

1996

# Recent Trends in the Organization of Legal Services

Frederick H. Zemans

*Osgoode Hall Law School of York University, fzemans@osgoode.yorku.ca*

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/scholarly_works)



Part of the [Law and Society Commons](#), and the [Legal Profession Commons](#)

---

## Repository Citation

Zemans, Frederick H., "Recent Trends in the Organization of Legal Services" (1996). *Articles & Book Chapters*. 348.  
[https://digitalcommons.osgoode.yorku.ca/scholarly\\_works/348](https://digitalcommons.osgoode.yorku.ca/scholarly_works/348)

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

## 6. Recent Trends in the Organization of Legal Services

1986

FREDERICK H. ZEMANS\*

This paper outlines the significant developments in the provision of legal services to low-income persons that have taken place since the First Congress on Civil Procedures, held in Ghent, Belgium, in August of 1977. Although only six years have passed, there have been numerous developments in various parts of the world with respect to legal services, as the legal profession, the judiciary and governments have grappled with civil and criminal procedures in their attempts to make them more accessible to the poor, the unemployed and other groups which have traditionally been excluded from the legal system. This paper carries forward the analysis of Professor Vittorio Denti which was published with the Ghent national reports on this topic in *Perspectives on Legal Aid—A Comparative Survey*, (1979),<sup>1</sup> and relies heavily on the data generated by the 26 responses to a questionnaire designed by the writer which addressed the issues of changes and developments since 1977.

As scholars we are both intrigued by the development of differing models of legal services within particular nations or regions, and also challenged to develop international models of comparative analyses and typologies which consider common factors in procedural developments. Within the broad parameters that are necessitated when one is dealing with a world overview of legal services, I shall focus on these issues. I shall also attempt to give a sense of the nature and state of legal delivery systems in the contemporary world with a special emphasis on new and innovative developments.

A number of national reports suggest that the commitment to social justice and social reform that gave birth to the first wave of legal services

\* Professor of Law, Osgoode Hall Law School of York University, Toronto.

<sup>1</sup> Denti, 'An International Overview on Legal Aid', in F. H. Zemans, (ed.) *Perspectives on Legal Aid: A Comparative Survey* (London: Frances Pinter, 1979) 346-61. Also published under the title 'Accessibility of Legal Procedures for the Underprivileged: Legal Aid and Advice' in M. Storme and H. Casman, (eds.) *Towards a Justice with a Human Face: The First International Congress on the Law of Civil Procedure* (Antwerpen: Kluwer, 1978) 167.

in the 1960s is being eroded by inaction and, in some instances, outright hostility on the part of governments in the early 1980s. As well as outlining the developments in legal services over the past five years, this paper will also examine the impact of political, economic, and structural factors that have influenced these developments during the past several decades. Analysis of data received suggests that, currently, the provision of legal services to low-income and underprivileged citizens is not based on the recognition that there exists in the sophisticated legal systems of the latter part of the twentieth century an inherent right of access. Rather, despite the gradual acceptance by many nations that reform-oriented social programmes should include legal assistance, we see in nation after nation limitations being placed on the funding of legal services and restrictions being imposed on the types of cases for which representation will be provided. In some instances, attempts have been made by governments to dismantle schemes which previous governments or regimes had introduced as aspects of state-supported welfare schemes. The issue of the right to legal services and models that will address that right is of primary concern to the writer, as it was to his respondents in this international survey.

Implicitly or explicitly, there has been a single underlying justification for intervention in the legal market-place, whether it be in contemporary North America or earlier periods in Europe. It is the undemocratic nature of the legal system. The twentieth century has seen the recognition of the reality that large segments of the population of all nations are effectively denied entry to or use of the legal system. It is the recognition of the exclusive nature of the legal system that has created the demand for, and the slow evolution of, a plurality of legal services and state supported delivery systems. It is this 'democratization' of the legal system that this writer develops as the main theme in his discussion of developments of legal service schemes. To understand the present situation, it is important to consider the manner in which the contemporary legal system came to be exclusive and undemocratic and to examine the question of whether legal services can possibly ameliorate such fundamental features of our legal culture.

Lawrence Friedman has traced the development of the modern legal system, and discussed the movement for access to justice in a historical context.<sup>2</sup> In essence, Friedman shows the historical trend toward a uniform, central legal system, one which brings all citizens under one

<sup>2</sup> Friedman, 'Access to Justice: Social and Historical Context' in M. Cappelletti and Weisner (eds.) *Access to Justice*, vol. II, bk. 1 (Milan: 1978) 3.

regime. The growth of a centralized system of law, he points out, has been at the expense of local and customary rules of social organization. Central authority came to be paramount over customary laws, and eventually succeeded in smothering local diversity. The significant issue for students of the provision of legal services is Friedman's observation of the paradoxical nature of this evolution. At the time when all citizens were being brought within a single legal system, more and more citizens also became effectively excluded from participation in the operation of law:

As the law became more and more 'uniform', it became both more and less accessible: more, in that a lot of medieval, crabbed, technical, obsolete trappings were pruned away; less in that system and uniformity destroyed what was left of popular (and lay) justice.<sup>3</sup>

Such was the evolution of the legal system in the industrialized world during the late eighteenth and nineteenth centuries. Of course, the coincident social force of the time was the entrenchment of the market system of economy. It is crucial to recognize these parallel developments. At the time when the legal system became widely applicable, the basic distributive mechanism was the market place. Not surprisingly then, the legal system and the services of the legal profession came to reflect the ideology of market economics; legal representation was a commodity that could be purchased; legal action could be purchased if the tenacity of the litigant was convertible into the necessary form of monetary exchange.

It is probably most accurate to describe these historical trends as coincident rather than coincidental. The uniformity and rationality of the legal system, and the objectification of social relationships cultivated by a market economy, were part of a matrix of change. As Foucault wrote of the reforms of the criminal law in the eighteenth and nineteenth centuries:

The true objective of the reform movement, even in its most general formulations, was not so much to establish a new right to punish based on more equitable principles, as to set up a new 'economy' of the power to punish, to assure its better distribution, so that it should be neither too concentrated at certain privileged points, nor too divided between opposing authorities; so that it should be distributed in homogeneous circuits capable of operation everywhere, in a continuous way, down to the finest grain of social body. . . . The new juridical theory of penalty corresponds in fact to a new 'political economy' of the power to punish.<sup>4</sup>

Foucault makes the argument that the centralization and rationalization of the criminal law reflected a change in the power base of law in general.

<sup>3</sup> *Id.* at 10.

<sup>4</sup> M. Foucault, *Discipline and Punish* (London: A. Lane, 1977) at 80-1.

Power, or the power to punish, in Foucault's words, was rendered 'more regular, more effective, more constant, and more detailed in its effects'.<sup>5</sup> As the legal system became more effective as a medium of general control, then, its monetary expense, according to the market principles in vogue, ensured that access to the formal legal system was limited. Friedman puts it this way:

Somehow, the influential people in society sensed that litigation was an enemy of rapid economic growth. Litigation is inconsistent with a vigorous, active market; the market thrives best when people do not break off commercial relations and sue each other at the least trouble or disagreement; rather, they absorb their losses in the short run and keep on trading.<sup>6</sup>

Not only was the legal system organized along market principles, but it was deliberately made expensive in order to discourage litigation, except by those who had the resources to engage in costly legal proceedings, or those who had interests at stake that sufficiently exceeded the cost of participation in the legal system. The average man was deterred from utilizing the courts of most countries and came to perceive the legal system as another impenetrable aspect of the socio-economic elite.

One should not, however, emphasize the role of the cost barrier to the exclusion of other impediments to participation. Equally significant have been the psychological barriers, those features of legal culture that serve to discourage the approach of tentative claimants. For example, the legal system's success as a system of control lies in its highly formalized procedures and proceedings. In particular, its formal character communicates the weight of authority to legal proceedings, and at the same time generates the commonly perceived image of hostility.

Similarly, formality has significant implications. The opulence of palaces of justice, the garb of court personnel and the appointments of counsel offices all contribute to the intimidating face of the legal system by suggesting power through prestige. The creation of a uniform legal system as a medium of authority founded on market principles achieved limited access by erecting barriers of cost, psychology and class. These issues are often discussed in terms of formality, remoteness, and expense, but ultimately all reflect the barriers to litigation—the principal mode of dispute resolution.

Cappelletti's recent discussions of legal services, particularly his *Access to Justice* study, describe the underprivileged as gradually being allowed to

<sup>5</sup> M. Foucault, *Discipline and Punish* (London: A. Lane, 1977) at 80.

<sup>6</sup> *Supra* note 3, at 12.

'enter' the palace of justice—or at least the waiting rooms.<sup>7</sup> The Cappelletti studies, as do the Wurzburg national reports, show that when legal services are provided they are directed, at least in their initial stage of development, to providing advice and assistance in the legal problems experienced by the underprivileged, primarily for litigation; in other words, access to justice has been in most instances exclusively associated with access to the courts. The barriers of cost, an elite profession, and highly formalized court procedures continue to reinforce the remoteness and undemocratic nature of the legal system.

Recently some writers have questioned the legitimacy of the access to justice movement.<sup>8</sup> If the legal system has evolved with the purpose of excluding from participation democratic interests and rather has as its purpose the strengthening of minority and elitist interests, is it not likely that there is little of substance in the law to serve the interests of those who have been excluded from the legal system? One must inquire as to what possible advantages there can be in seeking entry for the poor and powerless to such a hostile place. The usual justification for improved access to justice and the development of legal services programmes is that if the substance of the law has developed by the exclusion of large elements of the community, then there is a possibility that improved access may bring about reform of the legal system or perhaps fundamental changes in the decisions of courts respecting underprivileged persons.

Grossman and Sarat discuss the drawbacks inherent in the simple solution of increasing litigation or improving representation. Neither is, in itself, a sign of progress nor an indication of social justice. They point out that there is no guarantee that increased access implies increased effectiveness. Indeed, they argue that expanded access may be counterproductive, since the capacity of the legal system to deal with the resulting increased burden of cases is often diminished. By overloading the capacity of the system, the value of the system as a deterrent may be undermined.<sup>9</sup>

Such critics of the access to justice movement contend that legal services are merely a device by which legitimization is enhanced. For them,

<sup>7</sup> See generally, Cappelletti and Garth, 'Access to Justice and the Welfare State: An Introduction', in M. Cappelletti, (ed.) *Access to Justice and the Welfare State* (Florence: 1981) 1 and also M. Cappelletti and B. Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective', in *Access to Justice*, vol. I, bk. 1 (Milan: 1978) 3.

<sup>8</sup> See for example, A. Sarat, 'Book Review' (1981), 94 *Harv. L. Rev.* 1911 and E. Blankenburg (ed.), *Innovations in Legal Services* (Mass.: Oelgeschlager, Gunn & Hain, 1980).

