



“Just in case”: Too much litigation?

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Abstract

This *Oñati Socio-Legal Series* publication is the product of an Oñati workshop on Too much litigation, held June 2019. This is the third and final part of a trilogy of workshops held in Oñati; the first two parts dealt with the legal professionals: lawyers (Oñati workshop 2012, titled *Too Many Lawyers?*); and judges (Oñati workshop 2016, titled *Too Few Judges?*). In this final workshop, we focused on litigants and litigation – the “clients” of both judges and lawyers. The overall finding is that too much/not enough litigation might endanger access to justice. In a wider context, putting the three themes together creates a better understanding of the importance of access to justice and the role of the legal profession and the professionals in ensuring this basic right.

Key words

Access to justice; litigation; court; judges; lawyers; the legal profession; judgements

Resumen

Este número de *Oñati Socio-Legal Series* es producto de un seminario celebrado en junio de 2019 en Oñati sobre el exceso de litigios. Es la tercera parte de una trilogía de seminarios celebrados en Oñati; las dos primeras partes trataron sobre las profesiones jurídicas: abogados (seminario de 2012, titulado *Too many lawyers?*) y jueces (seminario de 2016, titulado *Too few judges?*). En este último seminario, nos centramos en los litigantes y el litigio -los “clientes” tanto de jueces como de abogados. El hallazgo general es que un exceso o un defecto de actividad litigante puede poner en peligro el acceso a la justicia. En un contexto más amplio, reunir los tres elementos procura un mejor entendimiento de la importancia del acceso a la justicia y el papel de la profesión y los profesionales de la judicatura para garantizar ese derecho básico.

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Palabras clave

Acceso a la justicia; litigio; tribunal; jueces; abogados; la profesión jurídica; sentencias

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1. Introduction

A growing body of literature (in disciplines such as law, political sciences, sociology) discusses whether there is “Too much litigation”. This has received much attention in the USA since the 1980s, and through the 2000s, though less attention in Europe and elsewhere. Interdisciplinary, comparative and contemporary research could further broaden and deepen this study. Such a methodical examination, was at the center of an Oñati workshop on *Too much litigation*, held June 2019, which fostered a productive dialogue deliberation with participants from: USA, the UK, the Basque Country, Germany, Israel, Japan, Australia, South Africa, Canada, Italy, Singapore and Russia.

The result of this workshop, this *Oñati Socio-Legal Series* publication on *Too Much Litigation* is the product of a third and final part of a trilogy of workshops held in Oñati. The first two parts dealt with the legal professionals: Lawyers (Oñati workshop 2012, titled *Too Many Lawyers?*); and Judges (Oñati workshop 2016, titled *Too Few Judges?*). In both previous workshops, the data was presented – the numbers relating to each profession – in order to make sense of what are otherwise abstract numbers concerning the various players in the legal arena in different countries. The reasons behind these data sets, and the problems they cause were investigated together with suggested solutions. The common perceptions that there are “too many lawyers” and “too few judges” were challenged. In this final workshop, we focused on *litigants and litigation* – the “clients” of both judges and lawyers, and challenge the common belief that there is too much litigation in courts around the world. In some senses, this workshop closes the relationship triangle of lawyers – judges – litigants, who represent the producers, providers, and clients of justice.

2. Workshop’s outline

2.1. Methodology, data and numbers: *Too much litigation?*

A common thread across the three workshops, and particularly in the current workshop – is the need for better definitions: who and what is a lawyer? Who is a judge? What is a case or a dispute? Who is a litigant? How we measure – in this case – the volume of litigation? Definitions are important but hard to come by: for example, there is no single definition for *a case* even within the same judicial system. The definition sometimes depends on the wording of the question or on what lies behind the question. It is not only a matter of the right or wrong questions, but also of who is asking the questions, and why? For example, some would argue that the clichés of “too much litigation” simply stem from particular socio-political interests, state interests, court or judges’ interests, or from professional interests. Not enough litigation might also represent the (not good enough) quality of litigation. Quantity and quality of litigation need both to be assessed. The quality of justice is at least as important as the quantity. And often, even if we agree on the definitions we simply do not always have the data.

