poverty criterion for groups that can afford some legal costs, but not all of the costs.

The main justification for expanding the Norwegian contribution system has been to help financing an expansion of the poverty criterion to cover somewhat more affluent groups that falls outside coverage today. "More people ought to receive public support to carry the costs of necessary help from lawyers to a price compatible with their economic capacity."[10]

Contributions might also stimulate users both to a thorough evaluation of their need for legal aid and to a continuous control of them. Especially percentage

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[5] Interesting enough, the proposal still is under consideration by the Ministry of Justice, five years after the report was delivered. Inflation amounts to 20 percent since 2020.

[6] Barlow 2019 p. 253-254.

[7] Johnsen 2024 p. 22-23

[8] See Barlow 2019 p. 247 for more examples.

[9] Norway structures contributions for health services and medicines this way.

[10] NOU 2020:5 p. 143

contributions give the lawyers an incitement to consider the users' economy when planning how to pursue the case, which also helps keeping public costs down.

However, no demand that contributions should be paid by the users themselves exists. The point is to hamper public spending. In Norway nothing in the legal aid legislation hinders a social security office, a charity or other benefactor to pay a contribution for a user.

Basic and maximum contributions tell users about the full cost risk they must prepare to carry themselves. Percentage contributions without any ceiling are unpredictable like the ordinary cost risks of market clients. Their final seize depends on the volume and complexity of the case and will not be fully fixed before the case is finished.

They add an element of uncertainty and risk taking to the calculation, since the final fee usually depends on the total amount of work, which users seldom have the capacity to predict on their own, and lawyers might be reluctant to give precise estimates. Both the seize of the costs and the uncertainty about it, might deter poor people from forwarding even substantiated claims and from other ways to utilize their legal positions.

Such deterrents against entitled users will, of course, form an effective cost reduction measure, but might also counteract the main purpose of public legal aid, namely to secure that poor people should not be denied necessary legal help to protecting their legal positions because they lack the ability to pay.

4 COLLECTIONS OF CONTRIBUTIONS

As shown, a common justification for contributions is the assumption that they reduce public costs by better utilizing the payment capacity of the entitled. If they cannot pay everything, they might still have the capacity to pay some of the costs.

However, using contributions is not without drawbacks. A system for collection and administration produces expenses. A dilemma might arise. With small contributions, the administrative expenses might consume most of the income, while large contributions might deter entitled that are targeted by legal aid from using i

Government might avoid such costs by leaving the collection to the lawyer and deduct the contribution from the lawyers' legal aid fee. Then the lawyer carries the collection costs and the risk of non-payment. Obviously, lawyers are not very pleased with such arrangements, which adds to their reluctance to accept legal aid commissions.

In a survey, Norwegian legal aid lawyers reported that they actually collected only half of the contributions their clients owed. Norwegian statistics also showed that in parental disputes with legal aid, lawyers' fee bills in cases with contributions lay on the same level as in cases without contributions.[11]

However, reduced willingness among lawyers to accept legal aid commissions also might reduce public costs. On the other hand, if legal aid lawyers abstain from compulsory collection, users unable or unwilling to pay, might be freed from the contribution costs.

[11] NOU 2020:5 p. 132-133

Lawyers might secure their fee by asking for advance payment of the contribution. However, that is difficult for percentage contributions since their seize depends on the total costs of the case. High advance payments also deter people that qualify from using legal aid.

Norway has seen both systems in operation. At present government deducts the contribution from the fee to the lawyer, but NOU 2020:5 proposes a significant increase in the seize of the contributions, which will increase the lawyers' cost risk.[12] The report therefore proposes that government shall collect it and pay the lawyers' fee unabridged. However, such a change might also reduce the lawyer incentives to consider the client's economic capacity and willingness to pay contributions when considering the commission.

5 CASE TYPE LIMITATIONS

Case type limitations constitute another often-used cost reduction measure. In addition to the poverty criterion, legal aid rules might contain specifications about the content and character of the legal problems covered.

Coverage might be wide and without case types, only demanding that the problem should be of legal kind and have some welfare importance to the user. Legal help shall not be limited to for example disputed claims because clarification of legal positions, help with legal dispositions like contracts, applications, wills and property transactions also, etc. ought to qualify if the problem has obvious welfare implications. All sorts of case types might qualify. The purpose of this sort of limitations is primarily to delimit the scheme from trivial matters.

