Unequal Protection: Thoughts on Legal Services, Social Welfare, and Income Distribution in Latin America

DAVID M. TRUBER* 

INTRODUCTION: LEGAL SERVICES AND THE DISTRIBUTION OF INCOME

In recent years the literature on development policy has given increasing attention to problems of income distribution. It has come to be recognized that high rates of economic growth may not be a sufficient goal and that “development” also implies concern for ensuring an equitable distribution of national income. The purpose of this article is to initiate discussion of the potential impact of subsidized programs of legal assistance to the poor, referred to as “legal services,” on the distribution of income in Latin America. There are some who believe that if legal services were made available to “have-not” groups in a society, these groups could employ the services to improve their economic position in the society. If that were the case, then legal services programs might play a role in any overall program designed to assure more equitable patterns of income distribution in Latin America.

The issue of the distributional potential of legal services in Latin America is of interest to policy makers concerned with reducing income inequality, and lawyers anxious to make a contribution to social justice. Unfortunately, there is very little data or analysis which can clarify the policy issues involved. We know a little about the cost of using private lawyers in Latin America, and thus something about the subsidies needed to make legal services more widely available. We have some descriptive information on the nature of public legal services programs in some of the countries in the region, but we lack any conceptual analysis of possible relationships between the expansion of legal services and changes in the distribution of income. Finally, we have little information on how specific changes could be accomplished in individual countries.

There is renewed interest in these topics. Recently, the American Society of International Law organized a group to survey legal services in Latin America


I wish to thank Tom Heller, Mark Rosenberg, Joaquim Falcão, Gary Bellow, and Luis Bates for helpful comments on earlier drafts.
and suggest new approaches to legal assistance for the poor in the region. There is some evidence that policy makers may take an interest in these ideas. For these reasons, it is important to develop better theoretical models of the role of legal services in development policy and to stimulate more detailed case studies of existing experiments. I hope this article will stimulate such research. To this end, I present a conceptual analysis of ways in which legal services might influence income distribution and examine existing legal services programs in light of that analysis. I attempt to show what would be required from legal services programs if they were to play a meaningful role in changing governmental decisions which affect income. Comparing this model to what I can learn about the existing situation in Latin America, I conclude that legal services will provide real help for the poor only if programs are changed, governments are committed to social justice, and the programs can operate in and/or help create political environments in which the needs of the "have-nots" are legitimate societal goals.

It is important to note the preliminary nature of the analysis set forth here. I have chosen to write about "Latin America," that fiction of map-makers, governmental bureaucracies, and academic institutions. I have done so because I have a little information about several countries but not very much about any one, and because there are some similarities between the countries I know the most about—Brazil and Colombia. For my purposes, which are merely to develop some conceptual models and raise questions for detailed inquiry, it seemed legitimate to discuss Latin America as if it were a somewhat homogeneous entity. I recognize, however, that the differences among countries may render aspects of this analysis inadequate or inapposite, and thus must stress that firm policy conclusions can only be based on the much more detailed and country-specific research that I was unable to carry out but hope to stimulate others to conduct.

In this article I am exclusively concerned with the potential impact of legal services programs on redistribution of income through governmental regulatory policies and direct governmental transfers of money or goods and services. One might see legal services as a direct form of income distribution, much like subsidized housing. My concern, however, is with the potential use of legal services programs to increase the flow of other governmental benefits to "have-not" groups. Governments provide various types of monetary and other benefits (e.g., housing, education) to various groups in the population. Furthermore, government regulation may be designed to redistribute income. The issue for discussion here is whether a legal services program can have a significant effect on the distributional effect of regulations or the amounts of benefits that flow to "have-not" groups.

I. DISTRIBUTION AND DEVELOPMENT

I believe that developmental policy should favor equalization of income within society, and I oppose policies that concentrate income in the better-off
sectors. I take this position on normative grounds, and it is because of these normative views that I am interested in the question whether expanded legal services programs can make a contribution to income equalization in Latin America. While my normative views shape my interest in this question, my analysis of legal services and distribution is intended to stand independently of my personal preference for equalization. The model I set forth can be evaluated without regard to the question of whether equalization is desirable.

Nevertheless, my normative views undoubtedly influence my view of the problem, and thus should be set forth explicitly. Those familiar with development policy debates will recognize that many analysts believe that some income concentration is necessary during the process of industrialization. Such analysts argue that concentration of income in the hands of the better-off groups in society is necessary to permit the accumulation of savings, to generate demand for certain industries, and to provide incentives for risk-taking behavior. My own view of these matters rests on the conclusion that the case for income concentration has not been proven, and that until it is, we should prefer income-equalization policies.

I assume that almost all proponents of concentration are in favor of at least some income-equalization in the long run. That is, they favor concentration not because they think substantial income disparities are normatively desirable, but because they think such disparities must be tolerated in the short run to ensure that the GNP will grow sufficiently to allow substantial redistribution in the long run. My quarrel with this position is not based on a rejection of the idea that concentration can accelerate economic growth. Rather, I question the assumption that income concentration is reversible. If concentration accelerates growth but is an irreversible process, it is fallacious to argue for such policies in the name of long-run equalization.

