

The Market for Legal Services
for the Dictionary of Law and Economics (Palgrave)

The market for legal services should properly be considered as a set of national markets constrained by parochial, national regulations defining who can provide legal services within each jurisdiction. The markets are characterised by monopolistic constraint systems privileging the classical professional project. This involves well paid, highly trained, organised groups, usually capable of controlling the supply of neophyte practitioners into the profession, controlling the nature and amount of work and controlling their clients.

The legal professions have retained their unique position longer in the face of progressive de-professionalisation and de-skilling than other areas of the service industry. But in many places their power and control has been under attack from government, consumerism, alternative legal services, lawyers from other jurisdictions and other professionals engaged in turf wars.

Some of the most interesting areas of activity have been the growth of multi-national firms, the growth in size of the larger firms, the growth in numbers, and the proportion, of sole practitioners and the demarcation disputes between the large, dinosaur, professional organisations.

It is sometimes difficult to distinguish the concerns of those who study and write the literature in any particular area with the reality of the actual conditions they study. With this in mind we can note what have been the central issues of academic interest. Much of the literature accords with the items already mentioned. There has been some concentration in recent years on the effects of change within the market for legal services, looking at how strategic operators have placed themselves in order to benefit from what they perceive will be the best opportunities. This literature often takes for granted a Weberian approach which sees professions as “conspiracies against the laity”, denies any altruistic pursuit and construes all reactions to be based on commercial or financial motivations.

A separate set of literature considers how changes both within suppliers and purchasers of legal services, and within the law and legal system itself have contrived to increase or decrease the level of access to justice, and sometimes the quality of the legal system's justice itself. Following on economically derived models within the health service, there have been some attempts to provide economic models for legal services. Although the disciplines of law and economics seem to have danced together in so many areas of substantive law, the market itself has received only a small amount of attention. Specific areas of legal work, such as the conveyancing of real property have received a little attention, throwing up some widely differing views over both methodology and findings. But, house purchase and sale is both ubiquitous and highly controlled in most countries. Some elements of house purchase and sale usually require a lawyer in each jurisdiction. It would be more interesting to study through economic analysis more uncertain markets where the alternatives are more complex and include the option of not going to law or lawyers at all.

A burgeoning area of literature is involved in the studies of management of law firms, the competence and quality issues relating to organising legal services and taking advantage of the new markets for legal services.

The literature does not in general consider the market for legal services in terms of a supply side and a demand side. An approach of this nature would prove useful in clarifying many of the issues relating to the market for legal services. Indeed, it is not clear what actually drives legal work and legal services. Some writers consider that legal services are supplier driven and that a true market understanding would only come out of a clarification of demand issues.

In considering the market as divided between supply and demand side issues, many issues could equally be reflected in either or both sides. The argument which follows should therefore be seen as the inception of this approach in analysing the market.

The Demand Side

What then are the ingredients of demand side for legal services? One way to look at this is through the analysis of “legal need” which was popular in the late 1960’s and early 1970’s at the time of the creation of neighbourhood law centres in both the United States and the UK. In order to discover “unmet legal need” researchers would investigate a particular area of law and survey a likely population in need, attempting to discover what proportion of those in need used legal services, which services they used and how satisfactory the use of such services was found to be. In general, the findings seem to show that there was a vast, immeasurable quantity of “unmet legal need” - potential cases which were not taken up, advice not sought and problems just tolerated, ignored or resisted in some other way; including a high degree of variability of demand for similar legal needs in different areas.

Subsequently such approaches went out of fashion and were considered unmeritorious. Identifying legal need in this way took for granted that all problems, or all such problems, had to be given a legal solution. Many problems were by their nature really related to poverty rather than the lack of legal help. Often a social, political, or financial solution was of equal, if not of superior value. Legal outcomes could be quite narrow, legal process long, painful and expensive and the cure might be as bad as the disease itself. More importantly, reliance on law and legal services breed a reliance on external professionals rather than a reliance on oneself. Law was a political individual and often serving of the powers which caused the problems in the first place. By measuring legal need in terms of the potential need, it was felt that social researchers might be undermining communal and political institutions at the same time as undermining the self reliance of individuals in need.

This reaction may well have gone too far. In assessing the demand for legal services, as a function of the market of legal services, ignoring the empirical possibility of plumbing the depths of unmet legal need has simply played into the hands of politicians wishing to cut, or control, financial budgets. In the business of construction of legal services from the demand side, it is therefore essential to be clear about the interests which promote particular constructions. It is contended that the analysis of unmet legal need is still of great importance in clarifying the demand side.

The demand side must also be driven by other factors. These include the amount and nature of legislation, law and regulation; the existence of education for the public in the use of law and legal services; and government policy and consumerism.

