

STUDYING THE FREQUENCY OF CIVIL LITIGATION IN GERMANY*

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Little is known about the factors influencing the frequency of civil litigation. Courts do not seek their clientele actively. Rather, they wait for litigants to bring cases to them. The determinants of litigation thus have to be sought primarily outside the courts: they have to be sought by analysis of the frequency of all conflicts which are relevant to legal regulation. Conflict of itself does not produce a civil suit: there has to be some initiative to bring the issue before the court. Although we do not know the total population of all law-relevant conflicts (that is, all conflicts which might possibly be regulated by law), we may safely assume that there is a selection process which sifts out all but a small proportion of all potential conflicts. Here, conditions within the courts (among others) enter: the more expeditiously civil suits are handled, the less costly, the more accessible courts are to lay people, the more readily they will take their issues to court.

Thus, there are two main classes of explanations of the frequency of litigation: on the one hand, societies may differ in the rate of conflicts which occur, so we have to study factors determining the frequency of conflicts. On the other hand, given a certain frequency of conflicts, there are factors which determine the conditions under which conflicts are referred to the judicial institutions. Taking a set of legal rules as given, there are independent variables which can be influenced by the courts, such as cheapness and expeditiousness of litigation, and variables which lie entirely in the realm of the litigants, such as their propensity to go to court, their knowledge about the judicial system, their capacity of pursuing other means of pressing a claim, and so forth.

In this note we do not offer any well-documented analysis which could explain the frequency of litigation at civil courts. Rather, we discuss the sort of insights that might be expected from such an analysis and the methodological problems that

* I am indebted to Peter Macnaughton-Smith and Marc Galanter whose comments on a prior draft helped me to put my idea more clearly, and who helped me in climbing over some of the language barriers.

might be encountered. We do this by presenting some bits and pieces of evidence collected in the course of studies which did not focus mainly on the present question. Our tentative results, however, challenge us to pose more precise questions for further research.

I. COMPARISON BETWEEN COUNTRIES

If we compare court activity in different countries, we notice remarkable differences. Information about court activity might be used to reveal major differences between societies. This is particularly evident if we restrict our comparison to societies with similar economic development and a similar degree of industrialization. The number and the types of societal conflicts change with the economic structure. For example, we would expect highly bureaucratized industrial societies to give rise to different types of conflicts and to display different mechanisms of selectivity in taking these to court.

In comparing the Federal Republic of Germany (BRD) and the German Democratic Republic (DDR), we have controlled a number of factors: both are industrially developed, both show a high and constant rate of economic growth, both have highly educated populations, and both share a common legal tradition. In the DDR legal institutions and regulations have been slowly changed over the past twenty years to conform to socialist legal ideas. The BRD sought to restore the legal tradition of the German Reich before the Nazi Regime. Thus, we may take the comparison between the BRD and DDR as some indication of differences between capitalist and socialist countries.

Table 1

RATES OF LITIGATION IN THE TWO GERMANIES

Civil Courts					Criminal Statistics
	writs of execution	civil law suits	divorce suits	other cases of family law	criminal suspects
per 100.00 inhabitants					
BRD	6.928	1.567	207	146	1,997
DDR	767	180	270	120	655

Note: Court statistics are taken from Statistisches Bundesamt, Wiesbaden: Rechtspflege- Statistik, Reihe 9, I, 1970; Statistisches Jahrbuch der DDR 1970, p. 490. Population figures are taken from Statistisches Jahrbuch der BRD 1971; DDR 1970, S. 3.

In civil law (as well as in penal law) there is a much lower rate of judicial proceedings in the DDR than in the BRD. Except

for divorce suits, which are slightly more frequent in the DDR, all other civil suits and writs of execution are almost nine times more frequent in the BRD.

