Rethinking the Social Functions of Civil Litigation

Wada, Yoshitaka
Associate professor, Faculty of Law, Kyushu University

https://doi.org/10.15017/1901

出版情報：法政研究. 55 (2/4), pp.195-270, 1989-03-25. 九州大学法政学会
バージョン：
権利関係：

Rethinking the Social Function of Civil Litigation

Yoshitaka Wada

Ⅰ. The Limits of Order Maintenance Theory

It is considered to be the duty of courts to protect individuals' rights and settle disputes by applying pre-existing legal rules to facts that are made clear through the trial process. According to this perspective, if the facts can be ascertained and legal rules applied to them, it should be possible to resolve social conflicts and preserve social order. When legal scholors consider what civil litigations perform in actual social settings, this legalistic view on court processes is strongly reflected. That is to say, the social function of civil litigation and the resultant court decisions is defined as the restoration or maintenance of social and legal order. This can be called an "order maintenance theory" of the social function of civil litigation.

In this theory, litigation is considered to produce general standards in the form of decisions that can be universaly invocated and that can effectively seffle disputes in and out of courts. However, even if legal rules are carefully systematized, when we are faced with the complexities of actual disputes, on occasion,

situation will inevitably arise in which the meaning of individual legal proposition is not clear, where their content is no longer appropriate in a changing social situation, or even where such properly applicable rules simply do not exist. Faced with these kind of problems, courts modfy pre-existing rules or create new standards which, if interpreted in a flexible manner, are deemed suitable for social situations. Such newly established standards not only influence the handling of subsequent cases, but work as a frame of reference for human interaction outside of courts. Thus civil litigation contributes to the preservation and reform of social order by facilitating out of court dispute settlement, and by controling people's conduct prevents the emergence of disputes.

"Order maintenance theory" presumes that another essential social function of civil litigation is individual dispute settlement itself, In general, litigants come to the courts after long tiresome periods of dispute. If such confrontations are left unresolved, the stability of the whole society, as well as relationships between the particular individnal litigants, will be undermined. Therefore, civil litigation absorbs these confrontations, terminates them by offering judgement based on legal rules, and thus not only stabilizes particular social relationships but restores general social stability by diffusing disturbing factors.

The fundamental presumption of this theory is that social disputes can *be settled* and social order can *be preserved* by means of legal rules or standards which may or may not be transformed through conrt process. However, a careful scrutiny of this stereotyped legalistic view on the social function of civil litigation, will detect some points which must be reconsidered. First of all, contrary to the proposition that existence of legal standards facilitates the settlement of disputes, people usually interpret those rules in favor of their private interests, manipulate them as a tactical weapon on which their claims can be based, and thus actually acclerate confrontation by referring to these legal

standards. No matter how elaborately standards are prescribed, there will always be room for a strategic interpretation. In this sense, legal standards have an innate ambivalence that simultaneously causes them to function as a guide to dispute setthement and as a provoker of dissent. If this flexible and manipulative characteristic of legal standards is to be acknowledged, the influeuce they have on the disputing process has to be somewhat relativized. For the extent to which legal standards excercise decisive power in each disputing process has to be assessed with reference to other manifold social norms and situational factors which are mobilized in the process.

One can not simply take for granted the logical relationship of the production of standards and the preservation of social order. Furthermore, we must rethink the meaning of the *resolution* of conflict. When a case comes before a court, litigants and their advocates transform the everyday dispute into one that is legally arranged and reconstituted.

What is thereby settled is nothing more than this legally recomposed issue. In many cases, the ultimate friction of real everday social conflict is not reflected in such superficial legal issues. Also, dynamic fransformation of disputes led by changes of situational factors can not be fully expressed. Thus, even if a legally reconstructed dispute is settled through the litigation process, real social conflict itself remains unresolved. It is not an uncommon phenomenon for friction between parties to become more fierce after the dispute is disposed of by the conrts. In industrialized social settings where social relationships are impersonal, simplex, and fluid, the concept of *dispute settlement* as the restoration of harmonious relationships between conflicting parties can no longer be held. *Dispute processing* in the fluid society is nothing but a channeling of the course of future negotiations with no relation to its outcome. In other words, dispute must be viewed as a social process which continues to develop and transfrom itself

in an ongoing process of interaction. Far from being settled by a court decision, dispute will never completely be resolved and transformed into social order. Here the distinction between order and conflict becomes vague and relative. And it thus becomes clear that the concept of the function of civil litigation that regards the legal disposition of cases as preserving social order oversimplified the problem.

