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Litigiousness, Civil

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Litigiousness is not a new subject, with the word appearing already in the seventeenth century. *Litigiousness* suggests an eagerness to go to law, perhaps even a fondness for the legal process. It is derived from the word litigious, which has its roots in the Latin verb *litigiosus*, depicting a quarrelsome, contentious person. Here it will mean a propensity or eagerness to litigate.

Although one can expain litigiousness on a psychological level, in this entry it will be described as a social phenomenon, which is, in fact, well documented by the sociology of law. The existence of this social phenomenon is based on the perception—whether or not it is supported by scientific data—of a “litigation explosion” and awards of excessive damages in contemporary Western societies. It is not at all clear whether the litigation explosion and huge awards should be regarded as a general tendency in society. Apparently, in some fields of law, such as medical malpractice and personal injury cases, litigation rates are increasing more spectacularly than in other fields of law.

Sociolegal Context

Litigiousness is a consequence of the way citizens respond to all kinds of daily problems. They wonder if a problem could be translated into legal terms and, if so, if they should take the appropriate legal steps. When a person undertakes legal action, law becomes “mobilized.” Legal mobilization models attempt to explain the decision-making process of the person seeking justice. Frances Zemans described the process as a desire converted into a demand, an assertion of one's rights. The decision to litigate, however, is not an automatic result of a want or a desire. The path to litigation can be thought of as having three stages; at any stage, a party could choose not to invoke litigation for a variety of reasons. William Felstiner and colleagues defined the three stages as naming, blaming, and claiming. First, an injury must be recognized and identified as such. Second, one should attribute blame for the injury to an identifiable entity. Finally, the injured person asks the blamed party to take responsibility for the injury attributed to his or her actions.

When and how litigation occurs depends on the experience of an individual where a legal remedy exists. There are many factors, such as consciousness of legal rights,

community norms, socioeconomic status, expectation of success, anticipated costs, and the existence of applicable law and policy that bear upon the decision whether or not to take action. These factors influence the way people respond to a legal problem. As Felstiner's group put it, one can “lump” it, avoid it, or take action. If one decides to take action, one can do it by oneself or by consulting a third party, such as a family member, a friend, or an insurance company. In this stage, people can find a **[p. 963 ↓]** solution or try to settle the dispute. The next step can entail the employment of a lawyer, who will activate a court or a government agency. The decision-making process is not a sequential one. For example, an injured person can decide to go immediately to a lawyer without first consulting with other third parties. At any point in the process, one can consider lumping the procedure or taking further action, even after a negative decision or result. This theoretical framework is a basis for scholars and policy makers to explain and steer the behavior of persons seeking legal solutions for their troubles.

Determinants of Litigiousness

Several factors may have an impact on a person's tendency to litigate. Some are based in law and others in social and economic conditions.

Socioeconomic Determinants

Numerous elements influence the extent of legal needs and disputes in society. Because of the increasing division of labor in society, people become more dependent on each other to provide the means of living and, therefore, they have certain expectations of each other. When traditional institutions such as the family, church, and neighborhood play a decreasing role in social control and conflict resolution, people find other ways to guarantee that their expectations will be realized. They could do so by making their social relations more formal and legally structured. Consequently, if problems occur, people are more likely to appeal to courts to solve their “legal” problems. During periods of social change, especially, the risk of conflict is high. Scientific and technological developments lead to new products, opportunities, and concerns (for example, health risks), but also to uncertainty about law and liability,

which provokes new litigation. In a globalized economy with mass production and consumption, products with technical defects, such as the Dalkon Shield birth control device, may affect a large number of people. This makes society more susceptible to problems that demand legal solutions.