Lower litigation rates in the socialist DDR may be explained in part by the presence of functionally equivalent methods of conflict-settlement: at the place of work and in neighborhoods there are "conflict commissions" which mediate in civil as well as penal cases. These commissions are compulsory but mediational since they cannot decide without the consent of litigants. Since they have no procedural rules and no legally trained personnel, we consider them "quasi-legal" institutions. As these proceedings are functionally equivalent to court litigation, there is a true "dying away of state institutions." The available statistics¹—unreliable as they may be—show that these commissions do not account for the total difference in court use. Thus, we may conclude that there is also a lower level of law-regulated conflicts in the DDR. It appears that two factors have a cumulative effect: there is a partial replacement of judicial courts by quasi-legal institutions, *and* there is a lower level of "legal" conflicts altogether.

We have to leave open whether a lower level of conflicts is an indication of a more harmonious society, or a consequence of a stricter system of social control. We cannot decide between these rival explanations without entering into a comparison of social structures in the two Germanies. Our tentative explanations suggest that looking at figures of civil court litigation leads us into structural characteristics which are vital to a comparison of socialist and capitalist countries. Enumerating possible rival hypotheses shows that our explanations have to be on three levels of analysis:

- 1) There might be a higher or lower level of conflict in a society.
- 2) There might be a higher or lower threshold of taking conflicts to some sort of public remedy agent.

1. The State of the Nation Report 1972 cites some figures on the number of cases handled by societal courts: in civil cases they deal mainly with housing and rental problems as well as neighborhood claims, handling about 15,000 cases a year. This adds up to about 100 cases per 100,000 inhabitants which could be added to official court figures in order to make the data comparable. Cf. "Materialien zum Bericht zur Lage der Nation", p. 283. In criminal statistics of the DDR all cases which are handed over to conflict commissions are included, however a number of petty offenses (mainly small thefts) are not treated as crimes any more. Comparing figures before 1964 shows, however, that decriminalization and differences in handling criminal statistics cannot explain the fact that the frequency of criminal cases in the DDR is considerably lower than in the BRD. Cf. *Ibid.* p. 214-219.

- 3) There might be a higher or lower level of monopolization of litigation by state institutions which fulfill the necessary conditions of being defined as "judicial courts" (e.g., codified law, procedural rules, independence of judges).

Systematic comparison of court use in different countries has yet to be undertaken. We may get some hint of its possible significance by comparing statistics within one country: here we have fewer problems with different legal codes and traditions, and might more safely interpret any differences found as resulting from differences at the first or second level of our analysis.

II. STRUCTURAL ANALYSIS OF THE FREQUENCY OF CIVIL LITIGATION IN THE FEDERAL REPUBLIC OF GERMANY

Even if we restrict our attention to differences in litigation rates within a single country with a uniform system of legal codes, data on litigation rates give rise to many puzzles which require explanation. Comparing different court districts within Western Germany, we find wide differences in litigation rates: while an urban center like Hamburg in 1971 had a rate of 4000 civil suits per 100,000 population, there are rural districts in the BRD where the rate was below 1000. We attempted to ascertain the factors influencing the frequency of civil and penal cases by establishing ecological correlations between litigation rates and various economic and social indicators, as shown in Table 2.

The matrix of correlations shows very high and positive correlations between the urbanization of the region and all kinds of court activities. Whether we look at payment demands which are more bureaucratic procedures, whether we look at civil courts or the district courts or at penal processes against adults or juveniles, in all cases the frequency of court activity rises in urban areas. Even the rate of appeals in civil cases correlates with the urbanization of the region. (This rate was computed by taking the ratio of all civil cases before the court of appeal to the number of verdicts in the civil courts of first instance.)