I think there is reason to believe that under the political conditions of Latin America income concentration tends to be irreversible. This is because in the political climate of modern Latin American nations it is difficult if not impossible to maintain income concentration policies in an open political system. If the “haves” are to get substantially better off, and the absolute (or at least relative) situations of the “have-nots” worsen, the “have-nots” must be effectively excluded from political life. This means that an income concentration policy necessarily entails the construction or maintenance of an authoritarian political system, the demobilization of political groups, the creation of a repressive apparatus, and thus rule by a small elite, usually with the aid of military forces.

Once such a regime is solidified in power, however, the chances for real income redistribution decrease substantially. Such regimes, once installed, are difficult to dislodge. They create a substantial repressive apparatus that has a vested interest in maintaining the authoritarian system. They destroy the centers

---

of political opposition that might press for social justice and defend the "have-nots." Since few within such systems have any incentive to support income redistribution, there is little reason to believe that such regimes will shift in time to support income-equalization. Anyone who wishes empirical verification of these observations should consult the recent history of Brazil.

It is, of course, possible that income concentration will accelerate economic growth. If it could easily be reversed, a good case in the name of social justice could be made for tolerating short-term inequities. But since concentration may well be irreversible, the case for supporting such policies is substantially weakened. If there are substantial risks that income concentration cannot be reversed in the long run, then the only case for concentration that is based on social justice must be that it is absolutely necessary to secure economic growth. Moreover, given the risk of irreversibility, I believe that the burden of proof should be placed on those who argue that income concentration is the only way to secure satisfactory rates of growth. Any policy which can be justified only on the grounds of possible but uncertain long-run gains should be greeted with skepticism. After all, as Keynes said, in the long run we are all dead. It is my view that proponents of income concentration have not met the necessary burden of proof.

The arguments, of course, are complex and the data fragmentary. I do not believe, however, that a sufficiently strong case has yet been made that concentration is the only possible path to satisfactory growth. Indeed, the author of one comprehensive analysis of the alleged growth-equity tradeoff concludes that Latin American nations could achieve much greater equality without a substantial decline in growth. Moreover, this study finds that the poor would be better off in the long run with redistribution even if this did cause some decline in growth rates.\(^2\) Therefore, until the contrary case can be proven, I retain my preference for income equalization.

II. SOCIAL WELFARE PROGRAMS, DISTRIBUTION, AND DEVELOPMENT

I shall use the term "social welfare programs" to refer to governmental programs designed to transfer resources to individuals for such purposes as improving health, providing shelter, and increasing or maintaining income. Thus, the term refers to such direct transfer activities as welfare, housing assistance, medical aid, and social security. It also includes programs which aim at indirect resource transfers by regulation of private activities. For example, housing regulations may be designed to increase the quality of housing services provided to consumers, thus transferring resources from producers to consumers.\(^3\) Such programs are frequently justified as techniques to redistribute income. Since they reflect state intervention into market processes of distribution,


\(^3\) See Markovits, The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications, 89 Harv. L. Rev. 1815 (1976), for a complete economic evaluation of the impact of housing regulations on consumers.
they would seem to represent a public decision that market distribution is unfair. It is well known, however, that such programs are not necessarily income-equalizing. While some social welfare programs do create net transfers from the relatively well-off to the relatively disadvantaged, other programs may maintain or even increase existing levels of income stratification.\footnote{4}

There are three types of factors that influence the income effects of social welfare programs. For several reasons, social welfare programs may increase or maintain income stratification. They are designed to have this effect. Program implementation skews resource allocation. The programs affect political structures and thereby the potential of affected groups to secure a larger share of national resources.

Programs may be \textit{designed} to have a disequalizing effect on income. In his analysis of the Brazilian social security program, Malloy shows how the design of the system ensured that benefits would be proportional to salary (thus favoring better-off participants), favored urban workers from the Central South over less well-off rural workers and participants in other regions, and was financed by regressive taxes.\footnote{5}

In addition to such elements of explicit design, however, social welfare programs may increase income inequality if they are implemented in a way inconsistent with the apparent legislative intent, or if program administration weakens the capacity of have-not groups to secure larger benefits. Since these two features, which I shall call "misallocation" and "participatory inequality," are central to the analysis of the secondary impact of legal services, I shall examine them in greater detail.

\section*{III. Misallocation}

Social welfare programs require administrative decisions. If the program is designed to affect social welfare through regulation of private activity as in housing and building codes, standards must be set and levels of enforcement determined. If programs involve direct aid, then physical units, services and/or financial resources must be transferred from state agencies to recipients. A system of public administration is needed to make these choices. Bureaus, rules, and policies become an essential part of the program.

Administration is similarly needed to carry out programs such as land reform, which have as their particular goal increased well-being through increased economic production. Even if ultimate levels of agricultural production and producers' income will be determined by markets, administrative bodies must allocate factors like land, credit, and technical assistance.

This means that administrative decisions will determine the extent of effective distribution these programs will achieve. The classical model of administration is one in which general goals and policies are established, and all subsequent

\footnote{4. \textit{Id.}}

\footnote{5. See Malloy, \textit{Previdencia Social and Income Distribution: A Research Note}, in ESTUDIOS CEBRAP (forthcoming) (a monograph series published by Centro Brasileiro de Pesquisas.)}
decisions are subordinated to these goals and policies. If the goals of these programs are the improved welfare of the intended beneficiaries, and if subordinate decisions are made correctly and efficiently, then the programs should result in improved well-being for beneficiaries. All students of public administration realize, however, that there is a profound gap between the ideal model and administrative reality. In the first place, goals may not be well established. Moreover, even if they are, resources may be inadequate to the task, so that even the most efficient administration will yield relatively little progress towards the goals. Finally, programs may fail even where goals are clear and resources adequate. Thus, subordinate decisions may misuse resources or fail to redistribute them at all. In either case the program will fall short of its intended purpose. Some or all of the intended or apparent beneficiaries will be worse-off than they might have been.

