Published on e-First 19 February 2018

Book Review

IN PRAISE OF LITIGATION*

by Alexandra Lahav

CHOO Han Teck
LLB (Hons) (National University of Singapore), LLM (Cambridge); Judge of the Supreme Court of Singapore.

1 Lawyers are familiar with the saying "a good settlement is better than a good law suit". In this book, Lahav makes the argument that a law suit can be a good instrument in the promotion of democracy. She is referring to an American law suit in relation to American democracy, but some of her points are universal to litigation in an adversarial system of litigation. She states her thesis as follows:[1]

> Litigation helps democracy function in a number of ways: it helps to *enforce* the law; it fosters *transparency* by revealing information crucial to individual and public decision-making; it promotes *participation* in self-government; it offers a form of social equality by giving litigants equal opportunities to speak and be heard … [emphasis in original]

She explains that her motivation in writing this book arose from the "increasing limitations on the right to sue" and by "arguments that misunderstand or ignore the democratic purpose of litigation".[2] When considering her thesis, it is best to remember the differences between a parliamentary style democracy and the federal style of the US. As Marcel Berlins and Clare Dyer pointed out, in an average year, the UK Parliament enacts 45 to 60 new Acts of Parliament.[3] The American federal system operates within 50 states, each with its own legislature and court system, and its form of judicial review is different from that of the UK.

2 Lahav cites the case in which four disabled people sued Taco Bell for not having adequate facilities in their car parks for handicapped people. The suit was settled in 2014 but had forced Taco Bell to agree to complying with the standards set under the Americans with Disabilities Act[4] ("ADA"). The suit also led to other fast food restaurants to take similar action to comply with the ADA. Noting that using litigation as a means of enforcing the law often gives the impression of "lawyer

---

* Oxford University Press, 2017.
1 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at pp 19–20.
2 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 21.
3 Marcel Berlins & Clare Dyer, *The Law Machine* (Penguin, 2000) at p 1.
4 See *Moeller v Taco Bell Corp* US Dist Ct – ND Ca No C 02-5849 (MJJ).

overreach or frivolous lawsuits", Lahav believes that "litigation affirms the value of autonomy and human dignity". She also believes in the utility of litigation when it comes to "answerability and accountability", and acts as a "deterrence … to prevent similar harms … A single lawsuit can promote all three goals".[5]

3 After examining the types of regulating the enforcement of law, namely, by administrative agency, government lawsuits, and private litigation, Lahav examines the question, "[h]ow effective is litigation"?[6] In her discussion, she examines three examples. The first is the case of *Brown v Board of Education of Topeka, Kansas*.[7] The second concerned the suit against another fast food chain, Jack in the Box in respect of an *E coli* outbreak, and the third was the suit against General Motors, by the family of a girl who was killed when the airbags did not work.[8] She ends her discussion with a reference to medical malpractice suits, pointing to the ways they deter misconduct. First, the data collected by hospitals and practitioners are used to improve practices. Those data include lawsuits.[9] Secondly, she contends that legislative curbs on litigation have an effect on patient safety: "[i]f tort reforms do decrease litigation, and litigation has a deterrent effect, one would expect that as tort reforms took effect the rates of injury would rise".[10] Thirdly, she challenges the claims that "the main argument against medical malpractice litigation has been the contention that there are too many frivolous claims. But the evidence does not support this assertion".[11] Fourthly, she also refutes the claims that medical malpractice suits are unfair because the claimants are paid even when the doctors were not negligent.[12] Finally, in addressing the effect of the cost and expense of medical litigation, Lahav refers to a Harvard study that shows that "most of the costs incurred were for valid claims".[13]

4 In the next chapter, Lahav discusses the power of information through litigation. In the discovery process in the 1996 case in which the victims of E coli infections sued a fruit juice company, Odwalla, the discovery process uncovered a letter from the US Army to Odwalla "revealing that army inspectors had found that the juice manufacturer's 'plant sanitation program [did] not adequately assure product wholesomeness' and rejecting the company's application to provide juice

5 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 32.
6 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 41.
7 347 US 483 (1954).
8 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at pp 42–50.
9 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 51.
10 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 52.
11 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 52.
12 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 53.
13 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 53.

for US Soldiers".[14] Although the Odwalla case did not impede the development of the law because the legal rules were clear, Lahav issues the warning that because the discovery process in the US is lawyer driven, "much of the information produced is not public unless the litigants choose to publicize it", and further, "parties who do not ask for information in discovery will not get that information. Having a good lawyer who knows what to ask for matters".[15] Moreover, often, the expense of the civil discovery process does not produce sufficient value to justify it, and that includes instances in which "discovery can be abused in cases where the burden of discovery falls more on one party than the other".[16]