<sup>9</sup> Grossman and Sarat, *Access to Justice and the Limits of Law* (1981), 3 *Law and Policy Quarterly* 125 at 138.

access to justice leads to formal adjudication conducted under the idea of 'formal equality', providing the basis for the erroneous equation of 'fair procedure with substantive justice'.<sup>10</sup> Others believe that expansion of access to justice leads to the expansion of state intervention in social affairs, hence amplifying social control by the state in what is perceived to be a repressive manner.<sup>11</sup>

Although discussions of the criticisms of the access to justice movement are helpful and contribute to the examination of developments of the legal services movement, their main value is that they enforce limits to the discussion of access to justice, making it clear that access itself does not lead inevitably to a 'new social order'. Discussion of legal aid and legal services can no longer take place under the belief that adjudication will bring about a legal 'nirvana' where all injustice and inequalities will miraculously be obliterated. Professor Santiago Oñate, the Mexican national reporter, sums up the argument in a brief but considered analysis of the situation:

Notwithstanding the virtues inherent in these critical approaches, they might involuntarily lead to consider legal services as an artful decoy provided by the ruling classes for the perpetuation of their order and as a practice that does not purport significant progress for the underprivileged.

This peril is easily avoided when the roles of adjudication in particular, and of law in general, are carefully considered. Adjudication is certainly not a good in itself, nor is it a general system for the redistribution of power within society. Contemporary legal scholars have clearly stressed that neither the regime of formal nor that of substantive adjudication is able to solve, *per se*, the problem of freedom in our society. Nevertheless, adjudication and dispute processing activities represent a precise mode by which law is created and applied. Broader access to the courts means broader participation in the creation and construction of law. For the under-privileged, generally unrepresented in other law enactment bodies, litigation might prove to be their only instance of participation in activities related to the legal shaping of social structures.<sup>12</sup>

Like Oñate, we recognize the barriers to a more democratic legal system, and we realistically assess the possibility for change inherent in litigation. We are nevertheless unprepared to abandon the movement for access because of these obstacles. The presence of such impediments should rather justify more ambitious access initiatives which will make the movement for legal services more politically sophisticated and viable.

<sup>10</sup> *Supra* note 8, Sarat.

<sup>11</sup> Z. Bankowski and G. Mungham, *Images of Law* (London: Routledge & Kegan Paul, 1976).

<sup>12</sup> Oñate, Mexican National Report (1982) at 4-5.

There appears to be no merit in the argument that access is an unworthy objective merely because there are substantive as well as procedural inequities in the legal system. Either out of supreme optimism, political naïvety, partisan rhetoric, or sound reasoning, some form of model of legal services for the underprivileged can be rationalized. The greater difficulty for the analyst of legal services lies in articulating what the character and the form of these services should be.

### **The moral argument**

Historically, the concern of lack of access to the legal system first emerged in the late nineteenth century in Western European countries, particularly Germany, and in the United States, when members of the legal profession voluntarily chose to donate their services to certain underprivileged persons. As such, only the causes with the greatest moral merit, as perceived by concerned members of the profession, were recipients of service from the public-minded advocates. Although the creation of legal aid societies in New York City and other limited assistance programmes of this period implied recognition that the legal marketplace did not adequately distribute services to all elements of society, there was no significant pressure for reform or change. Rather, the political economy of the Victorian era saw universalism, centralization, and the market system adopted as the values of the legal system in developed, industrial nations. Rules of procedure reinforced these tendencies and any possibility of inexpensive, informal dispute resolution, or class actions were thwarted by the courts and governments. These forces served to exclude the vast majority of society from asserting legal interests and their lack of substantive and procedural rights reinforced their secondary and often impotent role within society. Even the early charitable groups and compassionate lawyers who exhibited concern for attempting to right the imbalance by providing some form of legal services, did so for religious or charitable purposes and not out of a sense that the poor, or for that matter, the working man, had the right to be represented, or to legitimate his substantive legal claims. Quite the contrary. Early legal aid groups applied moral criteria which effectively meant that legal services were not available in the very situations which affected the poor most significantly: bankruptcy, eviction, and divorce lacked the necessary degree of purity or propriety to be given legal assistance.<sup>13</sup>

<sup>13</sup> The first successful legal aid to the poor in the United States was organized by the German Society in New York City in 1876 to provide aid to recent German immigrants who



As Professor Martin Partington has written in his national report on England:

It is against this ideological and socio-economic background that legal services are provided. The rhetoric of the law talks of justice and freedom. But the law which lawyers help to administer, and the services that they therefore provide, are in essence a part of the private enterprise economy in which it is essential that work be done for profit, if business is not to go to the wall.

In protecting their own business interests, lawyers in England (as in other developed countries) have been able to use their knowledge of law and their social organizations to create powerful professional control over legal services provision, and to determine, to a large degree, the nature of the services provided. Although some of the wider manifestations of monopoly power (restrictive practices) have been relaxed in England in recent years, as a result of external pressures on the legal professions to reform themselves, the professional bodies still remain an extremely powerful influence on the scope and quality of legal services provision.<sup>14</sup>

The Wurzburg national reports underline the fact that legal services, even in the most developed programmes, continue to retain their original judgmental qualities. Legal services continue to be allocated frequently on the basis of moral merit,<sup>15</sup> rather than legal right, and controversies continue,

were exploited by merchants and landlords (J. S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976). The second group was formed in Chicago in 1886 as an adjunct to the Women's Club with the 'reform' purpose of protection of women and children (J. Katz, *Poor People's Lawyers in Transition* (New Brunswick, NJ: Rutgers University Press, 1982)). Both of these organizations set the stage for legal aid societies for many years. They were private organizations, financed by private charitable contributions and controlled by boards of directors, virtually indistinguishable from other charitable organizations. Legal services were 'doled' out frequently because of moral merit, rather than legal right, and controversies developed early in prohibiting the provision of divorce services that would split up families and possibly increase the drain of poverty on society. (Menkel-Meadow, 'Legal Aid in the United States: The Professionalization and Politicalization of Legal Services in the 1980's' (1984), 22 OHLJ at 33.

<sup>14</sup> Partington, English National Report (1982) at 4.

<sup>15</sup> 'Moral merit' may be used in some cases as a mere justification for other ends. Recent limitations in the American legal services scheme serve as an example. Legal services are not provided in cases involving school desegregation, abortion, aliens, and homosexuals, and lawyers may not engage in lobbying activities. The arguments of the Reagan administration to exclude aliens from eligibility in the programme were phrased in terms of morality. (See Menkel-Meadow, *supra*, note 13, at 59.) It cannot be ignored, however, that such aliens benefited significantly from Caesar Chavez's farmworker unionization drive in California, when Reagan was governor of that state. This programme was a political thorn in Reagan's side at that time, and was supported by California Rural Legal Assistance. The present restriction of legal services to aliens, and, indeed, Reagan's attacks on the programme as a whole are an outgrowth of these earlier political struggles. (See Menkel-Meadow, *supra* note 13, at 55-63.) It is difficult to distinguish whether exclusion of services is based on moral, political, or cost factors.

particularly within *judicare* schemes, as to the type of service that should be provided. Legal services remain discretionary with respect to most minor criminal offences and with respect to civil and domestic disputes involving lesser services. Similarly, it is not universal in service-oriented schemes that private lawyers will be paid to represent low-income persons before administrative tribunals determining eligibility for social welfare, unemployment insurance, and workers' compensation. As well, bankruptcy and often divorce are a discretionary area of legal service representation.<sup>16</sup> The relevant criterion in *judicare*-private lawyer schemes is whether similar services would be provided for a paying client. Criteria with moral overtones are particularly vexatious in periods of economic restraint such as the present where we find legal services curtailed on the basis of selective value judgments.

Professor Menkel-Meadow, the United States national reporter, describes the current American situation:

Furthermore, the early philosophical underpinnings of the Legal Aid movement of providing individual representation for 'deserving' cases continues to affect legal services delivery systems today. With more demands for services than can possibly be met, programs must establish priorities and decide who is to receive some of the available, but limited resources. Some continue to argue that the most 'deserving' should receive aid.

The significance of these legal aid developments in the United States must be underscored in the present climate of attempts to disembowel legal services for the poor.<sup>17</sup>

Despite their individualistic, moralistic, relatively ineffective, and badly funded nature, they did succeed in establishing that the provision of legal services to the poor was a legitimate, if not a necessary function of industrialized nations. And what had developed initially in countries such as Germany and the United States has become, in the last two decades, an aspect of most contemporary legal systems.

It becomes clear that in the western world (and elsewhere), legal services have not grown out of the belief that there is an inherent right to legal representation. Rather, services have tended to be dominated by notions of moral relativity and differential entitlement. But if the fundamental justification for legal services is, as is proposed here, that the legal system is inherently undemocratic, does it not logically follow then that

<sup>16</sup> Access to justice is limited in a number of ways. The most straightforward of these are specific limitations on the types of problems and the individuals eligible for services. Limitation of the types of problems is the most common restriction.

<sup>17</sup> Menkel-Meadow, *supra* note 13, at 35-6.

access to justice can only be meaningful if a right to legal representation is recognized?

It has been seen that, historically, the legal system has deliberately denied access to a definable segment of society. Yet it is the legal system that must be relied upon to give effect to the intention of governments. Legal entitlements approved by parliament can have no meaning if their vindication is dependent upon the holder's pursuit of his or her due, and such pursuit must be carried out by an unaffordable and unapproachable agent. In the organization of the modern polity, the legal system is virtually as prominent an institution as the commons, the executive, or the judiciary itself. The courts and the profession, in practice, bear increasingly the burden of administering the modern state. How, then, can differential access to the machinery of our society be justified?

The issue can be put simply: if the legal system's inherent defect is that it alienates a portion of the population, and if it is recognized that this offends the democratic aspirations of our society, then should not a democratic right to equal participation in the legal process be recognized?

Further, in the context of the legal process alone, equal participation can be considered essential to the adversarial system. Richard Abel, describing the situation in the United States, writes:

Equality in the distribution of legal services has a value beyond that of enhancing the welfare of the unrepresented or underrepresented. The very integrity of the US legal system as an adversary system depends upon equal representation of all parties. The legitimacy of contemporary law rests on the assumption that optimally efficient allocations of scarce resources are produced by parties who freely negotiate with each other on the basis of equal information about the law and equal competence to use it. The adversarial model of litigation . . . is grounded upon the belief that factual truth and fidelity to substantive and procedural rules are best achieved by partisan struggle between equal opponents, which at a minimum means opponents who are equally represented. Moreover, the theory of democratic pluralism assumes that all citizens are equally able to influence the making and application of laws. Given the influence of lawyers in US politics, that assumption requires equal representation by lawyers before both the legislature and the executive at all levels of government.