Perhaps the factor underlying these correlations is to be sought in the economic structure of the regions. In urban areas about one-third of the working population is in trade, only about 1% work in agriculture. In the rural districts, however, the percentage of people employed in trade is below 10% and those in agriculture may reach as high as 30% of the working population. Consequently, there is an equally high positive correlation be-

Table 2
Matrix of Correlation Coefficients (Pearson's "r")
Between the Rate of Litigation and the Economic and Social Structure

	Proportion of Working Force by					
	% of Urban Population among Total Population	Economic Sectors			Occupational Status	
		Agriculture	Industry	Trade and Transport	Self Employed	Manual Workers
Court Activity per Capita						
Writs of execution	.63	-.55	-.16	.62	-.48	-.54
Local Courts: Civil Process	.78	-.63	-.19	.76	-.55	-.39
District Courts: Civil Process	.71	-.61	-.17	.65	-.53	-.43
Local + District Courts: Civil Process	.77	-.63	-.19	.73	-.55	-.42
Penal Process (Adults)	.75	-.54	-.20	.75	-.53	-.29
Penal Process (Juveniles)	.61	-.49	-.15	.55	-.42	-.14
Court of Appeal: Rate of Appeals per verdict in First Instance (Civil Suits)	.29	-.09	-.03	.34	-.37	-.03
Lawyers per Capita						
	.61	-.46	-.22	.59	-.43	-.47
Proportion of Urban Population among Total Population						
		-.63	.06	.66	-.66	-.13

Note: All correlation coefficients are computed by taking census data and court statistics for 54 regions covering the BRD. The 54 regions had to be defined in order to make judicial statistics and census-data comparable. We divided the Federal Republic of Germany into 54 regions so that the overlappings of court districts with the border-lines of counties and cities are minimized. See E. Blankenburg *et al.*, (1974).

tween court activity and the percentage of the working force employed in trade, and there are almost as high negative correlations with those employed in agriculture.

Kaupen (1974) followed this line of thought by analyzing the registrations of business firms in several court districts in one of our regions (Eastern Northrhine-Westphalia). Here it is not the most densely populated areas that have the highest court rates but regions with medium population density and a high number of small firms. Kaupen found that the frequency of civil suits rises in areas where there are many small firms, but that it declines where a region is dominated by large industrial concerns. He concludes that taking conflicts to court is a characteristic of a classical capitalistic society where small firms and competition still exist, but that it declines in modern economies with big companies and oligopolistic tendencies. However, this interpretation is plausible only as far as the civil suits brought before court deal with economic conflicts. As far as the statistics permit distinction among types of conflict which are brought before court, they do not confirm such an overall explanation of higher rates of court use in urban regions. If the "growth rate" of court activity from rural to urban regions were explainable by the type of economic activity alone, we would expect a sharp difference between conflicts closely related to economic exchange—like sales or service contracts—and those related only indirectly, like divorce, child support, or traffic accidents. However, sales contracts are the most frequent of all types of law suits in regions with low population density, but not in more densely populated areas.

Let us differentiate between contracts which we might call "directly economically related" and others. The former category includes

conflicts about *sales contracts* which concern the physical exchange of goods for money—these are the most frequent form of economic transactions from businessmen or firms to private persons;

works and service contracts (Dienst and Werkverträge) which concern all transactions where somebody is commissioned to deliver a product or rendering a service to somebody else. This form of contract is the main source of conflicts among businessmen.

From these we distinguish conflicts which are only indirectly related to economic activity:

Liabilities resulting from traffic accidents;
Divorce;
Child support;
Rent and housing.