Several factors have had an impact on the process of *transformation* of social problems into legal needs, legal demands, and litigation. Citizens become aware of their rights. Awareness is influenced by the level and nature of a person's education and by information provided by interest groups (for example, consumer associations or trade unions), the media, public service agencies, and the government. To some extent, the size and position of the legal profession in society are related to the demand for legal services. Because most people are not fully aware of their rights and the possibilities for litigation (there is asymmetric information between principal and agent), lawyers can to some extent create their own demand (supply-driven). Some groups and nongovernmental organizations may increasingly use litigation to obtain policy reform and claim compensation for public damage. Apart from the public's awareness, practical and financial considerations may stimulate or discourage access to justice and litigiousness. When law seekers have easy access to legal aid insurance, they are less discouraged by the psychological barriers that may otherwise impede them from bringing their cases to court. If society does not provide good alternative systems of conflict resolution, such as mediation, conciliation, and arbitration, people will lack the possibility of choosing among different options that may help them avoid litigation.

Law and Litigiousness

Litigiousness, and the tendency to find legal solutions for social problems, is strongly influenced by those who make and apply the law. Especially in areas such as procedure law and tort law, the government can positively or negatively affect the litigious behavior of citizens. The lower the financial costs for litigation, the greater the number of people who will choose judicial conflict resolution. If court cost is low or will be divided between the parties, the financial risk of losing a case will be low, and this will encourage litigiousness. The lower the income one must have to benefit from legal aid services, the greater the number of people who will be eligible and, consequently, able to bring a case before the court. Some argue that an attorney's “contingency fees” or the principle

of “no **[p. 964 ↓]** win, no pay,” by which a law seeker need only pay for legal assistance if she wins the case, may also stimulate litigiousness. It is not clear to what extent lawyers discourage clients from litigation if they believe that the case cannot be won. Some believe that the tendency to litigate is high if the law does not reserve pleading or other steps in dispute procedure to members of the bar (for example, a pleading monopoly).

Finally, just as procedure law may affect litigious behavior, the same is true for tort law. As more areas of social life become subject to liability by means of court decision or legislation (for example, product liability, driving liability, professional liability), the more society is likely to be confronted with a so-called claims culture. When legislators and judges provide for the possibility of higher amounts of compensation (punitive damages), find better methods for determining tort and causality, and acknowledge new kinds of damages, victims will be more attracted to making claims.

Litigious Societies

The United States has the reputation of being a highly litigious society. American newspapers and popular media pay much attention to spectacular law suits, such as the case of Stella Liebeck, who sued McDonald's after burning herself with coffee; students who sue professors for bad teaching; and overweight people who sue movie theaters because the seats are not wide enough. Herbert Kritzer wrote that comparative research on national litigation rates gave a rather different picture of the United States as a litigious society. Seventy-five cases are filed for every 1,000 American inhabitants. In other countries, such as Germany, Sweden, and Australia, the litigation rate is much higher (123, 111, and 96, respectively). The general perception that Americans are more litigious than are citizens of other nations probably stems from the fact that one can litigate a broad range of matters in the United States.

At the other extreme, Japan is known as a nonlitigious society. The estimated litigation rate for Japan is nine cases for every 1,000 citizens. Only developing countries such as China, India, Thailand, and Paraguay have a lower litigation rate. Ethiopia has the lowest rate (2 cases for every 1,000 citizens). European countries and other modern countries generally have middle level or high litigation rates. Explanations for cross-

national variation in litigiousness include the level of economic development, nature of legal structures and cultures, and absence of alternative remedy systems. Scholars have explained Japan's low litigation rate by certain aspects of Japanese culture: Taking a person to court to guarantee the protection of one's own interests, or even being mentioned in court, is regarded as a shameful thing. Traditionally, Japanese people prefer extrajudicial, informal means of settling a dispute. Whether the perception of the nonlitigiousness of the Japanese is a myth has been the focus of contention for many years.