I wish to concentrate on situations in which resources—including legal powers—are either used in ways inconsistent with stated goals, or not used at all; I shall refer to both of these as "misallocations." In using the term "misallocation" to describe deviation from the formally stated goals of social welfare legislation, I recognize the possibility that the "true" legislative intent may deviate from formal goal statements. I use the term to describe deviation from the goals that are apparent on the face of the legislation or contained in explicit statements of legislative intent. While vague or seriously underfunded programs are also common and serious problems, such conditions are relatively easy to identify, even if they are hard to understand and correct. More light is needed, however, on misallocation and on the programs that never get off the ground or go awry.

The development literature abounds in examples of misallocation. Thus, Schaffer and Wen-Hsien describe a program to help small farmers in India in which the administration failed to allocate more than a tenth of the available resources.6 Thome shows us that Chilean Canal Associations failed to use legally-created powers to aid small landowners.7 Finally Falcão has shown how the resources of the Brazilian Housing Finance System were misallocated.

The Brazilian Housing Finance System was established to "stimulate the construction of housing of social interest, and the financing of the purchase of housing, especially for lower income groups."8 As the program evolved, administrative decisions were made which resulted in allocation of the bulk of resources to relatively expensive housing for the urban middle classes. Since the program was partly financed through forced worker savings, the net result of these administrative misallocations was to transfer resources from workers and consumers to relatively affluent sectors of the Brazilian population.

A. The Distributional Effect of Misallocation

Since our principal concern is with distribution—with who gets what from programs—we must first ask if there is particular distributional significance to what I have called bureaucratic misallocation. That is, can we say anything about these alleged distortions of programs and the distribution of goods and services in the societies in question?

Misallocation means the failure of administrators to use powers and resources they have, or the use of such powers in ways inconsistent with program goals. These might have distributional effects, or might be random. If the latter, they would be of interest to scholars of public administration in general, but not of central concern to us. I suspect, however, that misallocations are not random, but rather that they tend to reflect failures to aid the relatively disadvantaged. Moreover, misallocations frequently act, directly or indirectly, to favor the better-off groups of a society. Thus, misallocation will have a net income-disequalizing effect.

Without more data, this suspicion must remain just a suspicion. I shall formulate it in the form of two hypotheses, and then develop some theoretical reasons why further research should verify these hypotheses:

H1: Public administrators of programs to assist disadvantaged groups will tend to underallocate program resources (money, power) more frequently than administrators of other programs.

H2: To the extent that public administrators of programs to assist disadvantaged groups divert resources from intended beneficiaries, the diversion will tend to be towards more advantaged groups.

The reasons why I think these hypotheses—or a more precise one yet to be formulated—will be verified lie in the nature and structure of administrative allocation. Succinctly put, in all stratified societies there will be a conflict between redistribution goals and the structure of agency decision-making. These conflicts, moreover, work systematically to deflect redistributitional programs. Thus, one would expect these hypotheses to hold for any society in which there are significant differences in wealth and social status. They apply to the housing programs in the United States as well as in Brazil, and to economic development in Appalachia as well as to land reform in Chile.

While diversion will occur in any stratified society, the nature and extent of diversion will vary from program to program and society to society. The variables determining diversion deserve more analysis. It is obvious that the more the program will make the haves worse-off, the greater the degree of stratification, and the more the allocational process is affected by factors which correlate with higher income and status, the more likely the diversion. There is reason to believe that these variables make diversion especially likely in industrializing societies like those of Latin America.

B. Misallocation and the Structure of Administration

Scholars of public administration have taught us that classic models of
bureaucracy are inappropriate guides for predicting administrative behavior. Thus, we have come to realize that rather than being confined by rigid and precise rules, administrators enjoy substantial degrees of *de jure* and *de facto* discretion. Moreover, while classical models suggest that agencies are hierarchical in structure and that top-level administrators control lower level decisions, in fact field level officials have substantial powers of decision, and their choices frequently determine program output. Similarly, we have learned that overloaded dockets and long delays in decisions implicitly have substantial impact on bureaucratic allocation.

All these factors indicate that the rules, policies, or goals articulated by legislators or top-level administrators may not, in fact, be the determinants of administrative behavior. Moreover, while textbook models assume that the relationship between agencies and affected citizens and groups is a one-way street, Macaulay reminds us that these relations are frequently a bargaining process in which the agency must negotiate with influential representatives of those either positively or negatively affected by the program being administered.\(^9\) For all these reasons, it is apparent that we cannot understand the behavior of administrators unless we understand the nature of the affected groups and the relations between these groups and the agencies.

While generalizations are difficult, it seems possible to assert that, as a general matter, the relative power and status of affected groups will determine—or at least substantially influence—the ultimate allocations made by administrative bodies. Once we see that agencies have discretion and bargain with affected groups over programs, it is obvious that the power of affected groups will affect outcomes. It follows that if we wish to understand how specifically distributional programs are administered, and particularly if we want to explain what I have labeled “misallocation,” we must look at all the groups affected by the program and the relative power of these groups to influence administrative decisions.

