Public Legal Services

A Comparative Study of Policy, Politics and Practice

Jeremy Cooper

Sweet & Maxwell

PUBLIC LEGAL SERVICES:

A COMPARATIVE STUDY OF POLICY, POLITICS AND PRACTICE

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For Juliet and Douglas

PREFACE

This book is a study of the policy making that lies behind the public legal services movements in three countries, the United Kingdom, the United States and the Netherlands. The original research upon which this book was based was carried out between 1979 and 1981 in the framework of the Florence Access to Justice Project at the European University Institute. That research was only made possible by the generous assistance of a large number of people. Public legal services are developing so fast that the only way in which to discover what is really happening is to go to the places where they are being developed. I was thus extremely fortunate in being able to depend upon the generosity of the European University Institute in supporting my travels. I was even more fortunate in having a supervising professor, Mauro Cappelletti, who could always be relied upon to encourage me in my desire to go to the places that I wished to study, and whose extensive network of contacts in this field played a significant part in ensuring that I got to the right place. For all this support and encouragement I am most grateful. Most important of all, I wish to extend my thanks and gratitude to the many people in the United States, the United Kingdom and the Netherlands who were prepared to give generously of their time and experience in helping me to compile the information necessary to this work. I know from my own experience that the pressures of work in public legal services are sufficiently great to allow very little time for such activity.

Throughout the text of this study I have endeavoured to acknowledge directly the assistance that I was given. I wish however to express my special gratitude to Steven Lowenstein for arranging my visit to Oregon and for giving freely of his enormous wealth of experience and his friendship throughout the past five years. I would also like to express my gratitude to Edo Brommet and Lian Mannheims in Amsterdam and to Patrick Lefevre in Brent, for their help, their ideas and their criticisms, on specific parts of the text that formed the original doctoral manuscript. Questions of emphasis and interpretation are however my own decision and these people should not feel necessarily associated with them.

Between 1981 and 1982 the text was rewritten to incorporate new developments up until May 1982 when the manuscript was submitted to the publishers. This schedule has rendered it necessary to leave the story at an arbitrary moment in its fast developing history. It is nevertheless submitted that the themes of the doctoral study, which have become the themes of the book, have not become any less relevant in the light of recent history.

The final stages in the preparation of this book were greatly assisted by the careful comments and observations of a number of people. In this respect I am particulary grateful to Patrick Atiyah, Martin Partington, Erhard Blankenburg, Walter Merricks, Phil Leask, Bryant Garth, Bucky Askew and Mike Stephens. Factual inaccuracies, and matters of interpretation remain my responsibility alone. Finally, I would like to thank Joanna Davies for her highly skilful preparation of the final manuscript, and my father for the assistance that he gave me in other ways. And the cherry trees, that began to flower that springtime, played their own special part.

Middlesex Polytechnic *Jeremy Cooper*
November 1982

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Part One

CHAPTER 1

SETTING THE SCENE

1. *THE THEMES OF THE BOOK*

The aim of this book is to provide a detailed study of comparative approaches to policy control of the public sector of legal services, and to examine the ways in which that policy is translated into practice. By public legal services is meant the provision, by lawyers and paralegal workers, of legal advice and assistance, paid for out of public funds, to people with comparatively little means, from an office, or offices, which are devoted exclusively to that purpose.

The services to be examined are those which operate in the United Kingdom, the Netherlands and the United States. In the United Kingdom, the service is provided by *law centres;* in the Netherlands, by *Bureaus voor Rechtshulp*; and in the United States by *neighbourhood law offices*. The empirical studies of selected offices which form the core of this study are taken from each of these three countries and are presented in that order.

The book will not provide a detailed, historical account of the development of this movement in each country. An excellent study of this nature has already been made by Bryant Garth, of the University of Indiana.[1] However, an understanding of how, and why, public sector legal services developed in each of these countries is an essential prerequisite to understanding why there are differences in policy control. Historical material confined to this particular question will be set out in the first part of the study.

The purpose of this study is more specific. It is concerned with the question of policy control, with the conflicts that have arisen between those who would like to assert control and with the effect of these conflicts on the public legal service that is offered. The analysis can be broken down in the following way:

1. In each country, legal services policy is controlled by essentially different groups/interests.

2. Each group/interest has a different view of what constitutes the best form of public legal service.

3. These differences of view are reflected both in the type of legal services that have been set up, and in the internal organisation of those services.

