Innovations in the Legal Services

Research on Service Delivery
Volume I

Edited by
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Chapter 7

Comments on Public Policy for Legal Services

Wolfgang Däubler

Two factors justify the provision of legal services:

1. They enable individuals to pursue their interests as defined and protected by the law
2. They assure that existing laws will be applied equally to all citizens, thus avoiding differences in the execution of justice

Therefore, legal services are not to be regarded as "welfare" for the individual, but rather as a contribution to the communal order, a means of promoting the public interest. The promotion of legal services implies an acceptance of the existing order, which may weaken the potential for social reform. Consequently, critical approaches to reform will be restrained from using the contradiction between normative rules and reality as an inconspicuous strategy for more far-reaching demands.

POWER BARRIERS

The costs of court procedures, which played a dominant role in Chapter 6 by Zander, are not the only barrier to access to court. There

are many subjective barriers to access, such as fear of role expectations, lack of information, and mistrust of the judicial system. These factors can be partially corrected through informational and educational measures. For instance, courses on legal instruction in the schools could play an important role.

A more important barrier to the protection of individual rights, however, are the existing power relationships, which prevent the individual from using the courts and judicial procedures to their full extent. This is particularly true for disputes between employers and employees. Only in extreme cases are these disputes brought to court during an existing employment relationship. Employees are usually so apprehensive about losing their jobs that court proceedings are started only after their employment has been terminated. This cannot be changed through financial aid or financial measures alone. It is necessary to develop forms of legal protection that are independent of the social situation of the employee. For instance, unions could be granted the right to act on behalf of employees in lawsuits. It is not desirable to simply omit the recognition of one party's dependence on the other; this omission would only serve to promote illusionary ideas about the possibilities and effectiveness of existing legal protection.

CONVERTING PUBLIC ISSUES INTO PRIVATE CONFLICTS

Furthermore, legal services cause an increase in the resolution of conflicts through legalized processes. This may not be desirable in cases in which there is an alternative form of handling conflicting interests, a form that allows all parties to at least partially effectuate their own interests. This is particularly important in labor relations. Which strategy should be chosen in this case?

In my opinion, conflict resolution through court decisions has three main disadvantages:

1. It individualizes conflicts. A case concerning a large number of people, for example, an action that results in the obsolescence of an occupational skill, is treated by the courts as an individual conflict between plaintiff X and defendant Y. This can prevent the court, either de jure or de facto, from dealing with the total background of the case. Participation by all persons concerned is prevented by the procedural codes, which are based on the liberal mode of free markets. A few approaches are developing within German law to extend the number of parties or participants

permitted within a lawsuit. Physical presence during the oral proceedings is possible, based on the "principle of publicity." It is, however, not customary and may be regarded as undue influence on the court under certain circumstances. The attempt of the Metal Workers' Union to induce a court decision on the legality of lockouts is noteworthy. By bringing 5000 simultaneous suits for back payment, they are trying to represent the employee's interest as a group interest. It remains to be seen whether this is a singular phenomenon or a first breakthrough for "collectivized" procedures.

2. The individualization of conflicts is complemented by a privatization of arguments. If a certain regulation is to be introduced through collective bargaining or Parliament, arguments are exchanged publicly. Those concerned, that is, every citizen, can follow the discussion and form their own opinions. They can implement their demands through various measures, such as demonstrations and collective refusals to cooperate. Courts, on the other hand, admit only certain arguments; "legally irrelevant" statements are barred from the courtroom or regarded as an infringement on the rules. The remaining arguments are then exchanged in a language incomprehensible to laymen. They are thus prevented from expressing their opinions. The process of defining and formulating interests becomes the private cause of lawyers.
3. When courts decide collective conflicts, this means that political questions are decided by actors who have not been sufficiently legitimized by democratic procedures. Even when judges are elected for limited periods of time, a rare practice in Western Europe, there is no control over their decisionmaking. This has become particularly apparent in the recent decisions of the German Constitutional Supreme Court. It can also be illustrated by the stop-and-go decisions on nuclear power plants. As the circle of conflicts resolved in court is extended, the democratic process recedes into the background.

ALTERNATIVES TO LEGAL STRATEGIES

The disadvantages of conflict resolution described above should not result in a general refusal to provide legal services. Where interests are not sufficiently organized (as with consumers, for instance), a renunciation of legal services would open the door to a

"dictatorship of the stronger party." The decision to provide legal services should be regarded as the lesser evil. Under certain circumstances, it is, moreover, conceivable that trend-setting test cases may sensitize the public and perhaps even induce attempts to organize interests. However, where there is an alternative between extralegal compromises and conflict resolution through the courts, the first solution is preferable. Whether there are cases in which both strategies can be applied cannot be determined theoretically. It is, therefore, necessary not to entrust legal counseling to traditional jurists, but rather to persons who are able to evaluate both alternatives in their capacity as engaged representatives of the interests involved. The workers' secretariats in Germany before World War I set an important example of this kind and there seems to be a similar approach within the English unions.