Virtually every problem in the area of legal services is related to this central issue of equality.<sup>18</sup>

Yet, there is a qualitative difference between the recognition that access to legal representation is an absolute necessity and the characterization of that necessity as a 'right'.

<sup>18</sup> R. Abel, 'Legal Services' in *Handbook of Applied Sociology 1981*, ch. 19.

To elevate the concept of access to justice to the status of 'right' is to view it with symbolism, reverence and, at least, a certain degree of inalienability. This is one argument that has been used to determine an appropriate system of legal delivery. Its proponents argue that this right is protected in the same way as democratic rights, such as the right of a citizen to vote, to assemble, and to speak freely.

The concept of 'rights', though apparently straightforward, is far from unproblematic. Precisely because of their symbolic character, rights are difficult to define. Removed from objective, unimpassioned discourse, they are in fact frequently ignored.

The positive aspect of 'rights' is that they give the person being represented a certain amount of protection from political interference. One of the main objectives of legal services advocates has been to entrench the concept of the entitlement to representation deeply in the public consciousness, in order to place the institutions of legal services on a firmer footing. In the past, the perceived 'charitable' character of legal services has, to an extent, prevented the question of legal needs from being taken seriously in public debate. To seek recognition of an access 'right', then, may well raise the profile of the legal services issue and concomitantly give the access movement a firmer foundation. Difficulties arise in discussing the introduction of the concept of 'access rights', however, since that concept may, in itself, restrict the type of legal services that any particular government, professional organization, or other body may decide to provide.

Rights proponents argue that a juridical model of legal services is the most appropriate delivery mechanism if all citizens are entitled as a matter of right to legal representation. Superficially, the juridical model is attractive to access rights theorists because services are provided on a case by case basis by a wide range of advocates. Such a model is perceived to be a reflection of the independent 'legal system', based on the belief that all litigants can have their cases heard in a comparable fashion and that representation is best accomplished by the 'independent' practitioner.

Opponents of the 'rights' theory condemn its irrational insistence on pursuing individuality over a calculable collective welfare. They argue that a more compelling justification for legal services is a utilitarian approach, recognizing that human existence is enhanced by the provision of such services and that priorities for the development of legal services programmes ought to be determined according to what will generate the greatest benefit for the greatest number of recipients. This approach has

developed in the United States in the last two decades<sup>19</sup> and is an outgrowth of the recognition of many writers that the allocation of scarce resources to legal services requires careful assessment of their effective allocation.

We find that in the United States in the 1980s, the utilitarian approach to legal services is under attack. Professor Marshall Breger is sharply critical of utilitarianism as a guiding principle in legal services delivery.<sup>20</sup> Breger extols the greater humanity of a legal services delivery model which is based upon the 'rights' theory, arguing that utilitarianism requires that value judgments about the legal position of others must be made arbitrarily by disinterested persons. Only rights theories, he argues, give primacy to individual dignity. Thus, the debate is far reaching and is conducted by scholars remote from the usual areas of legal services discourse.<sup>21</sup>

The merits and faults of both theoretical bases for legal services delivery have great implications for the access movement. Utilitarianism is most compatible with a clinical, public-funded, salaried lawyer model of delivery, whereas the rights theory suggests a more traditional *judicare* system. In fact, an imaginative interpretation of the right to counsel may well include both the *judicare* and the community-based delivery models, although it has been seen that at a theoretical level, rights theory and utilitarianism have been perceived as completely incompatible.

<sup>19</sup> The emphasis on broadly based reform, rather than on a case-by-case approach, may be seen in the uniquely American characteristics of the legal services plan in the United States, as explained by Professor Menkel-Meadow:

In reviewing trends in the development of legal aid in the United States, it is essential to note those characteristics of legal aid which are peculiarly American. In 1977, Clinton Bamberger, then a member of the Legal Services Corporation national staff, identified three 'immutable characteristics' of the American legal aid system: (1) public financing, (2) law reform (rule changes) for the poor, and (3) full-time salaried staff lawyers, specializing in 'poverty law' (Bamberger, 1977). To these characteristics, I would add two more. First is the employment of paralegals, who are legal assistants, trained especially to aid in providing services to the poor, many of whom were drawn from the indigenous poverty community. Second is the use of explicitly political forms of advocacy to better the conditions under which poor people live. These include community organizing and lobbying, national research or 'back-up' centres specializing in certain areas of law affecting the poor, and the use of peculiarly American legal constructs to fight the legal battles of the poor—the class action, group plaintiffs, and American constitutional theory as a device for expanding both substantive and procedural legal rights. (Dooley and Houseman, 1982) (Menkel-Meadow, *supra*, note 13, at 31–2. Professor Menkel-Meadow's references are to Bamberger, *The American Approach: Public Funding, Law Reform, and Staff Attorneys* (1977) Cornell Intl. LJ 207–12 and to Dooley and Houseman, *Legal Services in the 80's and Challenges Facing the Poor* (1982), 15 Clearinghouse Review 104–18).

<sup>20</sup> Breger, 'Legal Aid for the Poor: A Conceptual Analysis' (1982), 60 North Carolina LR 282–363.

<sup>21</sup> See R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), and H. L. A. Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1968).

## Models of delivery

The most frequently discussed aspect of legal services is the question of delivery models. Although much of the literature has focused on the distinctions between the use of salaried, full time legal services lawyers as opposed to private practitioners, we find a growing recognition that much of what the providers have accomplished, whether working in legal services on a full time basis or on a case-by-case basis, is not only comparable, but in many instances identical. In reviewing recent developments, the writer discerns in the national reports significant developments in the delivery of legal services concerning the types of clients served, the problems handled, the providers of the service, and the service model. All appeared to be in a state of flux. An observable trend in countries with sophisticated social welfare schemes such as the Netherlands, Finland, England, Canada, and the United States, is the movement towards a mixed delivery system—a development that is worthy of careful analysis.

In our search for a typology or framework for analysis of these recent developments in legal services, it is helpful to contrast the 'service' model of delivery with what has been described as the 'strategic' model of legal services.<sup>22</sup> Such a contrast takes the reader beyond the traditional discussions which tended to become mired in debate between the merits of private and public lawyering delivery schemes. Although service schemes and strategic schemes are not mutually exclusive, it is helpful to recognize that models of delivery of service to low income people have developed within a spectrum in which the poles are represented by a purely service orientation and a model dedicated to the strategic approach. Like the philosophical access rights as opposed to utilitarian approach, an analysis of these approaches and their underlying premises will assist in our examination of the mixed delivery models which have recently emerged.

The service model is the traditional and the most common form of legal services. An outgrowth of the juridical and charitable approach,<sup>23</sup> service models confine their attention to discrete claims and problems brought to a programme by an individual with a readily categorized legal

<sup>22</sup> The author wishes to acknowledge the contribution of Marc Galanter of the University of Wisconsin to this section of the paper. Galanter's paper on 'Making Law Work for the Oppressed' (1983), 3 *The Other Side* 7-15 develops the contrast between 'services' and 'strategic' legal services.

<sup>23</sup> The juridical rights approach to legal aid is contrasted to the welfare rights approach by M. Cappelletti, J. Gordley and E. Johnson, Jr., *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Dobbs Ferry, NY: Oceana, 1975) at 26-7 and at 110-12, and 124-8.

problem. This approach grows directly out of the traditional approach to protecting rights which:

. . . has been essentially legalistic and individual; it involves the promulgation of legal standards defining the obligations of the state, the vesting of corresponding legal rights in individuals, and the provision of judicial or quasi-judicial redress if these state obligations are not met. The end of this approach is to assign each individual his proper rights and responsibilities; the means is to provide objective legal standards and to ensure their impartial application . . . The nineteenth century granted legal protection to the right to aid; however, the right remained in good part charity since distrust of affirmative state action and a concern for a purely formal equality led to reliance on the charitable services of the bar. As that distrust subsided in the face of concern for an effective quality, it was only natural to attempt to combine such action with the traditional approach to protecting political rights.<sup>24</sup>

It is important to note that within the service mode, the lawyer (in some instances, the paralegal) can respond only in cases where clients, aware of their problem, have sought out legal assistance. Whether this assistance is provided by the private lawyer or by the salaried lawyer, in bureaux such as those created by the Quebec Commission des Services Juridiques,<sup>25</sup> or the municipal legal aid offices in Sweden, is of little consequence. The results are essentially the same. The role of the scheme is to represent low income persons who can establish that they are economically eligible and that their problems are worthy of a lawyer's time.<sup>26</sup> Inevitably overloaded, service models can expend little time or energy in educating the community or on outreach programmes. Since service models accept the norms of the legal system and provide a service for poor people which, in the opinion of the administrators (inevitably lawyers), is the same for the poor as for the rich, poor people using service schemes face many of the same obstacles that they would encounter within the traditional setting. Such service models offer little recognition of the uniqueness of the poor person's lifestyle. They neither make the service psychologically more accessible, nor do they attempt to handle problems which have not been on the traditional agenda of legal services (e.g. eviction). The service

<sup>24</sup> M. Cappelletti, J. Gordley and E. Johnson, Jr., *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Dobbs Ferry, NY: Oceana, 1975) at 109–10.

<sup>25</sup> It is worth remembering that there exists a wide variety of methods for establishing 'worthiness'. It may also be determined in direct response to the caseload and funding of the particular scheme.