Legal aid in court cases and before other conflict solution bodies might demand more complex, discretionary evaluation of the problem's welfare importance, chances of success, proportionality between the case cost and the users claim and of whether the case concerns a matter of principle. Still, the case type classification does not matter.

Norway has used two sorts of case type limitations. From the start, the Norwegian Legal Aid Act (NLAA 1981) had a general description of coverage that included all civil and administrative case types of some seriousness combined with one exception for cases about prison matters. Cost reduction, however, was not the primary motive for the exception, but that government thought it morally wrong to use public money to cover the costs of inmates' legal attacks on prison regimes and the content of legally justified punishment. Over the years government significantly increased the list of exceptions from coverage.

Government then introduced the opposite system to reduce costs. Instead of specifying the case types *excepted* from coverage, NLAA now specifies the case types *covered*, and excludes all other case types of coverage. Today, the listing of covered case types in NLAA comprehends 17 case types for legal help in non-court cases and 15 types of court cases. The categories used appear narrowly defined. Government also added an additional discretionary permission to make exceptions for individual cases of other types as a safety valve.

[12] NOU 2020:5 p. 148.

Legal problems might be classified in an almost countless number of narrowly defined case types. Legal aid research shows a complex panorama of types of legal problems among poor people. Most existing case types therefore became excluded by the reform. (Statistics)

The use of a few narrow, well defined case types works technically well if they are exceptions from a main rule of coverage. Then it might be manageable to consider them thoroughly.

If coverage of some extension is supposed to be expressed in similar narrow categories, the rules might become catalogue-like listings. The policy debate on coverage might also change focus from the desirability of a few limited exceptions from a broad coverage to justification of narrow expansions of an already limited coverage. In Norway reform debates now focus on adding more of the narrowly defined case types to the types already covered by the NLAA. Perspectives on the overall coverage have been lost, and both case types and individual cases worthy of coverage are let out due to lacking insights into the complexity of poor peoples' legal problems

6 LIMTING LEGAL AID SUPPLY

Costs might be controlled by limiting legal aid supply. *Monopolies* are one regulatory factor. Until recently, registered lawyers in Norway had a monopoly on commercial and other regular delivery of legal service, which was abandoned a few years ago. Delivery of legal aid, however, still stays a monopoly for practicing lawyers and licenced legal helpers. Continuation of the legal aid monopoly has been justified from quality reasons.[13] However, if demand for legal aid from the poor exceeds supply, some of it will remain unmet, and government will save money since no costs will accrue.

Governments might also influence the supplier capacity through its power to set the legal aid *fees*. Historically legal aid to the poor also has been considered a charity for the legal profession – and allocated to new members.

Usually, government sets the legal aid fee and often significantly lower than the average fee lawyers receive from paying clients. When lawyers use tariffs for commercial clients, government might also set the legal aid far lower than the average tariff fee, which is the case in Bulgaria.[14]

However, such fee policies reduce the professions capacity for legal aid commissions. Private practitioners primarily offer their services to commercial clients. When they pay better than public legal aid, more of the lawyers' capacity will become located to them and less to legal aid. Lawyers that lose in the competition for the paying clients will be left with the legal aid commissions. How many they will accept depends on the capacity remaining after the market demand is met, not the demand from poor clients. The lower the legal aid fee appears compared to the commercial fee, the smaller the supply of legal aid offered. Since poor people cannot use providers outside the monopoly, they are stuck with the capacity that exists. Governments therefore might use its fee policy as a cost reductive measure.

Lawyers in Norway have expressed a deep dissatisfaction with government's fee policy, and the Lawyers' Association also has organised two boycotts of legal aid

[13] See Barlow 2019 p. 256- 259 on the consequences of the lawyers' monopolies on delivering legal aid.
[14] Johnsen 2024 p. 34.

commissions at the Supreme Court. Barlow reports a similar example from England[15] Registered legal aid lawyers in Bulgaria hardly accept civil cases due to low fees.[16]

Lawyers reluctant to accept civil legal aid cases seem widespread in Norway. A questionary in NOU 2020:5[17] sent to all members of the Advocates' Association and answered by 79 lawyers, found that 42 percent regularly rejected legal aid cases on immigration, 34 percent property division in divorces and married cohabitation, 32 percent social insurance complaints. 27 percent parental disputes and 18 percent labour cases.[18] The Norwegian private profession counted 10 000 members in 2024, so only around one percent answered.