It is not suggested that all legislation, regulation or other forms of rule and law making will instantly lead to an increase in demand for legal services (see in particular, Fenn). However, in general, the more regulation the more there is a need for lawyers and legal services. At the basest level this involves advice and information on what the new regulation means. It may also include the need for lawyer involvement in more precise definition of the regulation through contact with agencies, institutions, or government. Some regulation may need the involvement of lawyers to negotiate with the other side, which is beyond the level of definitional construction. Other regulation may need legal involvement in court in order to transact a case through the legal process. One example of this highest form of need for legal services in recent years has been in relation to the separate representation of children in cases concerning children's rights and child protection.

Another aspect of the demand side must involve public education, knowledge and awareness. In some countries education in "civics" includes information on how to use lawyers on basic elements of law and some familiarity with human rights or civil liberties issues. In others, such information and knowledge is assumed. In some states of the US law students take part in the training of high school pupils in an exercise called "street law". Approaches of this nature are largely intended to provide young citizens with an understanding of their rights, but are likely also to alert them to the process of exercise of such rights if necessary through the use of legal services.

Legal awareness may not only be fostered or occur at high school level. A climate of information and invitation to exercise liberties, rights, or defend actions against private or public organisations, can also make a difference to the take up of legal services. Such information transmission can occur on a publicly funded basis, through filter and referral systems such as "Citizens Advisory Bureaux" or through

the affect of advertisement by lawyers themselves. Unlike problems with e.g. plumbing, or health, it is not always clear with “legal problems” to lay people that these problems are capable of a legal solution, or whether such a solution is desirable, optimal, affordable or pleasant. Education, knowledge and awareness are therefore all important elements on the demand side in choosing to use legal services.

Most important in all other spheres of economic activity, is the general economic situation. Clearly, where the level of economic activity is high there will be a great deal of commercial, company, planning, building and development work for firms of commercial lawyers. With a down turn in the economy it is often suggested that lawyers still do well. On this occasion though, the work is largely in insolvency, mortgage overvaluation, crime, divorce, employment and welfare law; all of which seemed to go along with the downturn in the economy and general despair. There seems to be little academic work on following through movements in the general economy against lawyers income. Indeed charting lawyers income seems to be a fairly recent activity and many of the approaches used (such as “The American Lawyer” and the English “Legal 500”) are not entirely grounded in certainty.

Two indicators might be used for this purpose. There do appear to be fairly firm data of numbers of entrants to the profession within some jurisdictions, and of those entering apprenticeship such as the training contracts, articles or pupillage. Where these numbers and fluctuations are monitored against fluctuations in the economy, it seems pretty clear that a downturn in the economy is followed by a downturn in numbers being allowed into the profession. This would also seem to suggest a downturn in the availability of legal work. However, in England and Wales this assessment would be skewed towards the areas of commercial work into which more than 60% of trainees enter. It would therefore not be clear from these figures whether the other areas of work which would be privileged during a downturn in the economy were more successful at this time.

Government activity and policy will also be important in relation to the demand for legal services through its decisions about funding them. Where governments fund legal service through public defender systems, neighbourhood law centres, sets of employed public lawyers, or through “judicare” by providing legal aid funds to

private law firms, this must clearly affect the demand side for such services. Governmental policy might involve funding some services, such as criminal or family, but not fund legal work relating to immigration, housing or defamation. There is a clear connection between regulation and funding. Regulation has often been changed so that less funding should be necessary, such as changes in family law in order to make it less court based and more subject to agreement by the parties.

Consumerism both acts by itself and in conjunction with government activity and policy. Consumerism has a clear affect within the lawyer/client relationship as a means of demand for the fashioning and pricing of legal services in particular ways. In the United States, for example, it is suggested that consumers are less keen now on the pricing of legal services on an hourly basis. They seem to prefer a system of prior estimation of costs than the possibility of a contest among suppliers (“beauty contests”) in order to ascertain more clearly in advance the detail of the services to be provided and the cost of those services. Time recording systems are still the order of the day for pricing of work in most commercial firms in the UK and in parts of Europe. In other parts of Europe pricing has not yet moved over to a time based system.

In general the consumers of the 1980’s and 1990’s do not simply accept what professionals tell them, or tell them to do. Professionals are no longer on a pedestal and are certainly the equals of many of their clients within the world of commercial law practice. Personal clients also have lost the ethos of obedience and deference to professionals. They make their views well known when they are unhappy and they also try to fashion the service given to them. Organised consumerism has a profound affect on policy and the availability and cost of legal services. The Consumers Association in the UK has had a major effect on changes in conveyancing services, whereas the National Consumer Council has a considerable effect on legal services for individuals and especially the poor. The Consumers Association backed the House Buyers Bill, which eventually led to the end of solicitors’ monopoly in conveyancing and the creation of an alternative specialised profession of “Licensed Conveyancers”. Moves to pressurise the government into widening the provision of

legal services or removing restrictive practices, also often emanate from consumer organisations who have an effective lobby and supporters from all political parties.

