Chapter 6

LEGAL AID AND JUSTICE

In many ways legal aid resembles health care. There is an imperative, on grounds of justice, to provide legal aid and to provide health care to those who cannot afford it. Both legal services and health services are performed by professionals whose knowledge about their trade is not shared by the users of their services. Both legal and health services can be so costly that they may stretch the limits of users. Schemes to protect users from both the heavy cost of legal services and that of health services are subject to moral hazard and information asymmetry problems.

1. INTRODUCTION

Legal aid is commonly seen to be an important cornerstone for a system of justice in a civilised society. Certainly justice would not be justice if access to the judiciary process were limited only to those with the means to seek redress through legal proceedings.

When legal aid was first introduced in the United Kingdom in 1950, it was designed exclusively for civil suits. However, it was soon recognized that defendants accused of criminal offences need to be properly represented in a court of law if society’s claim for espousal of justice is to be upheld. Today, in the United Kingdom, as in Hong Kong, legal aid is more liberally given for criminal than for civil proceedings. Indeed, in Hong Kong all people charged with criminal offences who require the services have been granted legal aid. The means test, passing which is normally required for civil suits, is routinely lifted by the Director of Legal Aid to make sure that the defendant has a fair hearing. Similarly, in the U.K., following the recommendation of the Widgery Report on criminal proceedings (HMSO, 1966), the proportion of defendants appearing on an indictable offence in a magistrates’ court with legal aid rose rapidly, from 20 per cent in 1969 to 80 per cent by 1986.

Legal services is in many respects similar to health services. Like health services, legal services is performed by professionals who need long years of training. Like medical care, the outcome of health services is often
not clear. One cannot predict success or failure in litigation, just as one cannot tell for sure whether a surgical operation will be successful or not. Similarly, very often one cannot tell how much will the litigation costs be, or even how long the litigation process is going to take. Like medical care, legal aid is prone to supply-side moral hazard and demand-side moral hazard. That is to say, lawyers, like doctors, may supply more services than are needed in order to benefit financially, while users of legal aid, like patients, may demand more services than social costs/social benefit considerations justify.

Under most legal aid schemes, applications for legal aid are subject to a means test as well as a merit test. Today (i.e., year 2000) in Hong Kong the means test requires that the total annual income and capital assets after paying the rent for the dwelling unit and an allowance for daily maintenance should not exceed HK$169,700 (about US$21756). The merit test, applicable only for civil suits, requires that an applicant must have valid grounds of seeking justice through the judiciary process and must have a reasonable prospect of success. The latter can be regarded as a “gate-keeping” mechanism to avoid abuse.

Because of the similarities between health care and legal aid, the arguments for excessive burden insurance principle that apply to health care also apply to legal aid. The idea is that even people with incomes commonly regarded as high may not be able to afford the expenses required in seeking redress through legal proceedings. There is a difference though. Whereas in the case of health care a yearly spending limit is perfectly sensible in the case of legal services probably a much higher, 10-year spending limit would be more appropriate. Unlike health care, litigation is in general not a regular need. It would not make sense to limit litigation costs to X per cent of the annual income.\(^1\) I would propose that one should be responsible for litigation costs up to half a year’s earnings. We would still need the gate-keeping mechanism in order to prevent demand-side moral hazard.

2. SUPPLY-SIDE AND DEMAND-SIDE MORAL HAZARD

Under many typical legal aid schemes, the lawyers acting on behalf of the aided persons are in private practice. This is more a result of political lobbying by a professional body than one of social design. In the United Kingdom, the Law Society, which administered the scheme until 1988, had offered a 15 per cent discount on legal aid work to avoid a salaried service. The fee-for-service mode of operation, however, is widely known to engender supply-side moral hazard. Gray, Richman, and Fenn (1999) found circumstantial evidence that is consistent with the supplier-induced demand