<sup>26</sup> For a description of the Quebec Commission des Services Juridiques see F. H. Zemans, *Perspectives on Legal Aid: A Comparative Study* (London: Frances Pinter, 1979). The national report on Canada for the First Congress on Civil Procedure written by Zemans, at 98–103.

model reinforces the distance between the 'recipient' and the 'deliverer' of the service by encouraging clients to assume passive and dependent roles in their relation with the legal aid scheme. Lawyers write briefs, interview witnesses, negotiate settlements, and go to court. The client's perspective is generally of an over-worked, under-paid lawyer who is dealing with the immediate problem and ignoring the fundamental cancer of poverty and poverty-related problems that continue to survive and destroy.<sup>27</sup>

In contrast to the service model of legal services, there is the 'strategic' legal services scheme. Such a programme is oriented to identifying the significant social problems facing the community it is serving. While dealing with the inevitable daily problems, a strategic legal services programme attempts to develop a long-term approach of research, reform, and education to deal with the more fundamental issues. Rather than handling cases which are relevant to the lawyer's experiences, a strategic programme sets priorities in one or several areas of concern to a particular community such as the environment, housing, land-ownership, occupational health, or immigration, to enumerate but a few. In concert with the geographic community or the community of interest, the professional will consider collective issues or the complaints of a class of individuals. (Thus, an emphasis on handling the problems of tenants will lead to an analysis of security of tenure and rent control.) A significant distinction between the service and strategic models is in methodology. While the

<sup>27</sup> The major studies of legal services lawyers have been undertaken in recent years in the United States. These studies are of lawyers working for the Legal Services Corporation which goes beyond the service model and is considered to be the basis for the strategic approach. The major studies to date of legal services programmes include Bellow, 'Turning Solutions Into Problems: The Legal Aid Experience' (1977), 34 *NLADA Briefcase*, 4 at 106; Bellow, 'Legal Aid in the United States' (1980), 14 *Clearinghouse Review* 337; Erlanger, 'Lawyers and Neighbourhood Legal Services: Social Background and the Impetus for Reform' (1978), 12 *Law and Society Review* 253; F. Handler, 'Perspectives on Legal Aid: United States', in *Perspectives on Legal Aid: An International Survey*, ed. Zemans (London: Frances Pinter, 1979); J. F. Handler, E. J. Hollingsworth, and H. S. Erlanger, *Lawyers and the Pursuit of Legal Rights* (New York: Academic Press, 1978); Hosticka, 'We Don't Care About What Happened: We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality', 26 *Social Problems* 599; E. Johnson, *Justice and Reform: The Formative Years of the American Legal Services Program*, (NJ: Transaction Books, 1978); Katz, *Poor People's Lawyers in Transition*, (New Brunswick, NJ: 1982); Legal Services Corporation, *Delivery Systems Study*, (Washington: 1980); Menkel-Meadow and Meadow, 'Allocating Legal Resources in a Non-Market Context: The Case of the Legal Services Attorney', paper presented to the Midwest Political Science Assoc. Annual Meeting, (Cincinnati: 1981); Menkel-Meadow and Meadow, 'Resource Allocation in Legal Services: The Limits of Rationality in Attorney Decisions', paper presented to the Law and Society annual meeting (Amherst: 1981); and H. P. Stumpf, *Community Politics and Legal Services: The Other Side of the Law*, (Beverly Hills: Sage, 1975).



service model perceives itself as bound to the court and to litigation, the strategic model views advocacy as only one potential strategy. Other strategies might include tenant organizing, lobbying the legislature, television and media coverage, or community picketing of a particularly abhorrent landlord.

The distinction between the strategic and service models of delivery should not be taken to describe schemes which are mutually exclusive. Most legal service administrators have been attracted to the juridical or service model. The problem inherent in the service approach is that seldom, if ever, are there enough funds available for all needed services to be provided to all persons eligible for the service. As Professor Mary Jane Mossman of Canada has written:

From the perspective of legal aid administrators, moreover, the focus on individual rights prevents decision-making which allocates available funds on the basis of cost-benefit analysis, an eligible client must receive legal aid for a service included by the programme even though, by any objective standards, the funds could provide a greater benefit to an eligible client for services excluded from the programme. Unless funds are available for *all* eligible clients for *any* needed legal services, it is inevitable that legal services will not be 'covered' in a programme using a juridical rights approach.<sup>28</sup>

The attraction of progressive theorists to a utilitarian, welfare, or strategic approach to legal services has grown in large measure from recognition that governments will seldom provide sufficient funds to allow all individual and collective claims to be asserted.

### **Models of legal services**

The discussion of various analytical frameworks for legal services brings us face to face with the significant issues that confront current developments in legal services. The national reports indicate that in all parts of the world an on-going debate is taking place between those committed to developing the welfare rights or strategic approach to legal services and those who are desirous of expanding traditional service models. The national reports clearly indicate that legal services, even in wealthy nations where the welfare state is well developed, remain a fragile movement, frequently lacking direction and unity and existing solely at the whim of government. Unable to distinguish themselves from other social services, legal services have often been the subject of political attack as

<sup>28</sup> Mary Jane Mossman, 'Legal Aid in Canada' (unp., 1983) at 28-9.

governments have become more conservative in the changing political climate of the late 1970s.

The most significant and progressive development in recent years appears to be a movement towards mixed delivery systems which combine aspects of the service and strategic models, and which combine the use of the private bar and salaried lawyers based in clinics to deliver legal services. This move to a mixed system is often a reflection of the political compromises and partnerships necessitated by declining political and financial support for legal aid and the need for political and, in some instances, financial support of the organized legal profession.<sup>29</sup>

In 1977, Professor Vittorio Denti noted the almost exclusive use of a *judicare* system of legal services in European countries:

The first trend, certainly more homogenous with the laws of civil procedure in liberal countries, can be traced in the legal systems which have maintained practically unchanged the scheme of legal assistance introduced in the second half of the nineteenth century. These were based on: (a) the obligation for the lawyer to render free services to indigent litigants; (b) special committees establishing the requisites to be met for free assistance; (c) a preliminary inquiry into the probability of a favourable outcome.

This view of legal assistance as an honorary duty of the lawyer, has remained practically unchanged in the countries (like Italy, Spain and Belgium) where the legislation is still that of the nineteenth century. On the contrary, in other countries, changes have recently been made, leading to the direct or indirect coverage of lawyers' fees . . . All these reforms provide that fees are paid directly to the lawyer on public funds.<sup>30</sup>

Denti did recognize a somewhat different system operating in both Great Britain and Sweden, but noted as well that these systems did not represent a clear break from the *judicare* model:

Like the English reform, the Swedish reform of 1973, though one of the most advanced legal assistance laws in Europe, is a compromise between the traditional model of services rendered by private lawyers and the need to organize assistance by means of public offices established for this purpose.<sup>31</sup>

The *judicare* model must be compared to the community legal services model—the law clinic—which developed in the United States during the

<sup>29</sup> The support of the American Bar Association in the face of the unmitigated attack on the Legal Services Corporation in the United States is the most significant example of this phenomenon.

<sup>30</sup> Denti, *supra* note 1, at 175–6 of the Storme and Casman volume and, with editorial revisions, at 351 of the Zemans volume.

<sup>31</sup> *Id.*, Storme and Casman at 177 and Zemans at 353.

1960s. Denti discusses the community clinic model of legal services solely in respect of the United States, although community-based clinics had developed during the 1970s to a greater or lesser extent in the Netherlands, Canada, Finland, the United Kingdom, New Zealand, and Australia.<sup>32</sup>

The contrast between the traditional service-oriented models which exist in varying degrees in most countries of the world and the community-based law clinic with its more strategic welfare-based orientation operating in the United States still prevails. The service model with the private lawyer as the primary deliverer of services represents the major or exclusive delivery system in France, the Federal Republic of Germany, Great Britain, Japan, Israel, Australia, South Africa, the Netherlands, New Zealand, and the Canadian provinces of Alberta, New Brunswick, and Ontario. But despite the recent commitment by the Legal Services Corporation that at least 10 per cent of their funds would be spent on judicare schemes, the United States has retained a legal services model that is predominantly staffed by salaried lawyers and which continues to take a utilitarian reform approach to legal services.

Many countries with judicare models are developing strategically oriented elements in their programmes. The Netherlands is an interesting example of the trend towards a mixed delivery system. Holland introduced a judicare system in 1957 and extended it during the 1970s. The judicare system still absorbs most of the public funds for legal services, but since 1974 Holland has seen the development of a state clinic movement in the *Buro's voor Rechtschulp* (BVRs). These clinics were first established in 1974, out of a desire on the part of the government and the legal profession to become more directly involved in the community clinic movement which had been initiated in Holland by the development of the law shops during the previous five years. Law shops had been opened by Dutch law students as a response to the student unrest in the late 1960s. The first such law shop opened in Tilburg in 1969 and was inspired by the North Kensington Law Centre in London, England. Legal services were freely provided in the law shops by law students who worked as volunteers. The offices were casual, informal, and client-oriented. The concept was contagious in Holland, and within a few years approximately ninety shops operated on a regular basis throughout Holland. As Freek Bruinsma, our Dutch national reporter, writes:

<sup>32</sup> Some of the developments in these countries are discussed in this paper. In Saskatchewan and Nova Scotia American-style community clinics have been adopted as the delivery model.

The political influence on the law shop movement was much more important than their actual market-share in legal services would suggest. The only, rather controversial figure (based on a cumulation and extrapolation of the annual reports of the biggest law shops) is about 60,000 clients in 1974, a top year for the law shops: this amounts to about 5% of the articulated demand for legal services of individuals. The law shop movement derived its political influence from the fact that it put into practice an alternative legal service: the existence of a law shop was a practical criticism of the professional legal services by the private bar. In the first years of their existence, some doubts were raised about the quality of the legal services by law students, but these were not substantiated, while the law shop movement referred convincingly to the accessibility of the law shop, the kind of legal problems the law shops handled, i.e., welfare state law, and the kind of people the law shops serviced, i.e., low income people. At all these points a law shop scored better than the office of a lawyer, at least in the eyes of the public at large.<sup>33</sup>

By the mid 1970s, the Dutch Bar Association came to accept, or at least no longer to oppose, the law shop concept and recognized that such shops did not detract clients or income from the private bar, but rather expanded the market for legal services by providing lawyers and paralegal services to clients who previously found the system inaccessible. As well, the law shops expanded the demand for legal services by generating litigation and referring previously unrepresented clients to the private bar. The Dutch judicare system, in existence for nearly twenty years, theoretically available for both litigation and legal advice, was administratively cumbersome and ill equipped to handle welfare law problems. The Bar Association joined forces with the law shop movement in lobbying the Dutch government to set up the BVRs. After 1974, when the government took over their initiative, some law shops continued to exist, providing sporadic services dependent upon voluntary assistance.

BVRs were funded by the Dutch government and some forty offices have been established between 1974 and 1980, employing approximately 200 lawyers. These offices have the dual purpose of granting legal aid certificates for the judicare scheme and giving readily accessible legal advice. Although the staff lawyers are progressive, their heavy caseloads and conservative management boards have limited the possibility of social action. The use of the *Buros* had grown to 250,000 clients in 1981, approximately five per cent of the Dutch population.<sup>34</sup> *Buros* not only grew in number

<sup>33</sup> Bruinsma, Dutch National Report (1982), at 4.