5 Lahav is also sceptical about protective orders in discovery and secret settlements because they permit misconduct to continue, "and deny others, who are also victims, the information they need to pursue their own claims". These include private settlements with confidentiality clauses.[17] These are not the only threat to the transparency of litigation, according to Lahav, sometimes issues are not properly aired because "the courts refuse to decide legal questions properly presented in the cases before them".[18] Thus, it is the court's role to be alert to the risk of intimidation intended to silence proper disclosure, and judge whether it is in fact a case of qualified immunity that will allow it to avoid deciding the merits.[19]

6 Lahav believes that every type of lawsuit involves the parties in self-government. The suit itself has an impact in the determination of the law. One example she provides is the case of *Casale v Kelly*.[20] That case moved the court to halt unreasonable police arrests. Lahav goes on to surmise that participation also includes participation in jury service. But litigation can be problematic where litigants are self-represented. She points out that:[21]

> While judges want to help litigants who are not represented by a lawyer to make their case, this is difficult because judges do not want to be perceived to be favouring one side over the other …

Another problem concerns collective litigation because "when large numbers of plaintiffs are lumped together through a variety of procedures, individuals can be lost in the shuffle, without a voice in

14 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 56.
15 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 59.
16 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 69.
17 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 75.
18 She discusses the case of *Wood v Moss* 134 S Ct 2056 (2014).
19 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) pp 78 and 82.
20 710 F Supp 2d 347 (SDNY 2010).
21 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 88.

their own lawsuit, much like self-represented litigants who cannot meaningfully participate in their suit".[22] Lahav accepts that this does not mean that every plaintiff "in a massive lawsuit involving thousands is automatically entitled to a full-blown trial", she believes that "bell-weather" trials can partially solve the problem of such suits.[23] She says one obstacle to participation lay in the lack of incentives to the Judiciary because "administrators of the court system are primarily concerned with how many cases a judge has closed … A judge is not measured, as she should be, by how carefully she listens to litigants, how many hearings she held, how many self-represented litigants she treated with respect, or how many trials she adjudicated".[24]

7 The fourth aspect of the utility of litigation is the promotion of social equality. She reminds the reader that "[e]qual treatment before the law, regardless of status, is what is generally meant by the phrase 'a government of laws and not of men'".[25] Although there is tension between liberties and equality, "equality before the court is what makes the assertion of liberties possible".[26] In this context, there are two considerations of equality. The first is equality of the litigants, and the second is the equality of outcomes, that is to say, a consistency in outcomes across cases.[27] Formal equality in the sense of applying the law equally to all, treating the least esteemed the same way those high in society are treated is basic and unquestionable, but she says that the "legal system needs something more to ensure that the powerless can also realize their right to be heard".[28] One remedy is the use of the pooling system or class actions, but she fears that "courts have been curtailing procedures that allow people with limited resources to band together".[29] The procedural rules in antitrust suits are also examples of ignoring the effect of inequality.[30]

8 In respect of the second aspect of equality, Lahav says:[31]

> A court system that reaches consistent outcomes realizes one aspect of fairness. But our courts are not geared toward achieving consistency; instead, they are structured to provide individualized adjudication. For the most part, cases are brought one at a time, and that is how judges see them. Judges rarely consider how a series of similar cases

22 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 91.
23 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at pp 92–93.
24 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 97.
25 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 112.
26 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 114.
27 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 114.
28 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 117.
29 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 126.
30 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 128.
31 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at pp 132–133.

> resolve longitudinally across different courts or jurisdictions, or even within their own courthouse. Juries, meanwhile, are not told how previous cases were decided …

Lahav cites the example of the Vioxx litigation in which thousands of people were affected by the side effects of the painkiller, Vioxx, produced by Merck & Co. Yet, in some cases, the plaintiffs succeed and in others, not. She asks, "[w]hy should there be such different outcomes for these patients, if all of them took Vioxx and suffered a heart attack"? The problem, it seems, was that in each case "each plaintiff was required to prove that Vioxx caused *their* heart attack. A diabetic plaintiff – who because of his diabetes already faced an increased risk of heart attack – faced a more difficult burden in showing that Vioxx and not his diabetes caused his heart attack" [emphasis in original].[32]

9 Another cause of inconsistent outcomes is "the diversity of decision makers. The United States is a country made up of many legal systems: one for each of the fifty states, plus the federal court system, as well as separate court system in territories such as Puerto Rico, and tribal courts. Each state has different laws that affect the outcomes of individual cases".[33]

10 In conclusion, Lahav reiterates her point that litigation "is a process through which individuals, groups, organizations, and corporations promote and protect democratic values".[34] She maintains that "[i]f people cannot sue, in many cases they will not be able to enforce the law, obtain and reveal information that will discipline wrongdoers and spur legislative action, or participate in self-government; they will even be on their own in resolving disputes".[35] She realises, nonetheless, that "just as democracy is messy business, so is litigation".[36]

---

32 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at pp 134–135.
33 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 136.
34 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 142.
35 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 145.
36 Alexandra Lahav, *In Praise of Litigation* (Oxford University Press, 2017) at p 148.