Publication of the Science Center Berlin
Secretary General

Erhard Blankenburg, ed.

Innovations in the Legal Services

Research on
Service Delivery
Volume I

Oelgeschlager, Gunn & Hain
Anton Hain

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Edited by
Erhard Blankenburg


Oelgeschlager, Gunn & Hain, *Publishers,* Inc.
Cambridge, Massachusetts


Verlag Anton Hain · Königstein/Ts.

International Standard Book Number. 0-89946-010-0 (U.S.A.)
3-445-01976-2 (Germany)

Library of Congress Catalog Card Number: 79-24923

Printed in the United States of America

Library of Congress Cataloging in Publication Data
Main entry under title:

Innovations in the legal services.

Bibliography: p. 251.

1. Legal services—Addresses, essays, lectures.
2. Public Interest law—Addresses, essays, lectures.
3. Legal aid—Addresses, essays, lectures.
I. Blankenburg, Erhard, 1938–
K133.Z9I56 345'.01 79-24923
ISBN 0-89946-010-0

Foreword

This is the first publication of the Science Center Berlin on research on service delivery. It is one of the Science Center's main tasks to venture into new research fields relating to urgent social and political problems. Public services are a major problem area. In the Federal Republic of Germany, as in other Western countries, the proportion of the service industries in the labor force as well as in the GNP is steadily increasing. Accordingly, the expansion of the service sector is becoming more and more subject to criticism and analysis. The criticism is primarily directed at the quantitative and qualitative expansion of services and the financial and personal resources they require. However, these evident trends must be interpreted in the wider context of social changes in highly industrialized countries. A report of the Organization for Economic Cooperation and Development (OECD), *Innovations in the Social Services,* took up this problem and encouraged research in the field.

Within the framework of the research program of the International Institute of Management at the Science Center Berlin, a number of activities were initiated in the past few years in the problem area of "service delivery." They soon went beyond the scope of single projects and became a research program in their own right. The scientists involved in these projects decided to unite their efforts with researchers at the University of Bielefeld working in

the same field; together, they formulated an integrated research program covering problems of health services, legal services, and social services. This integrated research concept may lead to the institutionalization of "service delivery" as a research priority at the Science Center Berlin.

As part of the initial research and stimulated by the above-mentioned OECD report, the Science Center held, in cooperation with the OECD, an international conference on "Innovations in Service Delivery" in the summer of 1978. I am very pleased to include these conference proceedings in our publication series; the discussion and results of this conference demonstrate the relevance of the approaches developed at the Science Center in the research field of service delivery.

Needless to say, the responsibility for the data, results and conclusions presented rests solely with the authors.

Helmut G. Meier
Secretary General
Science Center Berlin

Berlin, July 1979

Innovations in the Legal Services

Contents

Introduction

Erhard Blankenburg

Law and the legal profession are usually stereotyped as bringing stability rather than innovation to institutional structures. However, the development of legal services since the 1960s demonstrates that this stereotype is not true. In many Western industrialized countries the use of law and of litigation has undergone basic changes, initiated by the movement to provide legal aid for people with traditionally limited access to the law. The most extensive innovations have been in Great Britain, where legal aid was introduced as early as 1949 and has been growing ever since. In the United States the War on Poverty of the 1960s initiated a wave of legal advice centers and legal actions intending to help minority groups, especially those slum areas in large American cities. Lawyers were the vehicle of social change in the 1960s, and by using legal institutions that are appropriate to their skills, they have shaped the form this change has taken.

This movement has been favored by the increase in the number of lawyers that all Western industrialized countries have experienced in the last two decades. The increasing size of the legal profession and its increasing engagement in social change activities have transformed the legal profession as a result. Although this movement took different forms in each of the countries studied (according to the specific national

legal cultures), innovative forms of legal services sprang up during the 1970s in Scandinavia and the Netherlands and found imitators throughout the French-speaking countries. Like other social movements, this one is a product of both imitation effects as well as converging conditions calling for change.

Research has been an important part of this process. Studies on "legal need" in the 1960s fostered an awareness of the traditionally selective activity of lawyers. Research findings have been used to legitimize the expansion of legal services into fields that previously were the prerogative of social policy rather than legal policy. It would be hard to say, however, which came first, research into legal needs or the actual extension of legal services. Most likely, both have reinforced each other mutually. There would not have been as much interest in scientific research if there had not been some public awareness of the problem, and there would not have been such a drastic change of lawyers' self-understanding without some of the provocations of scientific findings.