Once we realize this, we have grasped the basic paradox in the administration of distributional programs in stratified societies: *by definition, the intended beneficiaries of such programs will tend to have relatively less power to influence decisions than will other groups in the society.* To the extent that allocational decisions are made in processes in which this relative power can be brought to bear on decision-makers, there will be a structural tendency towards misallocation. If the program can benefit the have-nots only worsening the situation of the have-nots as is often the case in programs like land reform—the have-nots will use their power to deter use of powers and resources given to the agency. And to the extent that the decision-makers have discretion in allocating program resources among different types and classes of beneficiaries, the superior bargaining power of the have-nots will encourage diversion of resources from intended beneficiaries to the more affluent and powerful.

---

Unequal Protection

Falcão’s study of the gradual diversion of Brazilian housing funds from the poor to the urban middle class shows how bargaining by well-organized groups can lead to misallocation.\(^\text{10}\) He demonstrates that pressure from the construction industry and financial groups influenced the Brazilian National Housing Bank’s decision to reallocate program resources to more affluent sectors. At the same time, he shows that there were no groups who could speak for the poor, thereby offsetting the effects of this pressure.

IV. Participatory Inequities

This analysis leads us to the final set of factors through which social welfare programs can affect income distribution: the effects of program structure and administration on the capacity of disadvantaged groups to advocate for an increased share of the national product. Here we are concerned primarily with the relations between social welfare administration and political participation.

Most studies of Brazilian politics stress the relationship between social welfare programs and the maintenance of bureaucratically dominated, semi-corporatist, semi-authoritarian political structures. It is present in Schmitter’s description of the role of social welfare programs in the Brazilian political system:

The state apparatus gradually absorbed the paternalistic service and welfare functions formerly provided by local notables, vastly increased them, and bestowed them upon grateful and as yet unaware and unorganized dominated groups. In this co-optative setting, the best these groups could do was to organize just well enough to protect the corporate rights and privileges bestowed upon them... The sheer presence of such sponsored and subservient groups inhibits the emergence of either pluralist associations or totalitarian ones.\(^\text{11}\)

The system described by Schmitter, which was created in the 1930’s and operated until the 1964 “Revolution,” used social welfare programs as a device to court labor and other potential political actors, but permitted limited group advocacy within specific spheres. In his study of the changes in social security policies in Brazil, Malloy shows how the “reforms” of the post-1964 period have reduced the potential for group advocacy in the social welfare area.\(^\text{12}\) The new regime has centralized and unified the administration of social security policies, thus reducing participation of employers and employees in administration, and increasing the power of the state bureaucracy.

The “macro-political” impact of social welfare policies on political participation is matched by “micro-political” effects of program administration. Many social welfare programs are administered in ways that foster individual dependency and discourage organized political activity. Assistance may be

\(^{10}\) J. Falcão, supra note 8.

\(^{11}\) P. Schmitter, Interest Conflict and Political Change in Brazil 384-85 (1971).

administered in ways that accentuate the social distance between the granting bureaucracy and potential recipients. A combination of apparent bureaucratic rigidity with substantial discretion on the part of administrators increases the risks of individual or group assertion of "rights," and thus encourages recipients to adopt passive and dependent stances vis-à-vis the bureaucracy.\footnote{13}

These macro and micro effects of social welfare administration can have a significant effect on income distribution. They may discourage any effort at group advocacy for more substantial benefits, or limit these activities to efforts to secure minor gains within basically regressive systems. As a result, they decrease the likelihood that programs will have income-equalizing effects.

V. LAWYERS AND DISTRIBUTIONAL ADVOCACY

Social welfare programs will be more income equalizing to the extent they are designed to have this effect, resources are not misallocated, and the more disadvantaged groups have effective voice in macro and micro decisions about social welfare policy. Legal services programs can contribute to income-equalization if they can affect design, correct misallocation, and increase the participation of affected groups in macro and micro policy arenas.

What could lawyers have done to increase the flow of social welfare benefits to disadvantaged groups? Let us begin with the report of one illustrative case.

In his study of the Peruvian Dirección de Pueblos Jóvenes (DPJ), a government agency designed to render assistance to residents of squatter settlements, Dietz demonstrates the potential and the limits of legal services to increase resource flows to social assistance recipients.\footnote{14} While stressing that most groups who work with DPJ feel constrained to accept bureaucratic decisions and are afraid to challenge DPJ administrators, Dietz recounts one case in which a community group, feeling it was being unfairly treated, hired a private attorney and successfully appealed unfavorable decisions to higher levels of the Peruvian bureaucracy, ultimately to the responsible minister. Commenting on this rare occurrence, Dietz observes:

\[\text{[T]}\text{he difficulties involved prevent its being commonly employed. It is . . . tedious, time consuming, and expensive, generally involving repeated visits to the ministry and the advice of a lawyer, who must be paid. Furthermore, approaching the minister (or some other equivalent authority) involves, for the poblador, introducing a substantive element of chance into his calculations . . .} \footnote{15}\\

Dietz's observations are limited to a single incident, yet they are suggestive for our inquiry. He shows that in this single case legal assistance did increase benefits for one group of potential social welfare recipients. At the same time he