Although no precise statistics on legal aid lawyers exist, the extremely low rate of answers clearly indicates that the share working regularly with civil legal aid is very small. It seems probable that the lack of lawyer capacity deters potential users from trying to use legal aid. Some lawyers also demand a significant deposit before they investigate a legal case.

When government abstain from adjusting legal aid fees according to the fees lawyers receive for from paying clients, lawyers will allocate less of their capacity to legal aid, which also reduces costs

7 INFORMATION AS A COST REGULATING MEASURE

People call upon lawyers because they think a lawyer might be of help. They do not contact them for pneumonia. Asking for a consultation presupposes some rudimentary knowledge that the problem has some legal aspects – or at least is of a kind that lawyers might handle.

From legal aid research we know that legal impotence is widespread among the poor. They might acknowledge that they have problems, but rarely that legal help might be useful. An opinion among them is that lawyers are expensive and usually not interested in clients that cannot pay the market price. Such attitudes obviously will diminish demand.

Possessing some knowledge about legal aid schemes often is a precondition for poor people to seek out a legal aid lawyer. If lacking, they often will consider a visit to a lawyer unrealistic. Costs appear as one major barrier, but time use, fear of poor treatment, psychic strain etc. also counts.

Government's information and guidance might lower such barriers and influence the actual demand. More information might increase costs due to increased demand. If government limits information, fewer will consider whether they qualify, and costs will be lower.

The more we leave it to poor people themselves to identify, diagnose and forward their legal problems to lawyers, the greater the strain-off. The better they understand the alternatives for problem-solving, the better the chances that they will make rational choices between whether to actively pursue a solution, choose a non-legal strategy for coping with the problem or just resign.

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[15] Barlow 2019 p. 255.
[16] Johnsen 2024 p. 33-35
[17] NOU 2025 Appendix 1 p. 12-15.
[18] NOU 2020:5 Appendix 1 p. 13.

NLAA § 2 (2) makes it a duty for private practitioners to inform clients about legal aid if they might qualify. Many people in Norway has received legal aid because they have contacted a lawyer presuming that they must pay the market price and then received information about the legal aid coverage. In the NOU 2020:5 survey mentioned above, the lawyers estimated that more than one third of their legal aid clients came without any knowledge about their legal aid coverage.[19] They probably because they experienced the case as extremely pressing.

The duty does not oblige lawyers to accept the legal aid commission. Neither does it hinder the fact that lawyers generally refuse to accept legal aid commissions

8 OTHER SOURCES OF FINANCING

Several jurisdictions make public legal aid schemes *subsidiary* to other delivery or financing methods as a cost reductive measure. NLAA § 5 for example, says that public legal aid does not cover help that might be delivered by other instances or paid from other sources. For civil and administrative matters, the provision explicitly mentions:

- Private insurance
- Legal help from established public advice offices
- Advice that public administration might provide
- Government's responsibility to cover costs of opposing parties winning administrative complaints
- Legal help provided or paid for through membership organisations
- Help provided by private and public legal aid organisations in other countries

The sources mentioned are only examples. The exception applies when a reasonable expectation exists that another instance will provide or pay for the service. The legal aid authorities decide

The provision opens for cost use considerations and to make requests to and denial of coverage from other instances a separate condition for granting public legal aid. Denial of aid obviously is a cost reduction measure Such procedures also consume time, and qualified applicants might resign during the process, which also might reduce costs.

9 COSTS ADDITIONAL TO LAWYER FEES

Legal aid schemes might to a varying degree cover other costs than lawyers' fees. Examples are application fee, costs of expert and technical evidence, translation, court fee, travel and accommodation expenses, compensation for lost income and legal costs of the counterpart when loosing, etc. If not covered by legal aid, users usually must carry them in addition to contributions, which reduce public costs. However, when such costs are of some seize and unavoidable, the risk might also function as a deterrent against using legal aid – resulting in cost reductions for government but loss of legal protection for qualified users.

[19] NOU 2020:5 Appendix 1 p.15

Jurisdictions that practise liability for the counterpart's costs when loosing (inter partes costs), seem a significant challenge for legal aid users. Such costs might become significant and difficult to predict. Legal aid usually does not cover them.

When a claim or denial of a claim have been forwarded to the courts or other legal conflict solution body, the freedom of recall without paying the counterpart's costs, often appears limited. Such risks also might deter poor people from using legal aid also in well-founded cases.