The Supply Side

The supply side in turn is affected by the number of lawyers or deliverers of legal services available, the education and training of those lawyers, “professional capture” of legal work, and the rules of conduct which regulate whether and how they may advertise their services or gain clients. The abundance and nature of legal regulation is also important, as are issues of globalisation and multidisciplinary practice.

Weberian theory suggests that professions control the supply of new professionals. It is not clear whether in general legal professions now comply with Weberian doctrine. In many jurisdictions entry to the profession relates to qualification at university level and the taking of a Bar exam. Where no apprenticeship is necessary it is much less easy for the profession to control the number of entrants. Where this does not occur it would appear that the market, such as it is, controls the number not who enter but who will continue to supply legal services.

It has already been noted that the structure of apprenticeship, and the much larger proportion of apprentices taken by commercially oriented lawyers, is likely to skew the general supply of those qualifying. In some jurisdictions, such as England and Wales, it is necessary to undergo a period of three years beyond qualification working with a more than 3 year qualified lawyer. All such restrictions, together with the already lengthy period for training and qualification, tend to make the supply side of the market quite inelastic and unresponsive to fluctuations in demand.

In addition, where control is still exercised by the professions over entry, such control may not necessarily be exercised in relation to real demand, but will also be affected by the desire to keep the price of legal services high for lawyers who are already within the system. Since the price of legal service is often the subject of control by regulation (either by government or by the profession itself - in theory in order to

maintain the quality of service) there are a number of restrictions on the easy operation of this market.

Not only are the prices of legal services sometimes controlled, but also the salaries of apprentice lawyers or newly qualifieds. Once again in England and Wales there is a minimum salary for trainee solicitors, differentiated between high and low cost geographical areas, but having the effect of controlling the price of their services. This has a resultant effect on the services of qualified lawyers, which are unlikely to be lower than these levels.

The supply of legal services in particular areas of work is also affected by the approach and content of legal education. Lawyers naturally tend to work within subject areas in which they have been trained. To some extent legal education may follow the actual demand for legal services, but it may also be affected by notions of what is crucial within the study of law, the views of professional bodies about what might be important, and the interests of teachers of law. These may not necessarily mirror legal need or demand.

Recent literature talks about the phenomenon of “professional capture” of certain areas of legal service and of “supplier induced demand”. By this, it is meant that legal professionals tend to try and organise and work in particular subject areas that they know about, or which provide what is considered to be good remuneration. They may even “create” or induce demand for particular legal services. For example, although government funding may be provided for wide areas of “welfare law,” lawyers tend to work in personal injury, family and crime rather than housing, welfare benefit and debt. This is not only, or necessarily, because of the levels of remuneration which may not be that different, but it is about working in traditional areas of law, which will have been the subject of their undergraduate and vocational legal education.

Thus a cycle of education - training - subject work area is set up and becomes difficult to break. Because lawyers are able to control the work that they do and the way in which they do that work they can control the amount, the quality, the content, the

level and the nature of all that supply. This is particularly clear from some, as yet, unpublished statistics relating to the costs and outcome of a particular area of work undertaken in England and Wales under the legal aid scheme. Two work approaches have become evident with a division geographically between solicitors working in northerly and southerly regions. The northern paradigm shows solicitors piling up more cases, carrying out the less work on them over a shorter period of time and producing lower outcomes in terms of money agreed or awarded to the clients. The southern paradigm is the opposite. Lawyers are carrying out a smaller number of cases, but taking more time and doing more work and obtaining higher levels of damages for their clients.

What is most interesting is that the outcomes ratio of cost to return is similar in both. In other words the lawyers working under both paradigms seem to have in mind a similar rate of return for the work done, even though this relates to different numbers of clients and different amounts of compensation. It is conceivably possible that such divisions are as much related to different industry, different client expectations, different lawyer expectations or different courts and judges in the different geographical areas.