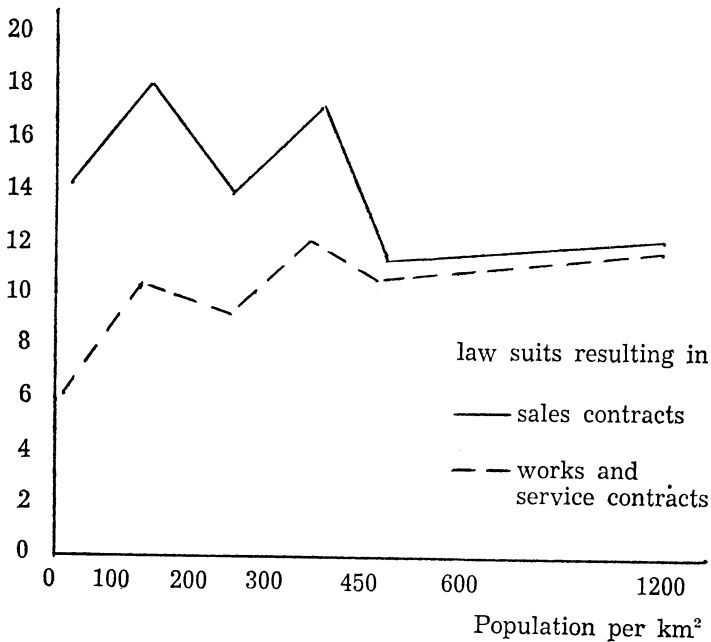
Looking at the curves of litigation rates (civil suits by 10,000 population), the most irregular curve is that of civil suits arising from sales contracts; their rate rises sharply at some courts in some less densely populated regions—this means *de facto* rural regions as well as small courts—while falling again in more densely populated regions—this means more urban areas and bigger courts. The reason is quite simple: until 1974 sellers had general contract clauses which allowed them to file their claims at the place of the company office, irrespective of the location of the client.² Companies which sell throughout the country often prefer to locate away from urban centers in smaller towns so long as they have good traffic connections. This choice of location, which might be for purely economic reasons, has the effect that some of the courts in regions with medium population density are flooded with law suits resulting from sales of a few companies. These districts consequently have very high per capita rates of litigation on sales contracts resulting from the activities of a few companies engaged in nationwide selling.

Other types of law suits brought before courts show more clearly the pattern of rising figures in urban areas. Works and service contract cases rise steadily with population density, the rise being sharper at the beginning of the scale. Liabilities resulting from traffic accidents, which we might expect to be highest in urban agglomeration areas, do rise as we go from low to medium population density, but the rate declines again in very densely populated areas. The same holds true for cases concerning child support: the low differences in the rate of such cases confirm our expectation that these cases have a fairly constant rate of litigation per capita. Subject matters which are most clearly related to rural-urban differences are divorce suits and law suits concerning rent and housing. Litigation rates here rise from 8 to 9 cases per 10,000 capita to more than 20 in more densely populated areas, thus showing a rise which explains much of the rural-urban correlation which we find in our ecological data.

2. This has been outlawed in the BRD since April 1st, 1974. Whether there will be an actual change of litigation patterns remains to be seen. It will be an interesting study of legal impact to compare court statistics before and after the legal change.

Figure 1

Frequency of litigation concerning sales contracts, and work or service contracts by population density



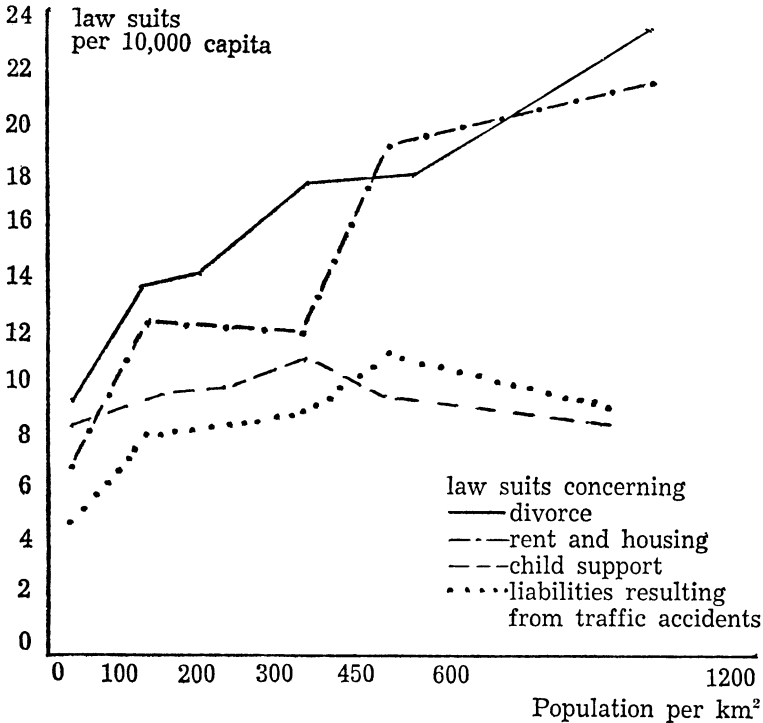
Source: Prognos Survey of courts in Baden-Württemberg (1971)