Although a cross-national perspective may reveal interesting differences, one must not take such comparisons too seriously. Definitions of lawyers, litigation, laws, and legal procedures differ from country to country, so it is hard to compare empirical findings from nation to nation. An important caveat relates to the fact that cross-national research seldom takes into account the amount of money awarded. In this respect, the United States ranks high compared with European countries. This may explain why the United States has the image of a litigious society.

Evaluation of Litigiousness

An important question is whether the benefits of current litigation practices outweigh their costs. One may analyze the positive and negative aspects of litigiousness and evaluate various ways of restricting litigiousness.

Positive Aspects

Although it may be unclear why significant litigiousness has some advantages, scholars argue that one should relate litigation to the broader context of the delivery of goods and services on one hand and the welfare system on the other.

The threat of litigation sends an important economic message to parties that offer goods or services. These parties will improve the level of precaution in the process of delivery or creation of services and **[p. 965 ↓]** goods to avoid potential liability. This has direct benefits to society, such as greater product safety or more careful medical

practices. In this respect, the preventive function of tort law becomes more pronounced if litigiousness is stronger.

Second, compensation for suffered damages appeals to the public's sense of righteousness and justice. Disbursement should compensate an individual to the level of welfare of the person who sustained damage that existed before the damage occurred. In the United States, especially, poor people have received large sums from financially strong corporations that harmed them.

Not completely free from criticism is a final factor that argues for litigiousness. Claiming damages on an individual basis offers, to a certain degree, an alternative for private or collective insurance arrangements and avoids increasing the pressure on social security and welfare systems. In the United States, a wide array of matters that other countries handle without adjudication, such as compensation for accidental injuries, social problems such as abortion, or conditions in schools and prisons, are taken to court. Whether this is a vice or a virtue depends on one's viewpoint. Although some argue that relegation of social problems to the courts may be interpreted as a sign of unwillingness or inability of the political system to cope with social issues, others state that “justice through law” reflects the quest for liberty and equality. People are free to pursue their individual interests so that liberty may flourish, while governmental authority remains diffused.

Negative Consequences

Persistent litigiousness may also carry some clearcut disadvantages for society and the legal system. First, an increasing progression in the claims culture increases pressure on the judicial power. Legal systems across the world are confronted with judicial delays. Informal dispute resolution could significantly lower the costs of dealing with conflicts.

Second, the emergence of a compensation culture puts a burden on the economy. Businesses in the United Kingdom saw a rise in insurance premiums of almost 50 percent in 2002, an increase that is primarily due to the growing number of

compensation claims. These premiums indirectly affect the price of consumer goods and services; a visit to the doctor or the supermarket becomes more expensive.

Finally, especially in the United States, some argue that an out-of-bounds claims culture causes companies to withdraw products and services from the market. Local governments also limit their degree of liability by closing down public parks and swimming pools. The threat of being sued results in a lower level of innovation and the withdrawal of commercial insurance agents in certain fields, such as hospital insurance.

Restricting Litigation

Efforts against litigation appear in two basic forms: discouragement and replacement. Discouragement policies try to restrict litigiousness by making it harder or less rewarding to bring lawsuits. This policy is often implemented by capping the amount of money that a plaintiff can receive or by imposing a ban on punitive damages or the use of contingency fees. The former policy is already in effect in some American states, and the latter is the situation in the whole of Europe.

Replacement reforms are much more complex because they eliminate entire categories of litigation and replace them with an alternative mechanism. A typical example is the New Zealand accident insurance system, in which accident victims apply to a government agency for compensation rather than suing their victimizers in court. The transformation of individual disputes to a collective solution is resisted mainly by the same people that oppose expansion of the role of the state in society.

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See also

- Access to Justice
- Civil Court Procedures, Doctrinal Issues in
- Civil Court Procedures, Economics of
- Cost-Benefit Analysis
- Court Caseload Statistics

- Dispute Resolution, Alternative
- Injury to Persons, Property, and Relations, Doctrinal Issues in
- Injury to Persons, Property, and Relations, Economics of
- Mass Torts

Further Readings

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