This order maintenance theory focuses its attention exclusively on decisions as a *result* of trial process. Whether standard production or legal settlement is presumed, either is generally considered with reference to decisions as outputs. However, if we acknowledge the fact that the function of legal standards is relative, and that in real social settings, social conflict has dynamic characteristics, it is much more productive to reconceptualize the function of civil litigation as referring to the process itself : the nature of actors, the manner in wnich legal rules are mobilized and manipulated, and the influence of the structure of procedure on the disputing process. Attention should not be limited to the "process for outcome" but rather the process itself must be taken into consideration. So, we have examined the limits of "order maintenance theory" in general terms, These limits are reflected in the view points of legal scholars when they examine recent controversial issues. The most important arguments here are probably the ones concerning public interest litigations and alternative dispute settlement. By examining these issues, we will be able to obtain a new perspective on the social function of civil litigation.

Ⅱ. Public Interest Litigation and Its Social Function

Public interest litigation is sometimes called policy-making litigation. This implies that such litigation is usually considered to be very different in both its nature and function form ordinary

types of litigation. To begin with the interests at stake are not confined to individual litigants, and there is thus a potential group of people who will be influenced by the litigation. Secondly, the legal right advocated is very often a newly created one, based on no preexisting statute (for example environmental rights or nonsmoker's rights). Thirdly, issues are not limited to remedies for past damage, but include future action, typically in the form of injunctions of public or private organizations. Such points are generally seen to be characteristic of this kind of litigation.

The question here raised is what to think about the social function of this sort of litigation. Needless to say, the possibility exist that public policy or decision will be modified through the litigation process, If this possibility of policy modification by litigation is focused on, their social function is usually conceptualized as "polcy making function". However, although each litigant may indeed subjectively intend to alter the policy and although policy issues may be argued in the trial prosess, the concept of "policy-making function" is misleading when examined as an objective function of these litigations. First of all, as far as court decisions are concerned, these kind of claims are rejected in almost all cases in Japan. Thus, in this case, there is almost no possibility that litigation performs a "policy-making function," with decisions as outputs. Ofcourse the concept of "policy-making function" confined exclusively to court decisions is too narrow from a sociologcal point of view. A more important problem is how to understand the fact that in spite of negative decisions by the courts, policy-modification is in fact often realized out of court, as a kind of after-effect of the litigation process.

These kind of litigations are the subject of mass-media attention. By interpreting and amplifying information, the mass-media causes the litigation process to influence the formation of public opinion. And the reverse occurs as well. Thus, for the plaintiff, bringing the case to court has numerous merits,

irrespective of the final judicial outcome. In the first place, it is possible to inform the public of the existence of the problem itself and of the plintiff's opinion on it. Thus mass-media can be used to cultivate public opinion. Secondly, defendant organizations which had not seriously answered their claims before the cases were brought to court find it necessary to respond in court under public attention. As a result, significant information which could not be obtained out of court negotiation may occasionally be offered ; or sometimes the hitherto concealed true intentions of an organization may be revealed. The courts are thus used as a means to mobilize public opinion, which in turn acts as a source of social influence on the negotiation process. As a result, policy modification actually takes place out of court, despite the manifest negative content of the court's decision.

Now, it may seem natural to define the social function of these litigations as a "policy-making function" in cases in which actual policy modification is concluded. However, in this definition there remains the influence of the order mainfenance theory of civil litigation. This "policy-making function" concept should be valued in that it includes both the social effect of process itself and the actual interaction between in and out of court process in its scope. Nevertheless, there is a problem with the idea of function regarding the actual policy-modification *as a result of the litigation.* To the extent that the substantial result is emphasized and the particular content of policy-modification is directly combined with the function of litigation, the wide-ranging social effects of court proceeding will be considered as just means to an end. And, seen from this perspective, the substantial result is nothing but, yet another, newly established static order. The question, however, is whether or not this is an appropriate description of the function of litigation in our ever-changing society.