But, even if this is so, it is nevertheless fascinating that the rate of return remains similar. It is not known how far such findings could be replicated elsewhere. However, such findings do seem to suggest that lawyers work with a clear sense of an economic rate of return. Even if they are working under very different conditions and with different traditional approaches the amount of time and work spent in relation to the return obtained is similar. This suggests a notion of supply which is affected not so much by a market sense of what is good for the lawyer (since the rate of return means return for the client and not profit costs for the lawyer). But this data seems to suggest a different notion of an economy which might be more akin to a Durkheimian view of professional behaviour. It does not, however, contradict the notion of how much control lawyers appear to have over the market, or of conceptions of “professional capture” of the market. All it seems to suggest that if the lawyers capture the market they do so with a clear sense of what is a reasonable rate of return on their work, for their clients.

Also figuring on the supply side are different issues of government policy from those which affect the demand side. Such policy issues include the level of self government allowed to the legal professions, the amount of competition allowed in the market for legal services, the number of judges, courts and juridical systems allowed to exist and the number of juridical posts, court and tribunal staff or administrative decision makers involved in work of a legal nature.

Self governance of the professions provides them with the ability to control their work, to control entrants and therefore the supply of legal work. That government has a say in this is clear from the examples of England and Wales where the Lord Chancellor's Advisory Committee on Legal and Education and Conduct helps to advise the Lord Chancellor on such issues, and recent changes in legislation in the state of Victoria, Australia, where governmental control of the profession has recently been established by legislation. Such control can keep an eye on rules regarding advertisement and go as far as organising entry of new professionals or quasi-professionals into the legal services market.

The numbers of courts and judges affect the amount of possible litigation. Litigation is the tip of the iceberg of legal disputes and most disputes will be settled between parties or between their lawyers and will not need to go to either court or tribunal. However, the number of cases which can go to court or tribunal must be affected by the lengths of delays within the system and ease of litigating. These are clearly affected by the number of court and tribunal staff, lower level judges and higher level judges etc. Whether this visible part of the iceberg has a greater effect on what remains below is not clear. But it is suggested that it must be more important than just relating to those cases which go to court or tribunal. The disincentive from taking cases to court or tribunal because of delays or difficulties must affect the number of cases that are settled by negotiation and also the number of cases that lawyers can handle.

Alternative legal services is clearly a phenomenon organised on the supply side, but their prominence does have some relation to consumerism mentioned above on the

demand side. This expression includes self help systems which enable clients to carry out elements of legal work by themselves, advisory and other agencies which provide legal services free or on a charitable basis and alternative approaches to litigation and court or tribunal based systems. The effect of these is to change the nature of the services provided, the character of those providing the services or the approach taken in effecting the service itself.

Globalisation has also begun to affect the market for legal services in a small way. As global clients have sought the need for international work to be carried out with the same expertise in all of their world markets, there has also been some demand for large firms to have offices internationally. Before 1990, such offices tended to behave like satellites of the main office and were not likely to contain indigenous lawyers, licensed to practice in that jurisdiction (the firm of Baker and McKenzie was a significant exception to this). In recent years, local regulations have tended to be relaxed and more international firms are setting themselves up with offices in many jurisdictions including in those offices lawyers who are licensed to practice in those jurisdictions. The global mega firm has arrived. Such firms operate at the top end of the market, dealing almost exclusively with high level commercial work. We are not therefore yet in a position where there is a “McDonalds” isation of legal services. However there are now some 20 or so, largely Anglo American law firms who have a significant number of offices abroad with the ability to practice in those countries. One can expect this phenomenon to grow partly by acquiring local lawyers in each country to work for them and then become partners in those firms, and also partly by bringing lawyers across from the head office to acculturise indigenous lawyers. It is not clear whether this movement will have a significant affect on the market; but it is certainly a situation which bears close watching.

But incursions into the market of the larger commercial firms does not necessarily come just from other lawyers abroad. The “turf wars” between lawyers and accountants, and even within the legal profession where it is split between solicitors and barristers, have proliferated in the last decade. Early skirmishes between lawyers and accountants were largely over the area of tax law. In England the lawyers lost out, but in Germany an intermediate profession grew up of company and tax lawyers.

In the next phase, accountants started to run or own law firms. This began with an accountancy practice running the largest law firm in France, and has moved on to three sets of law firms, each owned by larger accountancy practices in England and Wales. In Scotland, Arthur Andersen has just bought up the largest law firm. The “Garrett & Co.” phenomenon started small but seems to be growing. The accountants are not making any very big moves, but seem content to ensure that they have a foot in the door of the legal profession without wanting to rock any regulatory boat, which might decide to find a conduct rule which would exclude their involvement.

Conclusion

The market for legal services exhibits a traditional style but is undergoing some major changes. Many of these are occurring in specific sectors of the market such as the commercial sector affected by globalisation and the “high street” sector affected by government influence and funding for legal services.

An analysis of demand side and supply side issues shows a set of profitable elements for research and begins a clear understanding of this crucial market in the provision of justice for all.

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