A Norwegian study from 2015 that comprehended 117 short civil cases (1-2 days) found that inter partes midrange costs imposed by the court varied between € 6 800 and € 15 825 at first instance and between € 13 825 and € 32 250 at the appeal level. With a maximum poverty limit of € 40 000, legal aid users had to pay the counterpart at least one fifth of their yearly income in a short first instance trial and one third in a short appeal case. With lower income or more court days, the share of the yearly income at risk by a loss, becomes even larger.[20]

A survey of living conditions conducted by Statistics Norway showed that 17 % of the Norwegian population would experience problems if they had to pay an unforeseen expense of € 850, which constitutes only a small share of the lowest cost estimates above.

Legal aid users in Norway cannot afford losing even a short trial if the court imposes the counterpart's trial cost upon them. Such deterrence seems in poor conformity with the human rights principles on access to court – for example article 6 in the European Human Rights Convention.

10 APPLICATIONS AND DOCUMENTATION

Usually, a proper application with documentation is necessary to qualify for legal aid. If not, a request risks refusal. One important information concerns the legal and factual characteristics of the problem, which might be difficult for poor people without legal training to describe and especially if the decision has significant discretionary elements. Legal aid administrations vary significantly in how helpful they are. Users might seek out a lawyer on beforehand and ask the lawyer to collect the relevant information and produce and forward the application.

Lawyers might be reluctant to accept such tasks, especially if the work appears extensive and the risk of refusal significant. Legal ais administrations might be unwilling to pay lawyers for application work if the application is denied. The application procedure itself might become a bottleneck that hampers entitled from using legal aid. The more time consuming and uncertain the application process appears, the less interested lawyers might be to accept such commissions, which also saves public costs.

11 CONCLUSIONS

[20] Statistics from Larsen, T. L. «Tilgang til tvisteløsning og rettshjelp: Rettssikkerhetsrapport 2020». Det juridiske fakultet Universitetet i Oslo 2020. p. 22-25. https://www.juristforbundet.no/globalassets/dokumenter/arrangement/rettssikkerhetskonferansen/tilgang-til-tvistelosning-og-rettshjelp.-rettssikkerhetsrapport-2020.pdf.

Expected cost reductions from tightening the access criteria or using other cost reduction means, do not always happen. The business strategies of the private profession provide one explanation. They structure their service for the commercial market. Lawyers' whish for legal aid income is not driven by the demand for legal aid from poor people since government usually pays significantly less for legal aid than lawyers earn from market commissions. Lawyers mainly use left-over capacity for legal aid, which means that the demand for legal aid is only partly met. *Unmet* demand does not matter to the government's costs whether large or small.

Since poor people's legal problems are vast and legal impotence widespread, most of them are never channelled to lawyers. Actual demand only concerns a fraction of poor people's legal problems. Still demand for legal aid service exceeds the lawyers' capacity to handle legal aid commissions. If lawyers should want more of them, they might access a large reservoir of civil legal aid commissions.

When government uses cost reducing means, the existence of such a reservoir of unmet demand for legal aid might counteract cost reduction means. Lawyers might substitute the cases removed from coverage with commissions that still qualify, but not previously accepted. Then the cost reduction effect also might diminish. Lawyers might see temporary reductions in legal aid influx, but if they advertise for legal aid clients, they might easily turn out more demand.

If the lawyer's capacity for legal aid increases, for example due to significant influx of new lawyers into the profession, legal aid costs might also increase due to more intensive use of the scheme by the new lawyers. Such increase might gradually disappear, as new lawyers establish themselves better among commercial clients. Then the reservoir of unused legal aid commissions might grow again.

A liberalization of the access criteria to legal aid will not by itself expand the lawyer capacity. If lawyers shall serve more legal aid clients, they must reduce their capacity to serve paying clients, which might mean significant loss of income. While the demand for legal aid might increase, the lawyer capacity for legal aid will remain stable as long as they find commercial clients (or other work) more profitable than legal aid. Reforms that aim at expanding legal aid become mainly symbolic because the volume of legal aid delivery does not increase.

It is true that if the access criteria become liberalized, more of poor people's legal problems will qualify for legal aid. If these new groups decide to use their entitlement, the competition for the lawyers' legal aid capacity also will increase. The lawyers must prioritize between the groups already covered and the new groups brought into legal aid by the expansion of the legal aid coverage. The outcome might well be that access to legal aid for the groups previously covered – usually the poorest – will diminish. They will experience more problems in finding a lawyer than when fewer qualify.