There are various ways to approach these issues: empirically, quantitatively (the volume of the phenomena; judicial load etc.), qualitatively (e.g., biographies of serial litigants); historically (understanding whether there have been any changes; what are the roots of the phenomena?); and, of course, comparatively (can we learn from other legal systems; different courts etc.).

By dealing with and comparing different legal systems, this OSLS issue examines the numbers, the facts and the figures – or, in other words – how do we “count” litigants, files and cases? **Carrie Menkel-Meadow** reviews the claims about rates of litigation in the United States. In her article, Menkel-Meadow traces the litigation rates “in the context of differentiated case types”. Her article suggests that the answer to the question of how much litigation is dependent “on a variety of factors that goes beyond simple aggregate counting”. Menkel-Meadow also critiques practices which restricts litigation. **Lynn Mather** focuses on the concept of a “case”, leaning on two perspectives: “a bottom-up view” (of the disputing parties), and a “top-down view” (from the perspective of government). Mather concludes with the importance of integrating them. **William Haltom** and **Michael W. McCann** provide three answers or perspectives to the question of “too much litigation”, pointing on the need to ask the right questions. **Guy Seidman** examines the common law administrative tribunals, claiming that they handle much of the total caseload, while “located at the bottom of the judicial hierarchy or outside of it”, and therefore are often not part of the litigation statistics. Moreover, in the more substantive manner of “too much litigation” – they sometimes deal with “highly complex, socially sensitive legal issues” – while not getting “sufficient judicial oversight to ensure their good operation and litigants’ rights”. **Elena Alina Onțanu** and **Marco Velicogna** also point to the need for more accurate data and methodology when “counting” litigation their findings “point towards significant differences between analysed systems that suggest extreme caution should be exercised when using such data for scholarly, legislative or policy discourses”.

2.2. Reasons and consequences: Different players

There seem to be various reasons underlying the claim that there is “too much litigation” – they may be socio-political and simply a means of government institutions to stem the cost of justice through state institutions, or to stop cases against the State itself; they may be professional (with judges hoping to have less cases, but still claiming there as an increasing overload); unrepresented litigants and serial litigants, for example, cause more workload in courts, so it might be that providing more access to lawyers might assist in lowering the volume of litigation and the time spent in court. Or perhaps the number of lawyers is related to the volume of litigation? It seems that in various legal systems when the number of lawyers increased, the number of cases decreased. In the current workshop it became clear that there is sometimes “not enough litigation” which leads to limitations on access to justice.

This section considers the reasons and consequences of “too much litigation” or “not enough litigation”, by presenting four case-studies and different kinds of players involved: unrepresented litigants in Singapore, serial litigants in Israel, lawyers in Ontario, Canada and in Russia. **Helena Whalen-Bridge** studies unrepresented parties, in order “to identify the litigant in person (LIP) typologies in court-LIP interactions”. **Eyal Katvan** and **Boaz Shnoor** deal with the phenomenon of serial litigants, on two different levels: the impact they have on the judicial system; the personal motives of serial litigants. They show that serial litigants do not constitute a monolithic group, and suggest that courts have to take the differences between them into account, to ensure the “balance between the optimal allocation of resources, and the right of access to justice”. **Avner Levin** and **Asher Alkoby** explore the correlation and potential relationship

between the composition of the legal profession and the number of lawyers and the amount of litigation, in Ontario, Canada. The paper discussed possible reasons for the trends. **Timur Bocharov** explores current trends as well – in this case – in personal injury litigation in Russia, in comparison with the UK and the US.

2.3. Solutions

In terms of solutions, **David McQuoid-Mason** addresses the role that traditional dispute resolution mechanisms plays in reducing the burden of too much litigation in post-colonial countries – particularly in Africa.

3. Summary: Too many? Too few? Too much?

The strongest overall finding is that Too much/Not enough litigation, might endanger access to justice. Not enough litigation means less access to justice; too much litigation (if this exists) can cause less quality litigation, pressure on court and litigants and then deterrence to litigants, which denies access to justice. In a wider context – **access to justice** is also the common thread between the three workshops: too many lawyers; too few judges and too much litigation. Putting the three themes together creates a better understanding of importance of access to justice and the role of the legal profession and the professionals in ensuring this basic right.