\footnote{13. For a discussion of these effects, see Dietz, \textit{Bureaucratic Demand-making and Clientelistic Participation in Peru}, in \textit{Authoritarianism and Corporatism in Latin America} 413 (J. Malloy ed. 1977).\footnote{14. \textit{Id.} at 415-30.\footnote{15. \textit{Id.} at 427.}}
shows that such assistance is normally too costly if it must be purchased in the marketplace, and may create new risks which recipients may not wish to run. Further, the case does not tell us whether such legal activity could either increase the total flow of resources, or decrease net misallocation. To answer our basic inquiry, we must determine whether it is possible:

(1) to lower the cost of such assistance without decreasing the quality of the legal advice given;

(2) to reduce the riskiness of exploring legal remedies without reducing their effectiveness; and

(3) to ensure that legal activity has a net equalizing effect, increasing services for the disadvantaged as a whole.

Let us look separately at the barriers to effective use of lawyers for distributional advocacy.

A. Barriers to Use of Private Lawyers

Individuals who are "entitled" to social welfare benefits might hire private attorneys to pursue claims against welfare agencies that have denied benefits. However, there are substantial cost barriers to the use of private legal services for this kind of distributional advocacy. In his study of the Colombian legal profession, Lynch estimates that a member of the lower-income classes (e.g., laborers and service workers) must work eight to 8.8 days to earn enough to hire the lowest-cost lawyer for one day, and about fourteen days to hire the better-paid private practitioners for the same number of hours.16

One can only speculate on the implications of this data on the likelihood that lower-income individuals will use private attorneys to pursue claims. In the first place, even if such services were cost-justified, there are substantial informational barriers which make it difficult for low-income groups to assess the potential value of such services. There is reason to believe that even consumers who have adequate information would shy away from use of private attorneys. While the amounts in controversy may be significant for individuals, they must risk substantial income against the mere possibility of recovery. Moreover, any recovery will have to be quite large to cover the costs of using attorneys. Since most people in this income class already exist at basic subsistence levels, it seems unlikely that they will take such risks.17

The costs and risks of individual claim-handling could be lowered through institutional devices. Lynch reports that one law firm in Colombia had managed to develop a specialized practice representing laid-off government workers making claims for welfare benefits against public agencies. By specialization this office managed to reduce the costs (and perhaps the risks) involved in use of private practitioners for individual "distributional advocacy."18

17. Id. at 232-33.
18. Id.
Such institutional innovations seem to be relatively rare. Moreover, they only reduce the financial obstacles to use of legal services to vindicate social welfare claims. There are also substantial cultural barriers which also deter use of the legal system by low-income groups. Lynch observes that lower class Colombians tend to have highly negative experiences with the legal system and concludes:

> When the negative nature of their most frequent contacts with the legal process is combined with the social distance between the lower class and lawyers, there is little reason to believe they would identify a problem as "legal" if an alternative means of coping with it existed.\(^{19}\)

These cultural barriers deter redress of grievances. In many cases the only alternative is to do nothing. This tendency simply to drop the claim—which Felstiner calls "jumping it"\(^{20}\)—is undoubtedly widespread, and constitutes a major barrier to distributational advocacy.

There are similar barriers to using private lawyers for collective social welfare advocacy. Collective advocacy includes such actions as:

1. lobbying for more equitable program design;
2. efforts to secure administrative rules and institutional reforms that will curb misallocation; and
3. aggregation of individual claims through class actions and similar devices.

Efforts of this type to secure rule and institutional changes that will affect large numbers of potential beneficiaries seem essential to effective distributational advocacy. It is impossible to change system design through defense of individual claims. Moreover, exclusive reliance on individual claims may be a very costly way of correcting misallocations. Frequently, distortions of program goals may be reflected in systemic policies and even in formal rules. The most effective way to protect individuals may be generic efforts to change such rules and policies. Further, it may be the case that advocacy for institutional reforms is necessary to secure permanent gains for beneficiaries. For example, it may be that the institution of some formal system to monitor administrative compliance—such as the Swedish ombudsman system—is the best way to correct systemic misallocations that violate formal rules and policies; yet only collective-type advocacy could secure such reforms. Finally, even if the basic goal of legal action is defense of individual claims through traditional channels, it may be too costly to defend these claims unless they are somehow aggregated in ways which will produce economies of scale.

While collective advocacy and claims-aggregation may be important for distributional advocacy, it may be impossible to mobilize the financial resources needed to pay private attorneys to perform services. It is clear that if such

---

19. *Id.* at 238.
actions are successful, a large number of persons will receive tangible benefits, but the amount of each individual's benefit usually is far less than the cost of the collective action. As a result, the only way to finance such actions is to aggregate resources. This can be done by having representative groups pay the lawyers, by collecting monies directly from potential beneficiaries, or by creating systems which allow the lawyers to aggregate claims and collect fees from a common fund.\(^{21}\)

Unfortunately, none of these techniques can be easily used in collective distributional advocacy in Latin America. It is hard to organize potential beneficiaries of increased welfare benefits in any political system; it is doubly hard to do in political systems that discourage the creation of interest groups not controlled by the state. Furthermore, when there are no organized groups, it is literally impossible to collect funds from large numbers of potential beneficiaries. Moreover, the institution of the class action, which allows the attorney to aggregate the claim himself and collect fees from the sums recovered, is rarely if ever allowed in Latin America. Thus, even if there are legal remedies that could be sought that would create new collective rights, it may be hard to secure such rights through use of private lawyers.