Splitting court statistics up into different subject matters shows that the general correlation of litigation rates with demographic data has to be differentiated. Thus, any over-all explanation for the rate of litigation such as that attempted by Kaupen seems unwarranted. Kaupen's thesis may still be confirmed, but only if tested by more specific data on the population of all conflicts to which his thesis refers, that is, by a more refined analysis of economically related litigation. All the data which Kaupen (as well as we) used are aggregated on the level of court districts. Thus all our correlations between court activity and demographic characteristics are ecological, and it would be fallacious to draw any conclusions from this level of data of that of individual law suits (cf. Robinson 1950; Goodman 1959).

Ecological correlations can be very fruitful in making our hypotheses more informed. They would be of special interest if *historical* changes and comparisons were analysed. In the Federal Republic of Germany, the litigation rates have been fairly

Figure 2

Frequency of litigation concerning divorce, child support, rent and housing and liabilities for traffic accidents by population density



Note: This study is part of a report prepared for the Ministry of Justice of Baden-Württemberg. This southwestern part of the BRD has a very decentralized economic structure. Therefore, trends are not as distinct as they would be if metropolitan areas in other parts of Germany were included. Data analysis of the Prognos AG, Basel, from court files of 94 courts in Baden-Württemberg 1972. Unpublished manuscript 1974.

Source: Prognos Survey of courts in Baden-Württemberg (1971)

constant. From 1955, when most immediate post-war conflicts had been settled, to 1965, there was a slight decrease in the number of lawsuits. Since 1965, there has been a slight increase (Blankenburg *et al.*, 1974). Since we know that a major portion of all civil suits are related to economic activity, traffic accidents and urban agglomeration, we may wonder why court use did not rise along with economic growth, rising accident figures and urbanization. That it did not suggests that there are balancing mechanisms: on the one hand, within the judicial system there may be alternative bureaucratic procedures which keep many

conflicts out of court.³ On the other hand, the threshold for going to court may have been raised for professional litigators like insurance companies, sales firms, construction and housing companies. The capacity of legal staffs in firms which handle a lot of litigation is limited. Their filtering of cases may function as a mechanism keeping the work load of courts fairly constant. It remains a puzzle, why the higher court use in urban regions and in regions in which trade and transport are the predominant economic sectors, shows up only in structural analyses. In a historical analysis there is no rise of overall court figures, in spite of growing urbanization and an increasing tertiary sector within the working force.

III. INDIVIDUAL DATA: PERCEPTION OF CONFLICT, MOTIVATION TO GO TO COURT, BARRIERS AGAINST ACCESS TO THE LAW

Ecological data give rise to many puzzles. They may lead to explanations and stimulate hypotheses, but there are too many fallacies in simple interpretations of them, so that we have to seek surer explanations by testing data from individual lawsuits.

There is a logical problem in determining the factors which lead an individual to court or not; we have somehow to *define* the total population of law-relevant conflicts and legal needs in order to operationalize the question, which factors determine the portion that is finally taken to court. Defining "legal needs" cannot be done without normative assumptions.⁴

One alternative to making such assumptions is to select a class of conflicts where the legal relevance is beyond doubt. In a pilot study (Blankenburg *et al.*, 1972) looking into the reasons for going to an appeal court, we examined such a well defined class of conflict situations. The loser in a suit must decide whether to appeal his case or not. We took all civil suits at a local court for a two-month period (n=489) and followed their history up to the decision. Here again we may differentiate between strictly economically related issues and those which have to do with child support, rent and housing or traffic accidents. And from court records we could obtain some clues as to the social status of the parties involved.