This volume presents some of the discussions that are central to this remarkable legal change movement. Researchers from England, the United States, the Netherlands, and Norway assembled at the Science Center Berlin in order to help set up research on legal services in the Federal Republic of Germany as well as to confront the German legal profession with an international discussion that it has largely been unaware of until now. The contributions fell into three parts, which Cappelletti (1968) has aptly ordered into three "waves" of a social change movement:

- The first wave consisting of an attempt to provide *legal aid* to lower classes and minority groups who have so far been barred from access to the legal system
- The second wave of (predominantly American) lawyers campaigning for *public interest issues* of a much wider social spectrum
- The third wave of looking for *alternative forms of law* in order to avoid some of the dysfunctions of legalization that have been increased by the legal aid movement as well as the public interest law campaigns

In this book these contributions are presented in the form of a discussion as it took place in Berlin in June 1978. Some of the contributions were papers presented at this meeting and others were formulated in the discussion responding to the papers. I hope that the readers will find the arguments as stimulating as we did. I also hope that they will find the common thread that ran through the deliberations of our meeting. As a guide to the development of these arguments, they might use the simplified but suggestive way of ordering the discussion into three waves.

THE FIRST WAVE: LEGAL NEED RESEARCH AND THE LEGAL AID MOVEMENT

An important factor in the scientific discussion has been the international imitation effect. These contributions document some stages of this discussion. In Chapter 1, Barbara Curran presents an extensive survey on the use that Americans make of lawyers, showing that people take certain problems only to certain lawyers: those they think competent to handle the problems. The conclusions of Jon Johnsen in his survey checking on a list of problems that experts rated as being legally relevant shows the other extreme. Here the definition of "legal" is provided by the team of researchers, the survey mainly serving to find out how many of such problems do occur and how they are socially distributed. Thus, a profile of potential legal needs is defined by the researchers, based on their normative assumption about what would be "legally relevant." However, there is no empirical statement as to what conditions would have to be met either to make claimants aware of their claims or to activate them.

It is not surprising, therefore, that the policy conclusions of this research meet with heavy scepticism. For example, Griffiths challenges the normative assumptions of the "need" concept, maintaining that there is no scientific basis for concluding that noninvocation of the law implies an underlying need for it. In fact, Reifner shows that for certain socially underprivileged groups alternatives to legal action such as solidary action and preventive interest articulation might be more desirable. Both of these authors, Griffiths arguing from the point of view of positivistic separation of scientific statement and normative assumption and Reifner arguing from the point of view of certain interests, conclude that there are limits to legal action (either as a matter of fact or as a matter of desirability).

THE SECOND WAVE: PUBLIC INTEREST LAW

Arguing from the point of view of certain interests takes away some of the problems of defining "need." If legal aid teams and law centers in deprived neighborhoods lower some of the barriers to access to legal aid, they also provide a legal infrastructure for specified groups who are socially deprived. Arguing from the point of view of the interests of the socially deprived leads to a more radical strategy; that is, where traditional jurisdiction does not provide for any rights, the legal

strategy implies a drive for creating new laws and for changing the traditional jurisdiction. Therefore, recent protest movements use combined legal and political strategies, such as aiming at court decisions (especially in common law countries) while lobbying in the legislative arena at the same time and also negotiating for administrative rules or devising self-help institutions.

The "public interest law movement" in the United States provides many examples of using legal strategies, such as filing court cases, using political influence, boycotting administrative practice, or avoiding conflict by bypassing public institutions by self-organization. In contrast to legal aid policies, public interest law has not exclusively devoted its efforts to lower-class or minority interests. For example, broad-scale interests such as consumer protection or control of the medical profession are also of concern to the middle class. However, the individual consumer of industrial products or of professional services is usually not sufficiently affected to fight an issue singlehandedly against an established industry or profession. Organization of such "diffuse interests" calls for new modes of articulation through political as well as legal channels. "Public interest law firms" have found a unique way of mixing strategies. As a rule, they use public funds and foundation financing, and they also receive money from providing further education as well as a little from court work. They engage volunteers as well as young professionals, and they use the network of the professional as well as political community as much as it is accessible to them. The chapters by Joel Handler and David Trubek give examples of some of the most well-known aspects of public interest law.