B. Barriers to Effectiveness of Legal Services

Even if there are ways to finance distributional advocacy by private lawyers, it is not clear that this type of advocacy would be effective. While legal advocacy has had an impact on social welfare programs in some societies, the conditions for success may not exist in Latin America.

The first problem lies at the political level. Much of what I call collective advocacy can be perceived as political in nature. This obvious at the design level, where advocacy would involve lobbying with administrators and/or legislators. However, much activity at the level of program administration could also be perceived to be political. Many social programs in Latin America are administered in a clientelistic or paternalistic fashion.\(^{22}\) In these systems legal action may be perceived as a challenge to the very authority of the administering bureaucracy, or even of the regime. To the extent that this action is perceived to be outside the rules of the game, it will appear to be risky for beneficiary groups. Like the pobladores in Dietz' study, these groups may fear that they have more to lose than to gain from such actions, and thus are reluctant to employ lawyers even if financial barriers could be overcome. If administrators react negatively to legal challenges, this perception may be accurate.

A second problem lies in the obstacles to the use of the judiciary to challenge decisions by social welfare administrators. The judiciary in many Latin American countries is seriously overworked. Moreover, judges are frequently unwill-


ling to review questions which involve either a substantive analysis of program policies or a challenge to decisions of the state bureaucracy. Thus, Falcão reports that mortgagors in Brazil attempted to mobilize the Brazilian judiciary in an effort to challenge financial policies of the Brazilian National Housing Bank. These policies, he contends, reflected a "misallocation" of this assistance program by making it impossible for low-income borrowers to meet regular mortgage payments. While the loans contained monetary correction clauses that increased payments in accordance with general price levels, low-income recipients received salaries that lagged significantly behind inflation. Some judges were prepared to take into account the general policy of the Housing Law, which indicated that program resources were intended for lower-income groups, and to refuse to foreclose the mortgages of borrowers in this situation. But faced with the insistence of the state bureaucracy that the strict letter of loan agreements be followed, the courts eventually withdrew into formalistic interpretation of contract terms and denied lower-income mortgagors the protections requested. Thus, even though these borrowers got into court, they received no relief and the Housing Bank was able to continue policies which channeled resources from workers to more affluent sectors of the middle class.\textsuperscript{23}

C. The Problem of Net Equalizing Impact on Resource Flows

Even if legal services could be funded and conditions existed which would permit effective advocacy, it does not necessarily follow that these services would have a net equalizing effect on resource flows. For this to occur, either program design must be changed or an overall misallocation pattern must be eliminated. This means either that individual claims advocacy would have to occur on a massive scale or that major changes in collective rights would have to occur. Otherwise, legal advocacy will merely result in transfer of resources from some disadvantaged groups who lack effective representation to those who have access to such resources. Moreover, if the advocacy resources were used by the better-off beneficiaries, who secured benefits at the cost of less-well-off potential recipients, legal services programs could actually have a further disqualizing impact.

VI. Subsidized Legal Services Programs in Latin America and the Prospects for Effective Distributional Advocacy

In view of the foregoing analysis, what are the prospects that subsidized legal assistance activities (legal services) could contribute to effective distributional advocacy in Latin America? To answer this question, we have to look at the legal services programs that currently exist, or may be developed in the region, and then ask whether such programs might contribute to effective distributional advocacy.

\textsuperscript{23} J. Falcão, \textit{supra} note 8.
A. Typology of Legal Services Programs: A Discussion of Variables

First, it is necessary to develop a typology of subsidized legal services programs. There are numerous programs of this type which exist in Latin America and elsewhere. These programs differ in a number of salient ways and must be approached from several important dimensions.

(1) Type of Claims

Legal services programs may be limited to defense of individual claims. In such programs, only individuals may be entitled to use the legal services. Moreover, cases may be taken only when an individual has a justiciable complaint, and then only for the purpose of securing a tangible gain for the individual or avoiding a specific individual loss. Alternatively, programs may focus on collective actions. In this type of program, lawyers may represent groups, rather than individuals, bring individual claims only if they are “test-cases” with precedential value and collective impact, foster “public actions” where a whole class of persons are potential beneficiaries, or press for changes in laws, administrative rules, and institutions which will have collective effects.

(2) Principles of Case Selection

Some legal services programs are basically reactive—that is, they take the cases that are brought to them by clients. Moreover, such programs may make little effort to publicize their existence, thus limiting the population which knows of the service. Alternatively, programs may be proactive. Proactive programs have overall advocacy strategies, and seek cases and clients to further these strategies. These programs reach out to inform potential clients of their services, and search for test-cases and other opportunities to realize specific goals through advocacy.

(3) Advocacy Arenas

Laymen think of legal services as focused principally on one arena, the courts. Lawyers are litigators, and subsidized legal services are exclusively oriented toward courtroom work. Many programs are exclusively court-oriented. However, there are legal services programs that act in many arenas. Thus, legal services lawyers may operate in administrative arenas, legislative arenas, and the media as well as appearing in courts.