4. In consequence, both the short and the long term nature of

public legal services in each of these countries is significantly affected by the choice of who will control policy.

It is submitted that the questions raised by this book are critical to the long term development of public legal services. If it is true that the question of who controls policy is as significant as this analysis suggests it is clearly vital that some objective assessment is made of the likely effect of a particular interest group being entrusted with the control of policy in this field. As confirmation of the relative contemporary importance attached to this question by policy makers in all three countries, we can point to the number of continuing debates that are taking place on the question of where control of the policy of public legal services should lie. In the United Kingdom, this debate has centred around the work of the Royal Commission on Legal Services, which published, in 1979, a lengthy, and much criticised, report on the current and future state of legal services.[2] In the Netherlands, it has centred on the government proposals for a far reaching reform of legal services, that seeks to place the public sector of legal services on a statutory footing for the first time.[3] In the United States, a series of conferences and discussions within the legal services movement, has been further stimulated by the publication of a comprehensive investigation of supplementary models for the delivery of public legal services, mandated by statute in 1974, and finally made public in 1980.[4]

Policy—The Protagonists

In all three countries, the struggle to influence, and ultimately to control, policy in this field, seems to be fought out amongst broadly comparable groups of protagonists.

1. Central government

Far and away the wealthiest potential funder, central government is seen in all three countries as an interest whose degree of involvement in the control of legal services policy will be critical. As a general rule, it will be seen that the greater the funds committed by central government to legal services, the greater its desire to influence policy. This study will examine ways in which legal services programmes have responded to this dilemma.

2. Local government

If local government is committing no money to legal services, its power to influence policy is universally limited. Conversely, where local government contributes all, or some, of the funding, there is a

general tendency for it to interfere in a far more direct, and crudely political way than central government in the control of policy. The reasons for this can only be speculative but are no doubt connected with the closer proximity of a local authority to the local office and the fact that it is often either directly or indirectly the target of much of the litigation of an office. This study will show how both in the United States before the creation of the Legal Services Corporation, and in the United Kingdom, throughout the history of the law centres, local politics, when linked to funding, have intruded into the domain of policy control. The empirical studies of Adamsdown, Oregon and Amsterdam legal services offices, show how, in contrast, where central government has a strong financial interest in the office, this tends to provide a natural buffer against intrusion from local politics.

3. National lawyers' organisations (Bar Associations/Law Society)

The official representative organisations of the legal profession at a national level have been involved in the formulation of policy on public sector legal services to a differing extent in each of the three countries. This study will show that the extent of such involvement has been a critical factor in the formulation of policy on public legal services, insofar as it has served to prevent or allow others to make the policy.

4. Local lawyers

With the exception of some of the more political, community-based law centres in the United Kingdom, public legal services have invariably given local lawyers some representative role in the legal services' policy making bodies. In most cases such involvement has led the local legal profession to conclude that public legal services provide no threat to their livelihood, and often stimulate more work. The empirical studies in Part Two provide examples of the working relationship between local lawyers and public legal services offices.

5. Statutory advice/help agencies

In each of the three countries, there exist other local agencies (social work, citizens advice, community action agencies) which have been concerned to have some influence over the policy of public legal services. This has been partly in order to render them complementary to their own work, partly to avoid competition for the same funds, and partly for reasons of local political control. The

studies of Brent Law Centre, and the early history of the relationship between legal services programmes in the United States and local community action agencies, will provide examples of the general desire of legal services movements to avoid "agency" involvement in their policy making. The problem will always become especially acute when the legal services office needs to take action against a local statutory agency on behalf of a client.

6. Client community

The degree of client involvement in policy making differs significantly between the three countries. In the United Kingdom it is critical, in the Netherlands it is insignificant. This book will examine the differences of approach between a legal services office in which clients are deeply involved in the formulation and control of policy, and one in which they are not.

7. Staff

In all three movements, the commitment and political conviction of the staff often plays a key role in the formulation of policy. In the United Kingdom and the United States this has been particularly significant. As a general rule, this study will seek to show that the greater the involvement of central government in policy making, the less the role of the staff, whereas in a highly decentralised office the role of the staff can be very important indeed in determining policy.

A glance at this list of protagonists should be enough to raise the suspicion that there will be frequent conflicts of ideas and interests in the field of public legal services.