Although the specific mixture of academic entrepreneurism and populist legality in American public interest law might not be transferable to European institutions, the chapter by Kees Groenendijk from Holland shows that some diffusion effects of the use of political-legal strategies can be observed in the climate of continental legal cultures if there is a propensity for institutional innovation. While we hope to increase the receptiveness for institutional innovation by scientific exchanges like ours, the likelihood for innovation in the legal services nevertheless relies on structural features of the legal profession (see Chapter 13 on the conditions restricting innovativeness in the German legal profession).

THE THIRD WAVE: LOOKING FOR ALTERNATIVE FORMS OF LAW

A quantitative factor that makes the legal profession receptive

to changes is the increase in the number of lawyers in all Western industrial countries as a result of the extension of the educational system. In addition, social change toward increasing public organization and bureaucratization has turned many areas of social self-regulation into legally controlled systems. Public interest law has had an influence on legalizing the relationship of doctors, teachers or bureaucrats to their clientele. Therefore, it is common for professionals to avoid risks and for bureaucrats to adopt rigid rules rather than use discretion. In Philippe Nonet's terms, citizens lose in responsibility of public bureaucracy what they gain in legal controls. Thus, we find a strong movement among American law-and-society scholars for delegalization in some social areas at the same time as the same academic community is effectively legalizing others. Paul Geerts provides an overview of the intellectual currents that form the "delegalization" issue—a topic that simultaneously is a contribution to the general theme of the social definition of what is perceived as "legal problems" in our societies.

The effectiveness of legal rights depends on a particular party mobilizing the law, which is mediated by institutions such as lawyers, legal aid, or legal information. The way in which institutions perform their services determines to what degree the social barriers to access to the law can be lowered. How this is achieved differs from one legal culture to another.

In surveying legal institutions in West Germany, we found the following types:

Private lawyers, whose clientele and services may differ considerably
Public counseling services
Interest groups providing legal counsel for their members, sometimes combining this service with political strategies

Depending on the legal fields, social distribution of legal needs, and the organizing ability of legal interests, the likelihood and success of these types of institutions may differ. Certainly, the Scandinavian and Anglo-Saxon countries developed a greater variety of mediating institutions than did Germany.

Nevertheless, there is a similarity in innovations in legal aid in all of the countries surveyed. In England, legal aid societies, which have developed since the late 1940s, have changed continuously. In the United States, the "War on Poverty" gave rise to a number of innovations, although some of them were short-lived. In the Scandinavian countries and the Netherlands, there was a major innovative movement in the early 1970s, whereas in the Federal Republic of Germany there has been a vivid discussion until now, but only few attempts at actual

reform. Examining foreign experiences will serve as a stimulus in this situation. This book presents contributions by social scientists as well as jurists about institutions for legal counseling as a system of organization determining the effectiveness of law and analyzing changes of social functions of the courts if innovations in the system of legal counsel are introduced.

PART I

Research into Legal Needs and the Legal Services

Chapter 1

Research on Legal Needs: Patterns of Lawyer Use and Factors Affecting Use

Barbara A. Curran

The 1960s was a period in which the attention of the legal community in the United States focused on delivery of legal services to the poor, that is, the 10 to 20 percent of the U.S. population whose annual incomes fell below the level determined by the U.S. government to be necessary for a minimal standard of living in keeping with basic "American consumption patterns." Interest in the legal needs of this segment of the population had been stimulated by two developments. The first (occurring in 1962) was the U.S. Supreme Court decision that persons accused of serious crimes were entitled to legal representation as a matter of right and, therefore, it was the responsibility of the trial court in each case to insure that counsel was provided for any person who could not afford to hire a lawyer.[1] In response to this mandate, a variety of programs were established throughout the country that made free legal counsel available to indigent accused persons.[2] The second and contemporaneous development was the introduction in 1965 of a national program for funding free legal services for the poor in civil matters. This program, created as part of President Lyndon Johnson's War on Poverty, provided massive amounts of financial aid to local legal assistance plans established to serve the civil legal needs of the poor. The result of this infusion of funds into both the criminal and civil areas was a quantum jump in the amount of free legal service available to the poverty population.[3]