(4) Advocacy Modes

The traditional modes of advocacy are oral and written argumentation in formal legal settings. Some legal services programs are limited to this type of activity. Others, however, employ multiple advocacy modes. These include the use of media, research, negotiation, and bargaining in informal settings, as well as citizen education.
(5) Client Relationships

Legal services will vary in the relationships they foster between attorney and client. At one extreme, one will find programs that encourage paternalistic relations. Clients are treated as inferior to the attorneys, incapable of understanding the legal process and the reasons for success or defeat. Attorneys will present themselves as masters of arcane knowledge and as socially superior to clients. Clients are encouraged to accept free services as the beneficence of the state, and to assume passive and submissive roles in their relations with the program. Such programs confirm the clients' experience with other social welfare programs and maintain traditional attitudes of dependence. At the other extreme, programs may encourage clients to participate fully in decisions, increase their knowledge of the legal and bureaucratic process, foster the view that they are bearers of rights, not passive recipients of charity, and increase their effectiveness in self-advocacy.

B. A Typology of Legal Services Programs: Two Modal Types of Legal Services Programs

The relationship between these variations enumerated above is complex. There is reason to believe, however, that programs cluster into several basic types. At the risk of over-simplification, let us group these variables into two clusters, thus identifying two modal types of programs:

<table>
<thead>
<tr>
<th>PROGRAM CHARACTERISTICS</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>CLAIMS</td>
<td>Individual Only</td>
<td>Individual and Collective</td>
</tr>
<tr>
<td>CASE SELECTION</td>
<td>Reactive</td>
<td>Proactive</td>
</tr>
<tr>
<td>PROGRAM ARENA</td>
<td>Courts Only</td>
<td>Multiple arenas</td>
</tr>
<tr>
<td>ADVOCACY MODE</td>
<td>Formal Legal Argumentation Only</td>
<td>Multiple Modes</td>
</tr>
<tr>
<td>CLIENT RELATIONSHIPS</td>
<td>Paternalistic</td>
<td>Participatory</td>
</tr>
</tbody>
</table>

The first type of legal services, A, is limited to defense of individual claims, reactive, exclusively operates in courts, uses only formal legal advocacy, and has paternalistic relationships with its clients. The second type, B, handles both individual and collective claims, develops advocacy strategies, seeks out cases and clients, uses a variety of advocacy in several arenas, and encourages client participation in advocacy efforts.
C. Legal Services Models and Effective Distributional Advocacy

It seems clear from the foregoing analysis that to the extent that legal services programs approximate the first of these modal types, A, they will have little or no net effect on income distribution. To the extent that such type-A programs are individually focused, reactive and court oriented, they will be incapable of performing any role in influencing program design. To the extent they avoid collective actions, they can only correct misallocations which are based on violations of formal rules. Moreover, such individual efforts can only have net effects if they are comprehensive and thus massive in size and cost. Finally, to the extent that they encourage paternalistic relations which strengthen the passive and submissive attitudes clients have toward the state in general and social welfare bureaucracies in particular, type-A programs will enhance, not diminish participatory inequities.

The design of a legal services program does not, by itself, determine whether effective distributional advocacy is possible. Other variables, including the political climate and the response of the judiciary, will also determine the possibilities for success. Thus, it does not follow that type-B programs will achieve effective distributional advocacy. But it does seem clear that subsidized legal services can only secure significant changes in social welfare programs if they have most of the characteristics of the type-B system. What then are the prospects for type-B systems in Latin America?

D. Existing Legal Services Programs in Latin America

As far as I can tell, most of the major legal services programs in Latin America approximate the type-A model. The "typical" publicly funded program is oriented toward defense of individual claims in court, passive in case selection, and paternalistic. In addition, the programs are often overworked and underfunded. There are exceptions to this pattern; one can find legal services programs which have elements of the type-B model, however, these tend to be small and experimental. Often they are associated with universities and/or international assistance programs and their funding is neither permanent nor substantial.

Lynch describes a "typical legal aid program" in Colombia:

The normal pattern . . . would be to hire young attorneys willing to work for a lower salary while they obtain experience and prepare themselves for a legal career serving institutional clients or the middle and upper classes. They would have no long-run identification with the needs of their clients and their perspective would be that of a patron who knows what is best for his clients . . . they will tend to favor individualized legal problems which do not challenge or attempt to change the existing allocation of legal rights.24

24. Lynch, supra note 17, at 238.
Similar patterns can be found in Brazil. For example, the state of Rio de Janeiro has a relatively large state-supported legal services program employing 160 attorneys most of whom work on a part-time basis. The program takes only those individual clients who appear at the civil and criminal courts. It has no community-based intake system, and makes no effort to seek out test-cases. As far as I can tell, no collective actions are taken. The attorneys usually enter cases only when they are already underway and limit their activities to courtroom appearances.

The program has an immense case load. According to an official report, the program has contact with 45,000 persons per month, and completed 90,000 cases in 1976. One observer calculated that this means that attorneys average ten minutes per completed case!

Knight reports similar patterns in other Brazilian programs. He states:

[T]he underlying objective is limited to the provision of free representation of indigents in court proceedings. Free representation in civil cases is, in general, limited to defendants. Absent to any significant extent is the notion that legal services include preventive law/community legal education and law reform activity . . . . No real effort is made to reach the poor. This approach effectively eliminates 90 to 95 percent of the poor, who are not inclined to bring their problems to a legal aid office organised by rich and more powerful people.

Knight further reports that programs are poorly organized, financed, and administered. Salaries and morale are low, and clients must wait long hours for service.