To answer this question we must examine the social situation as it relates to the public interest ligifation from a more realistic

view point. In fact, social processes constituting public interest dispute settlenent are extremely complex, fluid, and dynamic. Although information or opinion on some publc interest issue is offered by the mass-media, the evaluation it will receive depends on each individual. Even if we aknowladge the possibility of manipulation of information by mass-madia, it is impossible to integrate people's opinions completely. In industrial social settings involving a variety of values and interests, and their concomittant friction, the word "public opinion" itself is repugnant, for there always be collisions of opinions on issues of public interest among the mass-media and even within a plaintiff group. In this situation, whatever positive role litigation performs, particular policy-modification should be thought of as resulting from continual multiple negotiations among many actors who have some interest in the issue. Moreover, as these multiple negotiations continue *ad infinitum*, the substantial result of particular policy-modifications is essentially just a transient passing point. Because the content of out-of-court policy implementation is transformed according to situational change, it is impossible or meaningless to attempt to decide to what extent a particular policy-modification is brought about by litigation. In short, the main function of such litigation is just to arrange and channel negotiations in and out of court among parties and surrounding actors who have some interest in an issue. It is more realistic to regard the social function of the courts as "nagotiation arrangement", in which actors adjust their values and interests not confined to legal rights (allowing room for change in the future), than to define it as substantial "policy-making".

This conceptualization is dasirable in terms of normative evaluation, because the function that courts should perform is not to take up the seemingly predominant social values or interests and mould them into some substantial policy-modification but to give to *a variety of* minorities the opportunity for negotiation and argument and to secure this process.

Because order-maintenance theory is output oriented, a "policy making" perspective can not understand the function of litigation when the future-oriented interaction among manifold social acfors is dynamic.

Ⅲ. Alternative Forums and the Function of Litigation

Now we must turn out attention to alternative dispute processing forums that deal with ordinary small disputes between individuals. When the function of litigation is considered in terms of the relationship between the courts and alternatives, usually a court-centered "planetary" structure comes to mind. That is to say, models for dispute disposition are constituted in the litigation process, and alternatives dispose of their cases in reference to them. Needless to say, such conceptions of alternatives are nothing but another version of order-maintenance theory.

One cannot deny that the tendency of court decisions will have a certain influence on the alternative disputing processes. However, as already mentioned, the trend of court decisions is merely one—although important—of the many factors which have some effect on the process of disputing out of court. However, the assumption that court decisions radiate out as authoritative models for alternative dispute settlement is too simplistic. Instead, what should be examined is the way in which a tendency of court decisions influences the out-of-court process.

Another common view of the relationship between litigation and alternatives assumes a clear distinction between them : litigations are said to produce all-or-nothing decisions according to pre-existing legal rules, but alternatives offerd harmonious settlements and are not bound by leagl rules. However, not only in court mediation but also in private negotiations people are very sensitive to legal rules. Often they obtain such information through publications, or from legal couneseling offered by administrative agencies. Today people

no longer make concessions which reflect respect for mutual positions without referring to legal rules. Rather, they try to dispose of their claims as advantageously as possible, strategicaly manipulating and invoking legal information. Given this situation, we can not maintain simple dichotonomies like legal vs. non-legal, adjudicative vs. consensual, or contentious vs. co-oprative.

One of the fundamental causes which makes both prespectives inadequate lies in the fact that they focus mainly on the output and make light of the process of disputing. Despite the fact that the planetary model pays proper attention to the way the trend of court decisions penetrates into society, it does not explain how information on such trend is utilized and manipulated. Instead, it regards penetration as a prosess of comforming outputs to court decisions Also, dichotonomy model that emphasizes consensus as output, overlooks the contentious arguments and the influence of court decisions in the disputing process that leads to the agreement. By concentrating our attention not on the output but on the process, we can increase our recognition of reality as complex and various. While it is true that alternatives work under the shadow of court decisions, this does not imply the mass-production of homogenized settlements according to court tendencies. Rather, taking the tendencies of a court into account as *one* indispensable facfor, alternatives encourage negotiation in which each party pursues his interest by invoking a variety of normative or situational factors. In such a negotiation process, the repertory of interests and preferences changes as the argument develops. Even if parties come to the agreement at the end, this is very often noting more than a temporary adjustment of one part of manifold interests pursued by the parties. In addition, it must be noted that throughout this process the *ultimate* interest of each party is not to make clear a past event and dispose of it, but to determine what is advantageous in the future. Thus, alternative dispute processing is nothing but a future-oriented negotiation for adjusting a variety of

interests ; whereas the tendency of court decisions is one of the tactical weapons which can be mobilized if desired.