<sup>34</sup> *Id.* at 6. An empirical study conducted in 1979 by the Dutch government examined the distribution of the clients of *Buros* and law shops. The income distribution in the client group matched approximately the income distribution of the population as a whole. Selection of clients is regarded as incompatible with the Dutch constitution (*id.* at 8).

and size, but their budget increased tenfold from 1977 to 1981, when it represented 9 per cent of the total legal services budget.<sup>35</sup>

A significant empirical study of legal services in the Netherlands was conducted by Professor Freek Bruinsma in conjunction with law students. The project adopted the consumer's perspective with respect to the actual access to and quality of public legal services in Holland. A law student went as an undercover client with a self-made problem for advice to different BVRs. The Bruinsma study showed that one-third of the advice given was of a poor quality while one-fifth was considered to be of a really bad quality. According to the law students, they were quite often given incomplete or out-of-date information which would have impaired the client's legal position. The report was critical of both the legalistic attitude of the salaried lawyers and the highly service oriented approach of the Dutch *Buros*.<sup>36</sup> The Dutch mixed delivery system is very much a service scheme with a minimal reform component. As Jeremy Cooper writes:

Access for all, national conformity, lack of local community involvement, bureaucratic thinking on policy: these are the features of the Buro philosophy, and they do not make happy bedmates for the romantic political radicalism that was sought in the early 70s to use lawshops as a spearhead for more fundamental social reforms within the state as a whole.<sup>37</sup>

Finland is another example of a country that expanded its judicare system in the 1970s to include legal services offices staffed with full-time lawyers. A system of 'common legal aid' was created at the commune level. Communes were allowed to establish legal aid *Buros* either alone or with other communes. By 1981 virtually all of the population was included in this *Buro* system wherein one or two communities received service from a full-time lawyer and one clerk. The programme was staffed by young, inexperienced lawyers who were controlled through the Finnish Bar Association. Workers in the common legal aid programme acted in a fashion comparable to lawyers who deal primarily with court matters.<sup>38</sup> The

<sup>35</sup> Expenditures for legal services jumped from 25 million guilders in 1972 to 225 million guilders in 1982 (Bruinsma, Dutch National Report (1982), at 10).

<sup>36</sup> See *id.* at 8-10.

<sup>37</sup> J. Cooper, 'Preserving Justice for the Poor: Can Public Legal Services Survive a Recession?' (unp., 1982) at 22.

<sup>38</sup> The Finnish national report offers a breakdown of their caseload:

Family	30%	Criminal matters	12%
Execution of wills	17%	Administrative matters	11%
Housing rents	5%	Other civil matters	20%

(Nousainen, Finnish National Report (1982) at 15).

Finnish system seems to be another example of the extension of the service model which places little emphasis on aggregating claims or pressing for reform of either the substantive law or the position of underprivileged persons.

A most interesting development in mixed delivery systems has occurred in Canada. Legal aid in Canada has been accepted in the last decade as a joint venture of the legal profession and the federal and provincial governments. Although Canada does not have a nationally administered legal services scheme, as is the case in the United States, there is some level of uniformity in the service delivered by the various provincial schemes because of the federal government's introduction of a cost-sharing scheme for criminal legal aid in 1972. Because the Canadian Constitution places the administration of justice within provincial responsibility, it has allowed Canada to develop twelve different legal aid schemes (in the ten provinces as well as in the Yukon and Northwest Territories). Thus, we see in Canada the full range of legal services from exclusively *judicare* to combinations of *judicare* and community clinics, to exclusively community clinics at the other end of the spectrum. Development of provincial schemes rather than a centralized federal scheme has encouraged a number of experiments, as well as an interchange of ideas and experiences between the provinces. The provincial funding base and structure has allowed Canada to avoid the political onslaught of legal services which recently took place in the United States.

The various Canadian approaches can be summarized into three major strands: *judicare*, salaried lawyers, and the mixed delivery system—which has been labelled the 'Canadian compromise'. The first government funded legal aid scheme to be introduced in Canada was the *judicare* model, in 1967, in the province of Ontario. This scheme was a service delivery model funded by the government of Ontario and administered by the provincial Bar Association—the Law Society of Upper Canada. Services were delivered on a case-by-case basis by private practitioners to clients who were able to demonstrate eligibility for a legal aid certificate. Today, New Brunswick, Alberta, and the Yukon territories operate exclusively *judicare* schemes. At the other end of the spectrum we find that Nova Scotia, Saskatchewan, and Prince Edward Island have established salaried lawyer models of legal services. The 'Canadian compromise' of a mixed-delivery system has developed in the provinces of Quebec, Manitoba, British Columbia, Newfoundland, and most recently, in Ontario.

Professor Mary Jane Mossman, our Canadian national reporter, writes:

In Canada, most legal aid programs have adopted what is essentially a juridical rights approach, sometimes with added special programs modelled on the rights approach. The juridical rights approach, with its emphasis on defined 'coverage', is in place in six provinces (Alberta, Saskatchewan, Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland) and the two territories . . . In three other provinces (Manitoba, Quebec, and British Columbia), the legislation provides essentially for a juridical rights approach but there is some limited scope for a welfare rights approach as well. In Manitoba, for example, neighbourhood legal aid centres created by corporations appear to have encouraged law reform activities by law centres, in addition to the case by case services required by the statute; the Annual Report of the Quebec Commission contains details of the activities of individual regional corporations although, as the report notes:

'There is a marked tendency to put more emphasis, in the annual report, on community activities rather than activities pertaining to the individual representation of clients before the Courts. This is not significant with respect to the daily reality of the work implied for each type of activity. In fact, the individual representation of clients counts for the vast majority of efforts . . .'

In British Columbia, the Legal Services Society is organized primarily as a juridical rights model of legal aid services, although it also provides funding (or partial funding) to a few independent organizations which have law reform mandates in the nature of the welfare rights model.<sup>39</sup>

As can be seen from Professor Mossman's report, the Canadian legislation in mixed delivery systems is permissive rather than requiring the implementation of a welfare rights or strategic model of legal services.

Perhaps the most controversial mixed delivery system has been the modified welfare rights system which has evolved in Ontario. As in the Netherlands, the profession has grown to gradually accept the concept of community-based clinics staffed by salaried lawyers. The profession's acceptance of the welfare rights approach was brought about in no small measure by two judicial inquiries which strongly approved the clinic model and encouraged government to fund clinics with a more strategic and community orientation. There are over 45 clinics in Ontario operating with many features of the American welfare rights model of legal services. Some are speciality clinics providing services in specific areas of the law,<sup>40</sup> services to ethnic communities, including Native

<sup>39</sup> Mossman, *supra* note 28, at 30-1. The interior quotation is from Commission des Services Juridiques, *Ninth Annual Report*(1981), at 25.

<sup>40</sup> The strength of the community clinic movement in Ontario is its diversity and the specialization of its clinics. The speciality clinics include the Canadian Environmental Law Association (CELA), Metro Tenants Legal Services, Tenant Hotline, Landlord's Self Help—all located in Toronto.

Canadians,<sup>41</sup> or clinics dealing with underprivileged groups in the community such as children and the handicapped.<sup>42</sup> Community-elected boards of directors establish financial eligibility guidelines and service priorities so that the caseload accepted is not solely on the basis of individual merit, but with reference to the likelihood of establishing significant reform for a client group. The boards have full responsibility for allocating limited resources to the areas of service that they determine will be most effective.<sup>43</sup> As an auxiliary of the original *judicare* scheme, the Ontario clinics have been able to develop a strategic approach to legal services and in most instances move beyond a service model to being involved in community education, community development, and some significant law reform litigation. These clinics are involved in some of the most significant and far reaching projects affecting low-income persons in Canada.

Before concluding our discussion of mixed delivery systems, it is important to briefly consider the development of the British law centre movement. The United Kingdom has, since 1970, seen the development of law centres in England and Wales which have taken a strategic and social change approach to legal services. The first law centre opened in North Kensington, London, in 1970. This office had a high profile from the time of its opening, having involved itself in controversial issues of police harassment of West Indian immigrants and committing itself to the housing issues of the racial minorities who were locating themselves in metropolitan London. Although North Kensington continually fought for its survival, it was eventually able to consolidate its position financially and professionally. By 1974, there were five law centres in England, each of which was operated independently, was publicly funded, had its own community board, and was staffed by a full-time staff of law clerks and solicitors. The English legal professions have given limited support to the law centres and have on occasion joined the public outcry against the termination of funding for several law centres.

<sup>41</sup> The Centre for Spanish Speaking People, located in Toronto since 1972, is the oldest ethnic clinic still in existence. There is a growing number of clinics serving Native Canadians, including Kenora Community Legal Clinic and Thunder Bay District Native Legal Counselling Services. Staff in both Native clinics speak Ojibway and include Native paralegals.

<sup>42</sup> Two important clinics are Justice for Children and Advocacy Research Centre for the Handicapped (ARCH).

<sup>43</sup> The clinics are also located in Toronto and concentrate on test-case litigation, lobbying for reform of legislation, community education, and some case-handling for their specific constituency.



By 1980, forty-two law centres were in operation in England and Wales, with the majority located in urban regions. The strength of the law centres has been their local management by members of the client community who have been prepared to join the struggle to sustain the continued existence of their law centre.<sup>44</sup> Funding for the law centres has been diversified and has come primarily from the Department of the Environment, with a stipulation that there be a 25 per cent matching contribution from the local government where the law centre is located. This diversity of funding has allowed the law centres to be resistant to attack, as no one government agency could close all of the centres. Since 1974, a law centre federation has existed and carries out a programme of new centre development, staff training, and publication of an excellent newsletter.

Cooper has written that the short-term strength of the law centre movement in England is its deep community roots, diversity of funding, and developing co-ordination. But he suggests that, in the long term, law centres will probably remain a marginal element to the state provision of legal services to the poor.<sup>45</sup> The marginality of the British law centres may ultimately be perceived as their major strength and allow the law centre movement to flourish as a strategic element within the basic judicare scheme.

The national reports on developments in legal services note the continued concern with the assessment of existing legal services schemes. In common law countries where the judicare model took root in the early 1970s,<sup>46</sup> we find a movement in the early 1980s to broaden these schemes to include programmes with reform components.<sup>47</sup>

National reports also note the caseload pressures on legal services offices. It is these pressures which prevent these offices from responding to their reform agendas and force them to deal only with burgeoning caseloads. Recent studies<sup>48</sup> in the United States indicate that American

<sup>44</sup> By comparison, the struggle for the continued existence of the Legal Services Corporation in the United States was waged by staff attorneys and the American Bar Association; the American client community had only limited involvement.

<sup>45</sup> *Supra* note 37, at 36.

<sup>46</sup> For example, Canada, Australia, New Zealand, and England.

<sup>47</sup> Our New Zealand national reporter, Smith, writes of widespread discontent with the existing judicare model of services. The first neighbourhood law office opened in Auckland, in August of 1977. As in other jurisdictions where professionally dominated legal services schemes already existed, the Grey-Lynn Law Centre encountered opposition. Under the supervision and control of the Auckland District Law Society, the project has had only limited community involvement in its administration and must continue to legitimate itself with its two distinct constituencies; its clientele and the legal profession.

<sup>48</sup> *Supra* note 27 for a full listing of recent American studies.

legal services lawyers have become acclimatized to their work and no longer engage on a day-to-day basis in the political struggles against the issues that fundamentally affect their communities.