3. There is clear evidence of this in penal law: in 1969 many of the petty crimes, especially traffic violations, were decriminalized by enlarging the competence of bureaucratic agencies in fining.

4. Cf. Abel-Smith *et al.* (1973) which evolves a working definition of "need for legal service."

Table 3

Constellation of parties involved in a civil suit⁵

Concerning economic matters: sales contracts, works or service contracts

		Plaintiff			
Defendant		Private Person	Businessman	Firm, Agency	
	Private Person	13%	11%	43%	67%
Businessman	5%	13%	8%	26%	
Firm, agency	2%	2%	3%	7%	
		20%	26%	54%	100%

N = 299*

Concerning matters not directly economic: traffic accidents, rent and housing, child support

		Plaintiff			
Defendant		Private Person	Businessman	Firm, Agency	
	Private Person	61%	7%	14%	82%
Businessman	6%	—	1%	7%	
Firm, Agency	10%	1%	—	11%	
		77%	8%	15%	100%

N = 122*

*68 cases had to be omitted in these tables due to missing or unclear data.

Courts are predominantly involved in collecting money claims which arise from economic transactions. Among economically related issues, we find that 43% of all suits concerned a claim of some business unit against a private party. Law suits among businessmen make up only 8% of our sample of civil suits. Suits in which firms or agencies sue one another only make up 3%. Only rarely (in 7%) is the modal constellation reversed so that a private party takes its claim against a businessman or a firm to court (for instance, demanding fulfillment of a service contract or reimbursement on a sales contract). Judging from the issues at stake in civil suits before the local court, we conclude that it is mainly a service institution regulating payment demands for the business world. Issues that are not directly economic cover only 25% of our random sample of law suits before our local court. Here the constellation private party vs. private party dominates with 61%, another 24% having a private party on the plaintiff or the defendant's side.

For further study of the motives of going to court we selected a sample of all cases concerning sales, work or service con-

5. For the method used in the court file analysis see Blankenburg (1972). We defined as "Businessmen" all firms under the legal form of "OHG" and "KG" and those which appear in the letter heads with the name of the owner only. All other business was defined as "firms."

tracts or liabilities resulting from accidents, thus including only cases in which the matter at stake was reducible to a sum of money. Interviews with 40 parties who had lost in the first instance in such cases provided some additional information on the social relations between parties. Surprisingly, half of all interviewees had some larger institution backing them and taking an active interest in their lawsuit. More than half our losing parties did not pay the court fees themselves, but had insurance which covered these (either liability or legal service insurance). In one-third of these appeal cases, the appellant party was not even informed that the case had been appealed (cf. Blankenburg *et al.*, 1972).

Court activity to a great extent is part of the web of bureaucratic regulation in modern societies. In only one-quarter of all our interviews did the parties to the litigation meet each other in court. More than half of the parties never appeared in court. To them a lawsuit was a matter to be delegated to a lawyer.

Going to court in industrial countries involves a pattern of conflict-settlement that is vastly different from that depicted in the anthropological literature where two individuals step before a judge who is mediating between them. A civil proceeding in an industrial country like West Germany is largely a written procedure, with little or no verbal contact between the litigants. In a society which is shaped by growing bureaucracies, judicial institutions are largely busy with conflicts in which at least one party is closely tied to some bureaucratic institution. Private parties seldom take a case to the courts. When they do, it is often with the support of organizations.

Analyzing the factors which determine access to law will involve us in a survey of the institutional network which is built around court activity. The sum of these institutions, the traditions and perceptions which are connected to them, we might call the "legal culture" of a nation. Only by understanding it can we explain the amazing differences in the frequency of litigation which we observe between, as well as within, industrial countries.

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