So far, we have determined that alternative dispute processing is neither a harmonious settlement without legal rules nor a production of homogenized resolutions bound to court decisions. Next, we must scrutinize the ideal types of litifation process that both models assume. Is it true that litigation give all-or-nothing resolutions based on pre-existing legal rules? Is it adequate to assume that litigations offer the fair and just decisious which can work as authoritative models? First of all, it must be noted that a decision is not only possible form of case disposition in the courts. In Japan the number of cases where decision is reached after a trial accounts for only one fourth of all cases. One third of all cases are settled by court conciliation. Thus, even in terms of statistics it is problematic to conclude that litigation is an all-or-nothing adjudicative mode of dispute processing. We can safely presume that the process of court conciliation is characterized by future oriented interest adjustment under the shadow of laws. But the significant point here is that such court conciliation is held in the midst of an ordinary trial. This means that the distinction between consensual sttlement in court conciliation and adjudicative decisions after the trial is unclear. From a sociological point of view, either ordinary trial date or conciliation date is an information exchange process. Thus, focusing not on the form of resolution but on the process, there is no reason to distinguish clealy decisions from conciliated settlements.

As the above argument implies, litigation in general is not an all-or-nothing type of dispute disposition bound absolutely by legal rules. Rather, to some extent, it is future oriented negotiations able to absorb and adjust a variety of values and interests which can not be covered by legal conceptions. Features of public interest litigations already mentioned and recent experiments to unite conciliation date and trial date suggest that this is the real nature of

litigation.

It should by now be obvious that the planetary model of dispute settement system is inadequate in its presumptions concerning the image of both litigation and alternatives. We must ask how we should understand the relationships among multiple dispute processing forums in our fluid society. What is the social function of civil litigation in this multiple society ?

Ⅳ. "Negotiation Arrangement" as the Social Function of Civil Litigation.

It is clear that the order- maintenance theory of the social function of civil litigation is too simple and static to explain disputing processes in our fluid and complex society. If it is acknowledged that conflict and order cannot be clealy discerned, and that each of them is just one phase of a continuing social interaction process, there is no necessity to conceptualize the function of litigation as being dependent on one point of what is in fact an ongoing process—a definite content of a substantial output—. The core of the function of litigation lies not in its output but in its process : it arranges and encourages negotiation in and out of court. Indeed, in the process of public interest litigations, where out of court negotiations proceed simultaneously and future negotiation will take place after the case is decided, such facfors must always be taken into consideration. In addition, throughout the litigation process, a variety of situational factors which can not be seized by legal conceptions are invoked and evaluated. Even in ordinary types of litigation the same characteristics can be found, although their scope is comparatively limited. Thus, as the conclusion of my argument, I would like to sum up briefly the problems of the litigation process with reference to the total dispute processing in our society. It must be noted that the litigation process is not a formal process which deals exclusively with legel rights and past

events. Absorption of a variety of values and interests which can not be coverd by legal standards and their future-oriented adjustment is an essential part of litigations. This adjustment often requires a flexible disposition, explicitly or implicitly securing consent on some issues by leaving others open-ended. Output oriented conceptions of the function of litigation, which insists on legal dispute settlement that applies pre-existing legal rules to past events, overlooks this flexible side of litigation which encourages and even extends conflict negotiation. Thus, despite what order-maintenance theory assumes the most important function of litigation is neither dispute setflement nor the production of legal standards. Rather, in this ever-changing society, its function is to channel in and out of court negotiations among interested actors, by encouraging and arranging the litigation process itself. When advocating this process-oriented perspective, we have to reformulate the functional relationship between litigation and alternatives. As far as a disputing precess is concerned, the image of court-centered outward radiating system in which court decisions work as a model for case disposition in alternatives is misleading. Following the transformation of an dispute, we find parties one transfering succesively from one forum to another. On occasion some forums are even mobilized at the same time. Litigation is just one of those forums, not the point of arrival. Simaltaneous negotiation which proceeds out of court and follows court decisions is common not only in public interest litigations and strategic litigations of private companies, but also in ordinary litigations. Litigation is not like a sun toward which planets are pulled . It only performs the function of negotiation arrangement as one forum. However, this does not imply that litigation is not important. It is the best forum for encouraging and arranging negotiations in that it can introduce a society's weaker party into a fair negotiation process. In this sense, litigation is still one of the most important dispute processing forums in our fluid and plural society.