According to Gary Bellow, former legal services attorney and presently a law professor and teacher of legal services lawyers at Harvard University, the practice of legal services lawyers in the 1970s was characterized by routine handling of cases, low client autonomy and increased client dependence on legal services staff, a tendency to favour settlement over litigation, and a focus on needs as presented by the client rather than as uncovered by the lawyer's broader investigations.<sup>49</sup> Bellow attributed much of this behaviour to the crushing pressure of high caseloads,<sup>50</sup> the complexity of cases that could consume all of the lawyer's time, and the emergency quality of many of the cases. As Bellow has noted:

Increasing amount of regulation and law governing activity in the United States makes the possible number of cases in any given poor population extremely large if not unlimited. Every conflict in the family, at school, at work, or with a vast array of governmental institutions has some legal aspect—that is, it is capable of being handled in whole or in part by a lawyer. Moreover, it is now reasonably well established that demand for legal services increases with supply. The more lawyers that are available, the more clients who will seek their help.<sup>51</sup>

Simply put, our national reports from both Canada and the United States indicate that with the expansion of the caseloads in both the judicare and clinic systems of legal aid the two schemes have become virtually indistinguishable. Judicare schemes have generated some mixed delivery aspects with limited reform elements, while the clinic model has moved away from strategic approach with an inherent social philosophy and responded to the pressures of caseloads and individual client demands.

Mossman, our Canadian national reporter, writes:

In the result, there is remarkable uniformity in the services actually available to legal aid clients across Canada, notwithstanding the difference in models in delivering services. The combination of minimum standard requirements in the cost-sharing agreements with the federal government, and the inevitable limit on provincial spending for legal aid programmes, has resulted in a salaried model which can offer some accessibility and expertise, but which generally

<sup>49</sup> See Bellow (1977), *supra* note 27.

<sup>50</sup> Average caseloads hovered between 100 and 400 cases per lawyer per year during this period. *Vide* Auerbach Corporation, *Office of Legal Services Individual Project Evaluation Final Report*, (Washington: 1971).

<sup>51</sup> Bellow (1980), *supra* note 27; see also Bellow and Bellow and Kettleleson, 'The Politics of Scarcity in Legal Services Work' (1979), 36 *NLADA Briefcase* 5–11.

cannot provide more than the services traditionally available in the fee-for-service model.<sup>52</sup>

Katz has arrived at similar conclusions regarding the situation in the United States since the creation of the Legal Services Corporation in 1974:

In the seventies, reform activity in Legal Services was treated officially as a professional, apolitical matter. Within the administration of Legal Services, 'anti-poverty' rhetoric passed from being an officially sanctioned routine—Legal Services Programmes originally had to report annually to the OEO—Office of Legal Services with an evaluation of the year's progress in reducing poverty—to an embarrassment to a dimming memory. Ever since its creation in 1974, the Legal Services Corporation has steered clear of indignant commentary on the social reality of poverty in America. The research projects funded by the Corporation have emphasized standard professional and administrative concerns—how to keep the federal courts open to Legal Services litigation, how to reduce staff turnover—not the development of a guiding social philosophy on a relation of the law to the social class justice for the poor.<sup>53</sup>

The fundamental question continues to be: what type of service model should be implemented or, for that matter, retained, in light of the similarity of the services performed? Cost may, unfortunately, become the basis for such a determination. The significant issue of a system's potential is overlooked in its concern with cost effectiveness. In Canada, the cost issue became significant at the end of the 1970s, as government restraint programmes threatened both existing and proposed legal aid services:

When money was more readily available, discussions about legal aid concentrated on meeting needs. Now discussions focus on controlling cost. But the objectives of legal aid have not changed, they still relate to meeting needs. What has changed is the resources available in legal aid. Thus, this, like our newly heightened interest in the cost of justice, is a result of government financial restraint.<sup>54</sup>

Two studies of legal aid costs in Canada are noteworthy. A three-year evaluation was undertaken in the province of British Columbia, to analyse the cost of delivering criminal legal aid services under a salaried, public defender system.<sup>55</sup> This study concluded that there is little differ-

<sup>52</sup> *Supra* note 28, at 46.

<sup>53</sup> Katz, 'Legalizing Poverty: Poor People's Lawyers in Transition' (unp., n.d.) at 3.

<sup>54</sup> 'Legal Aid in the Age of Restraint', quoted in Mossman, *supra* note 28, at 48–9.

<sup>55</sup> As there was no public defender system in British Columbia, it was necessary to establish a small project office staffed by three full-time lawyers, a paralegal, and a secretary. The public defense office routinely offered cases to the private bar when it became overloaded or when a conflict of interest arose, but cases were referred in blocks and there was

ence in cost of services whether provided by a salaried lawyer or through a fee-for-service model using lawyers in private practice.<sup>56</sup>

Significantly, related costs within the justice system rose dramatically under the judicare schemes in comparison with the public defender system. The British Columbia study concluded that judicare lawyers pleaded their clients guilty less often than public defense lawyers<sup>57</sup> and that judicare lawyers proceeded to trial more often than public defenders.<sup>58</sup>

Judicare and public defense clients experienced overall similar guilty rates, however, with about 60 per cent of the cases ending with guilty verdicts.<sup>59</sup> There was, however, a significant difference in sentences received: about 30 per cent of public defense clients, compared to 40 per cent of judicare clients, were sentenced to jail terms.<sup>60</sup> The relatively higher number of judicare clients receiving jail terms implies higher costs for correctional institutions for these clients, in addition to the costs of legal representation.

no screening of individual cases prior to referral. The study involved a comparison of data on all cases handled by the public defender lawyers and all cases referred to private practice lawyers during the period of the study.

<sup>56</sup> The average costs per case were as follows:

	Vancouver Judicare	Burnaby Judicare	Burnaby Public Defense
Average cost per case			
With eligibility assessment	\$263.66	\$225.36	\$235.65
Without eligibility assessment	253.07	218.53	227.62

The results of this study may be subject to quite dramatic changes with only small shifts in the variables. The report indicates that, 'if the caseload in the Criminal Defense Office were increased by one case per lawyer per month, the average public defense cost would drop to \$223.00, or effectively the same average cost as a judicare case. An increase of four cases per lawyer per month would decrease the average cost for a public defence case to \$192.00, thirty-three dollars below the average judicare cost. The determination of accurate cost comparison depends as well on the level of judicare costs which are directly related to judicare staff.' (Patricia Brantingham and Peter Burns, 'The Burnaby, British Columbia Experimental Public Defender Project: An Evaluation' (Dept. of Justice of Canada, and BC Legal Services Society, 1981), Report III. The table is at page 61, and the quotation at 65).

<sup>57</sup> Percentage of cases ending in a guilty plea:

Vancouver Judicare:	35.9%
Burnaby Judicare:	38.8%
Burnaby Public Defense:	51.0%

(*Id.* Report II at 35.)

<sup>58</sup> Percentage of total cases going to trial:

Vancouver Judicare:	42.7%
Burnaby Judicare:	36.4%
Burnaby Public Defense:	29.1%

(*Id.* Report II at 36.)

<sup>59</sup> *Id.* Report II at 40.

<sup>60</sup> *Id.* Report II at 46.

While public defense clients obtained more lenient sentences, the fact that more of them pleaded guilty raised the possibility that public defence clients had been denied the opportunity of a fair trial to determine guilt:

However, . . . in order to obtain those sentences, public defenders are entering guilty pleas for clients who would have been acquitted had they been represented by a member of the private bar. This fact goes to the heart of the purpose of defense counsel within that system . . . [If] use of public defenders results in guilty pleas by a statistically significant number of accused persons who have been found not guilty at trial, that alone is a reason for rejecting the public defender system of legal defense.<sup>61</sup>

The British Columbia research does raise questions about the assumption that the salaried service model is necessarily more cost effective. It also forces the legal aid analyst to compare the quality of service provided. Mossman writes: 'The report's value, however, lies in its clear demonstration of the mutability of cost figures for judicare and public defender services, depending on the tariff levels and payment categories for fee-for-service lawyers, compared to case volumes and salary levels for the salaried lawyers.'<sup>62</sup>

It is significant to compare the British Columbian results with cost studies in the Province of Quebec in 1981, where the Commission des Services Juridiques provides both criminal and civil services through both private practitioners and salaried lawyers.<sup>63</sup> In 1980-1, the Quebec Commission operated 142 legal aid offices, of which forty were only open part-time. Three hundred and thirty-one lawyers and 442 other full-time staff were employed through this scheme.<sup>64</sup> Of the 200,332 cases handled in 1980-1, 69.3 per cent were handled by salaried staff and the remaining 30.7 per cent were referred to private lawyers. A cost comparison was undertaken using the methodology of an earlier study.<sup>65</sup> The latter study

<sup>61</sup> 'Brief Presented on Behalf of the British Columbia Section of the Canadian Bar Association concerning the Burnaby Public Defenders Pilot-Project Study' 1982, at 23.

<sup>62</sup> *Supra* note 28, at 56. The 1982 cutback in tariffs in British Columbia would have made the judicare services even most cost effective than the salaried lawyers. Only by significantly increasing case volumes or reducing salaries could the salaried lawyer model retain its effectiveness.

<sup>63</sup> 'Evaluation de l'Aide Juridiques' (1982), at 35-6.

<sup>64</sup> *Id.* at 22-3.

<sup>65</sup> 'Etude des Coûtes d'Execution des Dossiers Juridiques' 1977-8, discussed in *id.* at 56 and 80.

confirmed the cost effectiveness of the salaried model demonstrated by the earlier study.<sup>66</sup>

The 1980-1 evaluation report in Quebec, indicates that the increase in the cost of salaried legal aid services was less than 14 per cent between 1977-8 and 1980-1, and could be related primarily to the increase in the average years of experience of salaried lawyers working in the Quebec plan.<sup>67</sup> The Quebec study also noted the relevance of the tariff: for example, a tariff increase effective March, 1978 meant large percentage increases in costs for criminal and family legal aid cases handled by private practitioners.

The two Canadian costs studies, in Quebec and British Columbia, arrived at different results with respect to the comparative costs of salaried and private lawyers. Any comparison between the sets of results, however, must take into account certain differences in the scopes of the reports. The Quebec figures are based on a comparison of the delivery of both civil and criminal legal aid services, while the British Columbia study was much more restricted, with a salaried public defender office created specifically for the project. It is difficult to assess the relative effects of the tariff paid to private lawyers in Quebec and British Columbia to determine what, if any, correlation the tariffs would have on the outcome of the studies. The Quebec study attributes the cost effectiveness of the salaried model to the increasing experience of the staff,<sup>68</sup> but also notes that cost effectiveness seems to increase when salaried offices employ three or more lawyers.<sup>69</sup> The Quebec study would appear to be more meaningful than the British Columbia study both because of the larger caseload and the greater number of lawyers, and the length of time that the Quebec legal aid services has been in existence. Although government and bureaucrats continue to become much more concerned with the

<sup>66</sup> *Couts Comparatifs d'Execution des Dossiers d'Aide Juridique, 1980-1:*

1	2	3	4
Nature de Dossier	Cout par dossier avocats salaries	Cout par dossier pratique privée	Variation 3 vs. 2
Séparation, divorce	\$267.14	\$319.53	19.6%
Autre matrimonial	108.79	133.89	23.1%
Compte en defense	84.12	233.77	166.0%
Autre civil	65.27	142.37	118.1%
Criminel	105.17	214.22	103.7%
Moyenne (Average)	\$105.44	\$221.58	110.1%

Source: 10th Annual Report Commission des Services Juridiques at 160.