It has been inevitable that such conflicts have had direct consequences on the provision of legal services. For example, a local authority that is funding a community law centre in the United Kingdom frequently demands that the centre should carry out more work under the legal aid/judicare scheme merely as a way of raising money to reduce pressure on the authority itself to increase its grant. The local Law Society, anxious to prevent legal aid/judicare work being taken away from the private sector normally opposes such a suggestion. The client community, represented through the management committee, has its own ideas about the priorities that should be set for work within the centre, but may also itself be split by the views of representatives of both the local authority and the Law Society on its own committee. And local statutory agencies may themselves be competing both for the same funding as the law centre and also the limited amount of space the centre can make available to take on cases from local agencies on referral. In these circumst-

ances both the conflict itself, and the in-fighting that will lead to its resolution will inevitably affect the service that is provided. Many more examples of conflicts of interest between policy making groups will emerge in the course of this study.

The Choice of Countries

The protagonists who battle for the control of the public sector of legal services are thus, in general terms, the same in each country. What is significant is the relative degree of involvement of each group/interest in each system. The coincidence of very different styles of public legal service in each country, with the fact that policy is dominated by different groups in each, makes these countries a natural and fascinating subject for comparative study. For example, in the United Kingdom, there has been no recognisable national policy on the development of the public sector of legal services either from a government or from the Law Society. Hence policy has been largely determined by the small group of radical lawyers and community groups who have pioneered the growth of law centres alone. In the Netherlands, the early origins of public legal services in the radical law shop movement were rapidly absorbed by the government, and having drawn up the alternative Bureau system and provided sound funding for its future, the government has largely taken over the function of developing policy on legal services from both the radicals and the Bar. In the United States the local beginnings of new public legal services and the intervention of central government through the provision of funding were more or less simultaneous, with the consequence that policy is based on a blend of local autonomy with an element of regulation along uniform guidelines from a central adminstrative agency that is independent of, though financed by, the Federal government.

Thus the countries provide an excellent base for comparison on a continuum, which has at one end the centralised Dutch system, at the other end the decentralised British system, and the American system somewhere between the two. Other practical considerations also commend these countries for this study. The United States created the first series of legal services programmes funded entirely from public sources, and their long history has enabled a great deal of experiment and empirical examination to take place. The writer already has experience as a lawyer in a United Kingdom law centre, and as a visitor to the Dutch offices, and thus had access to special information for the purposes of the study. And the fact remains that with the possible exception of the Scandinavian countries, there is no public legal services growth anywhere else in Europe.

Another even more fundamental question underlies the choice of these particular countries. It is the question of survival. For even as this book was being written political attacks from central and local government in both the United Kingdom and the United States have reopened the question of the very survival of the public sector of legal services.[5] In particular the Reagan budget cuts for 1981–83 threaten to reduce the legal services programme in that country to rubble. Several of the United Kingdom law centres face a similar fate. Budgetary restraints in the Netherlands hover uneasily beneath the surface of the final debates on the Reform Bill for legal services. In this context the question, what are the factors that enable some legal services models to survive, whilst others flounder without trace, is clearly critical, and is indeed implicit throughout the chapters of the book. In the final chapter, the question is explicitly addressed, in order that tentative policy conclusions may be developed.

II. *WHY CONCENTRATE ON PUBLIC LEGAL SERVICES?*

The second part of this chapter will explore a separate but related question: What is the value in studying the public sector of legal services when that sector is defined in such a narrow way? More specifically, why exclude the form of legal assistance to the poor, that in at least two of these countries (United Kingdom and Netherlands), has monopolised public subsidisation of legal services to the poor for well over 20 years, namely the legal aid/judicare system?

Legal Aid/Judicare as a Contrast

The question may appear a good one, but the answer is in fact obvious to those who are familiar with such schemes. For it is axiomatic to this study, that the public sector under scrutiny is not a simple extension of traditional legal aid/judicare schemes. It is a radical, even a revolutionary, alternative.

This view is now widely accepted by policy makers, field workers and academics involved in legal services. In the academic sphere Cappelletti and Gordley, two of the major contributors to the comparative literature on legal services, underlined this distinction in the conclusions to their review of the legal aid systems of Eastern and Western Europe and the United States first published in 1972.[6] The seminal pamphlet of the Society of Labour Lawyers, Justice for All, which provided in 1967 the first detailed, reasoned argument for the creation in the United Kingdom of a system of law centres to