As I have noted, there are exceptions to these patterns. There are a few legal assistance programs which have “outreach” programs and engage in “preventive” law work and law reform activities. Thus, the Department of Legal Assistance of the Catholic University of Chile in Santiago (DEPAL) has a large program which represents eight low income neighborhoods in Santiago. DEPAL offices have been established in the neighborhoods. The program publishes booklets which inform citizens of their rights. It has conducted a number of studies of legal problems of the poor, and has made efforts to secure new legislation. In Bogotá, Propúblicos, a new “public interest law firm,” engages exclusively in collective advocacy and research. This group has brought public actions on behalf of large groups, and has tried to use test case strategies to secure enforcement of environmental protection laws. However, both these type-B programs are small private ventures, heavily supported by international assistance agencies, and with little or no support from government.


26. Knight, Legal Services Projects for Latin America, in Legal Aid and World Poverty 77, 86 (Committee on Legal Services to the Poor in the Developing Countries ed. 1974).
CONCLUSION

The data available suggest that the present systems for delivering the services of lawyers to relatively disadvantaged groups in Latin America impede effective legal advocacy for more income-equalizing social welfare programs. While private attorneys may be able successfully to pursue individual benefit claims, and even to engage in collective advocacy for changes in statutes, rules, policies and institutions, it is difficult, if not impossible for potential beneficiaries of such legal assistance to pay for the services of the private bar. At the same time, while both the individual social welfare beneficiaries and groups representing them may have access to subsidized legal services, the systems that deliver such subsidized legal aid impede effective use of the programs for distributional advocacy. Publicly-funded legal services programs rarely, if ever, engage in collective advocacy, which may be essential if legal assistance is to have a substantial impact on social welfare program design or administration. Moreover, the public legal services offices are frequently understaffed, inaccessible, and paternalistic. Private systems, including university-based clinics and "public interest law firms" may conduct needed law reform activities and encourage more active participation by individual and group clients in distributional advocacy, but these programs are limited in scale and may depend on precarious sources of financial support.

However, it is important to note that many of the obstacles to effective distributional advocacy come from the nature of existing delivery mechanisms, and not from the inherent impossibility of using legal advocacy to further distributional goals. That is, there is reason to believe that distributional advocacy could work to some degree in some cases if a way were found to finance this kind of service. As I have noted, there are isolated cases of effective pursuit of individual and collective social welfare goals by lawyers. Sometimes, the private market does work: Dietz' pobladores and the clients of the private firm cited by Lynch seemed to get results. Moreover, experimental subsidized programs of collective advocacy to resolve social welfare and other legal problems of the disadvantaged have demonstrated the feasibility of legal advocacy. Programs like DEPAL, in Chile, and Propúblicos, in Bogotá, suggest that collective advocacy techniques may work in Latin American contexts.

The ultimate issue, then, is whether public systems can be reoriented to collective advocacy, private experiments expanded and placed on a more secure footing, or alternative systems for delivering the benefits of "legality" can be created in Latin America. It might be possible to persuade managers of public programs to adopt some of the techniques used by the private programs. Alternatively, public funds might be made available to university clinics and public interest law firms. Finally, new techniques, such as ombudsmen, lay advocacy, or more efficient mechanisms of administrative monitoring, might be developed to achieve some of the results desired.27 These reforms, however,
will only occur if governments in Latin America come to believe that distributional advocacy is a desirable social goal.

Will these developments occur, and what effects can we expect from them if they do materialize? It is important to recognize that underlying my analysis is the basic idea that legal services will not have any effect on income distribution unless the programs are part of an overall process of political action designed to benefit the disadvantaged groups in Latin American society. We have learned enough about the potential for change through legal action in North America to realize that even the most effective collective advocacy through legal means will have little impact unless it is supplemented by more direct political action and supported by important government decision-makers.\textsuperscript{28} Given the many barriers to legal advocacy in many Latin American nations, this conclusion should be even more valid there. Thus, it is doubtful that an expanded legal services program will make much of a contribution to income equality in countries like Brazil, Chile, or Peru unless it is part of an overall process of change which influences and ultimately receives the support of the government.

Thus, in the long run the prospects for effective use of legal services for distributional advocacy are tied to the fate of other efforts to secure social justice for the disadvantaged in Latin America. In the current political climate in many countries in the region, such movements are constantly threatened by many forces. In some countries they are ruthlessly suppressed by hostile regimes. In others they may secure partial gains only to find themselves threatened by tokenism or corporatism. Some reform movements, including legal services programs, may be tolerated or even supported by governments but only on a scale so limited that they remain merely symbolic gestures, promising the hope of social justice but powerless to achieve real change. Alternatively, they risk being totally taken over by authoritarian-corporatist regimes which will control their activity and thus similarly limit their reform potential.

On the other hand, many will think that the poor in Latin America will only be helped by a massive transformation of the social structure to the extent that the capitalist mode of production, and not some "failure" of governmental programs, creates and maintains income inequality. Under this belief, no legal services program can affect the distribution of welfare.

Does this mean we should abandon hope for legal services? Certainly not. These programs represent an aspiration for social equality and a way to secure some relief from social injustice. For reformers and revolutionaries alike they are an arena in which the struggles between ideals of equality and freedom and the realities of stratification and domination can be carried on. Whatever our ultimate political vision, we should support those who are carrying on this struggle.

\textsuperscript{28} See Trubek, \textit{supra} note 27.