<sup>67</sup> Lawyers had an average of 6.8 years of experience in 1977-8, and 8.5 years in 1980-1 (*supra* note 63, at 81).

<sup>68</sup> *Id.* at 81.

<sup>69</sup> *Id.* at 81.

issue of cost effectiveness, discussions of cost have done little to advance the discussion of legal services to low income people. Since both salaried and private lawyers schemes provide similar services, the cost effectiveness discussions become a digression from the crucial discussion of the democratization of legal services and provision of appropriate legal services to respond to the socio-economic needs of underprivileged and low income persons. Mossman writes in her Canadian report:

As is evident, there has been a major focus on the issue of relative cost in the delivery of legal aid services in Canada in recent years. To an extent, the focus on the cost-effectiveness has detracted from, rather than contributed to, a better understanding of legal aid objectives. Thus, rather than questioning decisions about equality objectives or the approaches to providing legal aid services, most legal aid efforts have been directed to assessing models of delivering such services; and because both salaried and private practice lawyers provide essentially similar services, the focus on cost effectiveness has been directed very narrowly indeed. Moreover, the preoccupation with cost-effectiveness seems to have obscured, for everyone except the administrators and government, the fact that salaried lawyer services provide an opportunity for cost control—potentially a much more significant feature than cost savings even on the scale reported by the Quebec evaluation.<sup>70</sup>

Although I have concentrated my discussion on new developments in models of legal services, particularly the evolution of the mixed delivery system, it is important to recognize that in most countries we find continued limited legal services programmes for low income persons provided by a variety of juridical rights approaches. In western countries, the juridical rights schemes have seen some considerable developments. In Germany, in 1980, the *Prozesskostenhilferecht* (law concerning relief of litigation costs) replaced the traditional *Armenrecht* (poor man's law). The new law retains the basic structure of the German *judicare* schemes but increases both the numbers of persons who are entitled to legal services, and more importantly, for the first time provides for legal advice outside of a litigation context.<sup>71</sup>

*Judicare* remains the preponderant model of legal services in France, New Zealand, Italy, Japan, and Australia. Within these countries there is

<sup>70</sup> *Supra* note 28, at 59–60.

<sup>71</sup> The German legal aid system is administered by the courts rather than by the legal profession. A potential litigant obtains a certificate of means from the town hall and then approaches a lawyer or court officer. There, the nature of the claim is reduced to its fundamental principles in writing. Application is then made by the litigant or his/her representative to the judge who will eventually try the case. This judge decides whether or not to grant legal aid. The decision is rendered according to the dual test of the reasonableness of the claim and the means of the litigant.

considerable variation in the services provided. Within the European Common Market, no right to counsel for accused persons exists in either Italy or France, despite Article 6 of the European Convention.<sup>72</sup> Although there is a growing awareness even in *judicare* schemes that services may be a legitimate expectation of tenants, consumers and welfare recipients, such services are often not available. This applies even in wealthy nations such as Japan, where until recently 50 per cent of the legal aid cases were traffic offences.<sup>73</sup> The largest growth area in Japan has been in the provision of legal services for domestic disputes. Similarly, despite the highly sophisticated social welfare scheme in Germany, there has been no development of independent legal representation in non-traditional matters; although advice can be obtained at some social welfare offices, very little representation takes place for basic poverty law problems. In Poland, where there is no private legal practice, costs are exempted in some matters when need is shown. Some assistance is given over and above the cost exemption by the judiciary whose general duty is to assist parties and inform them of their legal rights. As well, Polish social organizations attempt to resolve disputes by conciliation and may provide lawyers in certain limited instances.<sup>74</sup>

In countries where legal aid schemes have been in existence for some time, we note the development of a private legal aid bar which has become specialized in handling, not only domestic and criminal disputes, but also social welfare cases. *Judicare* administrators are being pressured by the expanding legal aid bar to grant certificates in landlord and tenant disputes, immigration cases, and social welfare matters which were traditionally considered to be outside the orbit of the juridical model. Private

<sup>72</sup> Article 6, paragraph 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states: 'Everyone charged with a criminal offence has the following minimum rights: . . . (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.' (Quoted in Varano, Italian National Report (1982), at 3-4).

In addition, paragraph 1 provides: 'In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' (Quoted in Varano, Italian National Report (1982), at 4.)

In the *Airey* case of October 9, 1979, the European Court of Human Rights held that the inadequacy of the Irish legal aid system constituted a violation of the 'fair hearing' requirements of this paragraph.

<sup>73</sup> Uchida, Japanese National Report (1982). The statistics refer to the assistance scheme organized by the Japanese Legal Aid Society. Since the Legal Aid Society uses the same criteria to grant aid as the government scheme, it may be assumed that a roughly comparable figure is applicable to the government scheme.

<sup>74</sup> Erecinski, Polish National Report (1982), at 117.



lawyers who have worked in clinics, either as part of their legal education or as staff lawyers, have often chosen to remain involved within the practice of poverty law. Similarly, many young lawyers who are unable to penetrate the corporate law firms or more traditional areas of practice have gravitated to legal services. Thus we note the growth for specialization in poverty law in the private and public sectors. The continued development of both the quality and quantity of poor people's lawyers is dependent on the willingness of governments to allow legal aid funds to grow so that tariffs for private lawyers and salaries for public lawyers can be kept at a relatively tolerable level.

### **Professionalization of legal services**

As this paper has already discussed, the traditional provider of legal services has been and continues to be the lawyer. The professional monopoly has protected the legal professions from intrusion from immigration consultants, divorce advocates, or welfare rights workers by various forms of policing of intruders. The significant development in provision of legal services, particularly in the community legal aid clinic, has been the growing use of paraprofessionals, non-lawyers providing legal services to low-income persons. Non-lawyers are being utilized in the public sector, either directly delivering legal services to low-income citizens or assisting staff lawyers in community legal aid clinics. Since legal aid services schemes have not permitted low-income citizens to retain paralegals directly or indirectly on a fee for service basis, the public sector paralegal or the community legal worker, as they have come to be known in Ontario, is the result of the community legal aid movement in North America and the English law centre. In Poland, where there are no private law firms and where citizens may represent themselves or be represented by a member of their family, most persons are in fact represented by advocates.

Public-sector paralegals bring to their tasks varying degrees of formal training and experience, but they usually have a special awareness of the situation confronting the potential client. In the United States, these workers have been recruited from within the community, sometimes from ranks of formal social security claimants, and are therefore uniquely in tune with the social and legal problems confronting the poor. There are distinct advantages to the familiarity and interest the legal worker brings to a situation. Thorough familiarity with the community and its needs, an ability to communicate easily with members of the community,

and the potential for innovative solutions not always apparent to the university-trained professional are all distinguishing features of the legal worker. It has been argued that the paralegal can articulate more effectively the problems of the underprivileged person or community group to government and public agencies which dispense services and monies to the poor.<sup>75</sup>

The use of non-lawyers in the delivery of legal services first arose in the American legal services movement in the 1960s. Initially, community clinics were staffed primarily by salaried lawyers and little use was made of either volunteer members of the bar or paralegals. This situation was severely criticized by Edgar and Jean Cahn. In their article 'What Price Justice: The Civilian Perspective Revisited',<sup>76</sup> they noted the failure of the neighbourhood clinics to use non-professionals on their delivery staff:

Finally, with respect to manpower, we have created an artificial shortage by refusing to learn from the medical and other professions and to develop technicians, non-professionals and lawyer-aides-manpower roles to carry out such functions as: informal advocate, technician, counsellor, sympathetic listener, investigator, researcher, form writer, etc.

At present lawyers are expected to perform all these functions. To so equip them, lawyers are put through an extensive period of formal training and then apprenticeship that limits the number that can be produced. Yet lawyers spend only a small portion of their time performing functions which cannot be performed equally well by less thoroughly trained persons. Nonetheless, the profession has refused tenaciously to delegate any of these functions to anyone else.<sup>77</sup>

Today, paralegals are a significant element in the delivery of legal services in the United States and Canada, both in clinics and in mixed-delivery systems.

The makeup of the staff of clinics and the relationship between the number of legal and non-legal personnel is of particular interest to the study. During the mid 1970s, Ontario clinics employed three paralegals for every lawyer. While the percentage of community legal workers relative to the total number of people employed in the clinics declined between 1976 and 1980, the ratio of community workers to lawyers is still two to one in favour of the paraprofessionals.<sup>78</sup>

We find by comparison that paralegals composed 17.5 per cent of the total staff in American legal clinics in 1974, while attorneys composed 39.4

<sup>75</sup> Wexler, *Practicing Law for Poor People* (1970), 79 Yale LJ 1049.

<sup>76</sup> Cahn and Cahn, (1966), 41 Notre Dame Lawyer 927.

<sup>77</sup> *Id.* at 934-5.

<sup>78</sup> Zemans, 'The Public Sector Paralegal in Ontario: Community Legal Workers' (1980), *Canadian Legal Aid Bulletin* 30.

per cent.<sup>79</sup> From another perspective, the Ontario clinics employ twice as many paralegals as lawyers, where the American clinics employ half as many paralegals as lawyers. The greater proportion of community workers employed in the public sector in Canada can be explained by the resistance of public-sector lawyers in the United States to both the hiring of and the delegation of responsibilities to paralegals, and the unwillingness to provide adequate funding to paraprofessionals.

In recent years the number of paralegals working in public-sector legal services in countries with a welfare perspective on legal services has increased substantially.<sup>80</sup> Concern has shifted from an initial preoccupation with the creation of the role of the paralegal to an emphasis on specific jobs, standards of performance, quality control, accreditation, and training needs. Functions which public-sector paralegals perform in the delivery of legal services may be characterized as follows:<sup>81</sup> (1) information giving: the paralegal is often called upon to provide information and advice on legal matters ranging from landlord and tenant to criminal law. The client will typically wish to be informed about: what the governing law is, what protection the law grants him in the situation, and which course of action is most advisable in the circumstances. (2) Assistance: this involves identifying and researching the legal problems, collecting and analysing the factual and legal material, providing procedural assistance, and in some instances preparing legal forms. (3) Advocacy: this function can be subdivided into informal and formal advocacy. The paralegal often functions as mediator and conciliator, attempting to negotiate in an informal manner through letters, telephone calls, and discussions with the parties. Where no settlement is possible, the paralegal will take a formal advocacy function. He will prepare his client's case for formal dispute resolution and will represent the client in the designated forum. Paralegals have the capacity in most jurisdictions to appear before administrative tribunals, lower courts, and legislative committees.<sup>82</sup> (4) Public education:

<sup>79</sup> National Survey of Paralegals in OEO Legal Services Projects, (1974).

<sup>80</sup> In Jamaica paralegals are employed in the Kingston Legal Aid Clinic, the Mid-Island Clinic and the Montego Bay Clinic and played a significant role in each of these programmes.

<sup>81</sup> In the development of the paralegal in England, see Michael Zander, *Legal Services for the Community* (London: Temple Smith, 1975) especially at 299–302, and *The Royal Commission on Legal Services, Final Report* (1979), vol. 1, at 406. Canadian developments with respect to paraprofessionals in law are discussed by Zemans in 'The Non-Lawyer as a Means of Providing Legal Services', Chapter 9 *Lawyer and the Consumer Interest: Regulating the Market for Legal Services*, Evans and Trebilcock, (Toronto: Butterworth, 1982).

<sup>82</sup> The work of Centro Permanode Estudios (CEPES) is noteworthy and was discussed by Diego Garcia-Sayan at the first Conference on Legal Services in Latin America and the Caribbean in San Jose, Costa Rica in October 1981.

this includes the preparation of booklets, newsletters, and other literature for popular dissemination and the planning of workshops and seminars. These aim at making the general public more aware of their rights and of the remedies available. Educators may also use the mass media such as newspaper columns, radio, and television to bring to the attention of the community their legal rights. This latter function has been used effectively by paralegals in Latin America. Land reform information, for example, has been brought to the attention of peasants in Peru by using comic strips.<sup>83</sup> (5) Community development and law reform: this function includes facilitating the organization of the community into groups that are prepared and able to exercise their rights effectively and press for genuine social change.

Any discussion of the role and functions of paralegals in the provision of legal services must consider the extent to which they are capable of functioning independently. This writer has conducted empirical studies on this topic—studies which conclude that paralegals working in community clinics have been given the freedom to handle a wide assortment of legal tasks with little or no supervision by staff lawyers.<sup>84</sup> Much of the work done by the paralegals has been handled effectively, efficiently, and economically. There are legal services programmes in Canada which are staffed exclusively by paralegals who received limited supervision from either part-time lawyers or private practitioners.<sup>85</sup> Such speciality clinics have tended to work in specific areas of the law such as housing or social assistance.

As funding for legal services becomes more constrained, the need for legal services continues to increase. Legal paraprofessionals allow the delivery of both effective traditional legal services and more innovative and reform-oriented services at a moderate cost and in a responsive

<sup>83</sup> Paralegals are allowed to appear at tribunals and before lower courts as 'agents' or 'friends' or at the discretion of the presiding judge or chairman of the administrative body. The non-lawyer is not able to appear in the higher courts.

<sup>84</sup> Zemans, 'Community Legal Clinics in Ontario: 1980: A Data Survey', (1981) I *The Windsor Yearbook of Access to Justice* 230 at 236-8.

<sup>85</sup> Injured Workers' Consultants (IWC) in Toronto, Canada is such a clinic. One of the original legal clinics in Ontario, IWC provides legal assistance to injured workers pursuing claims for the Workmen's Compensation Board of Ontario. In 1980, Injured Workers' Consultants received funding in the amount of \$162,982 from the Ontario Legal Aid Plan to employ eight paralegals on its staff, but no full-time lawyers. The day-to-day casework in this clinic is handled by the individual community legal worker who assumes responsibility for over thirty active files and is primarily responsible for the quality of the casework. These paralegals have developed a special expertise and competence equal, if not superior, to that of lawyers in the area of workmen's compensation.

fashion to the client community.<sup>86</sup> Training citizen advocates to represent their own community and to work within their particular areas of interest offers new potential and challenge to the delivery of legal services.

Along with the growing use of paralegals, the last decade has seen the growing professionalization of the lawyers working in salaried legal services programmes. By the late 1970s, legal services lawyers in the United States had become well established and their number grew to the extent that they became a significant force within the American legal profession.<sup>87</sup> As the political climate had changed, so had the lawyers who worked for the Legal Services Corporation. Gone was the radicalism of the sixties and early seventies. Legal services lawyers of the eighties are concerned with job security, limiting caseloads, and rationalizing their professional development. Some legal services lawyers have quite naturally banded together with others and unionized. Legal services lawyers not only had greater security in the late seventies, but they were better trained and more prepared to initiate test-case litigation. Such litigation was encouraged by national training seminars, exchange of pleadings, and the reports of significant victories in reviews and journals. Legal services lawyers began to see themselves as being legitimately able to join their professional colleagues as they moved from fighting for social change in the streets into the courtrooms. Appellate litigation as well as participation in professional activities gave legal services lawyers a level of acceptability with the establishment bar which 'poor people's lawyers' had not previously enjoyed in the United States.

The well-intentioned reform litigation of legal services lawyers began to have a significant impact on the administration of social welfare in the United States in the late 1970s.<sup>88</sup> Writers such as Jack Katz suggest that, in their efforts to rationalize the administration of welfare to the poor in America, legal services lawyers have reformed and rationalized welfare schemes but have, at the same time, effectively legitimated the treatment of poor people as a separate class.<sup>89</sup> Katz argues that much of the reform litigation generated by legal services lawyers is an outgrowth of their need to act like and perform tasks considered to be significant by other lawyers.<sup>90</sup> The effect of this form of practice has been the stabilization, regularization, and insulation of poverty programmes into separate government agencies.

<sup>86</sup> Partington, in the English National Report, discusses the issue of the professional monopoly and the position taken by welfare lawyers in the United Kingdom that the legal profession should be nationalized.

<sup>87</sup> *Supra* note 27.

<sup>89</sup> *Supra* note 27.

<sup>88</sup> *Supra* note 13, at 50-5.

<sup>90</sup> *Supra* note 13, at 52.

At the same time that critics of the system like Bellow and Katz raised their criticism concerning the 'insularity' of American legal services lawyers, the Legal Services Delivery Study, conducted by the Legal Services Corporation, concluded that the American staff attorney programme was the most effective form of delivery of legal services, especially with respect to law reform, because of the 'professional expertise' that such offices had developed. Thus, American legal services lawyers, at the end of the seventies, were cost effective, well trained, and sophisticated deliverers of traditional as well as reform litigation. Yet the concern continued to be expressed that the services were becoming too routinized, that poverty was being regulated and legitimized, and not removed, and that the justice system had merely expanded its boundaries slightly to encompass legal services lawyers whom the profession had co-opted.<sup>91</sup> The Reagan administration's attack on legal services in early 1980 has politicized the legal services lawyers if for no other reason than to sustain their programme and their livelihood.<sup>92</sup>

...

## **Conclusion**

This paper has examined some of the recent developments in legal services as reflected by the national researchers and the recent literature on legal services. It is difficult within the confines of a short paper to do justice to all the issues and changes which are taking place in twenty-five countries with distinct socio-economic situations. I have attempted to describe some of the significant developments in mixed delivery systems in Europe and North America, which I would suggest as the direction of the future. Whether such mixed delivery systems will develop beyond the provision of legal services and attempt to grapple with more fundamental problems is, at the moment, unclear.

Despite various recent developments in legal services, including the growth of welfare rights schemes in some countries and the continuing development of juridical schemes, we find that not only are legal services open to financial evaluations and government cut-back, but in some countries—notably the United States—the 1980s has witnessed a questioning of their very existence.

Access to justice, or even improved quality of justice, in the eighties appears to be of less significance than the issue of the cost of justice and

<sup>91</sup> These developments are discussed in the conclusion of this paper.

<sup>92</sup> *Supra* note 27.

the acknowledgement of the limited political commitment to reform and change. Thus this paper concludes on a note of realism which recognizes the vulnerability of legal services at the present time. We observe that during the recent world-wide recession, legal services have been open to severe government cut-backs in funding, zero-growth funding, and in the United States a sustained attack from the Reagan administration that attempted to totally dismantle the Legal Services Corporation. This abrupt change in attitude in many industrialized countries, as more conservative governments have been elected, not only emphasizes the fragility of the movement towards a more democratic legal system, but underlines how legal services are themselves perceived as an aspect of the political system. The threat posed by liberal governments' encouragement of social change and redistribution of power has been identified by think-tanks such as the Heritage Foundation in the United States and acted upon by the Republican government of Ronald Reagan:

Going to court is a political act, contesting a government action that threatens to terminate benefits is a political act. Demanding that a landlord maintain a home in habitable condition as a condition of being paid is a political act. All of these acts are assertions or expressions of power or of a right to something. Some power or rights can be given or shared without necessarily diminishing other people's enjoyment of them. Other forms of power or rights are necessarily competitive. Thus, providing those without power or resources with the means to attempt to obtain some is as much a political issue as the protection of those with power and resources. The debate surrounding the substantive limitation of what legal services attorneys can do poses this issue at its most extreme. Why else would opponents of class actions or suits against governmental entities fight so hard to prohibit these forms of legal action unless they feared they might just be successful?

So writes Menkel-Meadow about the fight for survival of the most sophisticated and highly funded legal services scheme in the world. Such a political attack as that mounted in the United States cannot be dismissed as merely an outgrowth of the political philosophy of a particular conservative government. The vulnerability of the Legal Services Corporation and the lengthy fight in which it engaged demonstrates that governments will only permit limited incremental change and will ultimately protect those interests which have a power-base and control the financial resources of the community.

Although I have outlined the development of new and more effective models of legal services and recognized the increase in access to the legal system through the use of paraprofessionals, the fundamental question

remains: will the access to justice movement be successful only as a procedural exercise which must continuously defend itself against political attack and economic cut-backs? The radicalism of legal services activities in the United States has left it open to political assassination. Legal services are dependent on the political and economic support of government and of the legal profession. As the winds have shifted in the United States in the early seventies and in the early eighties, legal services have found themselves in an extremely vulnerable position.

At a time when funding security is desperately needed to allow legal services to continue to develop stability and attract and retain the best advocates, we note the need to justify its very existence. This is in many ways the contradiction of the eighties: greater needs of low-income citizens and the underprivileged in all parts of the world confronted by less political and economic support of social welfare. We find little hope for the consumers of legal services who continue to be faced with a justice system which remains expensive and isolated from their lives. It is difficult, as legal services proponents well know, to sketch any strategy to enhance access to justice in face of the theoretical-practical paradox discussed in this paper. Developments during the next decade will determine whether the winds of change which began to blow through the legal system a decade ago will have totally subsided or whether government and lawyers will allow at least a breeze of democracy to flow into the justice system.