

## the americanisation of european law? adversarial legalism *à la européenne*

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### Abstract

Adversarial legalism, an approach to law and regulation long considered distinctive to the US, is spreading across the European Union (EU). The EU's institutional structure and its ongoing project of market integration generate political incentives and functional pressures that encourage EU policy-makers to rely on adversarial legalism as an approach to governance.

**Keywords** European Union; law; courts; judicialisation

In the post-war period, European democracies have experienced a profound, multifaceted judicialisation of politics.<sup>1</sup> Most scholarly literature on judicialisation has focussed on the strengthening of courts of constitutional review powers (Tate and Vallinder, 1995; Shapiro and Stone, 1994; Stone Sweet, 2000; Ferejohn, 2002; Ginsburg, 2003; Hirschl, 2004). This focus on constitutional review is understandable. A high court declaring a controversial law invalid or otherwise challenging the actions of a parliament or government can generate great drama, and assertions of judicial power through constitutional review can fundamentally alter power relationships between the branches of government. However, there is far more to the

judicialisation of politics than constitutional review. Less dramatic but equally important is the increasing judicialisation of day-to-day regulatory and administrative processes. An emerging literature explores the increasing role of lawyers and courts in these processes across Europe. Some scholars argue that this judicialisation is pushing patterns of law and regulation across Europe towards an 'American legal style' (Wiegand, 1991; Shapiro, 1993; Trubek *et al*, 1994; Galanter, 1992; Shapiro and Stone, 1994; Kelemen and Sibbitt, 2004; Kelemen, 2006). Other scholars disagree, maintaining that entrenched national legal institutions and cultures will block such convergence (Kagan, 1997, 2006; Van Waarden, 1995; Legrand, 1996).

Not all authors engaged in these debates mean precisely the same thing when they invoke the notion of American law or American legal style. Some focus more on growing judicial power, others on adversarial relations between government and regulated entities and still others on a growing proclivity to sue or 'compensation culture' among the public at large. While no concept can capture all of these understandings of American legal style, Robert Kagan's notion of 'adversarial legalism' comes close. Kagan explains that compared to the legal style prevalent in European countries, American legal style relies on a particularly adversarial, legalistic regulatory style, distinguished by its emphasis on detailed, prescriptive rules, substantial transparency and disclosure requirements, formal and adversarial procedures for resolving disputes, costly legal contestation involving many lawyers and frequent judicial intervention in administrative affairs (Kagan, 2001). Kagan (1997, 2006) argues that substantial Americanisation of European legal systems is unlikely. He maintains that despite many pressures for Americanisation, a number of entrenched institutional and cultural differences will prevent American-style adversarial legalism from 'blossoming' on European soil.

Kagan rightly identifies a number of 'entrenched differences' that discourage the spread of American-style adversarial legalism in Europe (see also Conant, 2002). However, he underestimates the strength of political and economic forces that are encouraging the spread of American legal style across Europe. As I have argued elsewhere (Kelemen, 2006; Kelemen and Sibbitt, 2004), European integration has set in motion linked processes of deregulation and re-regulation that are encouraging the spread of American legal style across all European Union (EU) member states.

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European integration has unleashed both economic and political pressures that encourage the spread of adversarial legalism as an approach to governance. The creation of the single European market has been based on a dual process of economic liberalisation or deregulation at the national level coupled with re-regulation at the European level. This process has undermined informal national styles of regulation based on closed, insider networks and trust among repeat players and has pressured regulators to rely on more formal, transparent and judicially enforceable approaches to regulation. More generally, the very structure of policy-making at the EU level encourages a shift towards an American legal style. Power at the EU level is highly fragmented and the EU lacks any significant administrative capacity. The fragmentation of power between the Council, Parliament and Commission encourages the adoption of laws with strict, judicially enforceable goals, deadlines and transparent procedural requirements. The EU's limited implementation and enforcement capacity makes it tempting for policymakers to effectively privatise governance by enlisting private parties and national courts to enforce EU policies.

The argument here is not that we should expect European legal styles to converge completely on an American model. Indeed, one could hardly expect total convergence when American legal style itself is a moving target and varies across policy areas. And more

importantly, as Kagan and others suggest, entrenched national legal institutions and norms will limit the spread of some American practices. While the existing institutional and cultural landscape of European legal systems will not block the spread of adversarial legalism, this landscape will surely channel these developments. The argument, then, is that adversarial legalism is spreading in Europe, but that it is a form of adversarial legalism with European characteristics – what we might call adversarial legalism *à la européenne*.

The remainder of the paper is divided into three sections. First, I argue in more detail why the process of European integration is stimulating the spread of adversarial legalism. Second, I discuss a number of recent ‘horizontal’ developments that both reflect and will serve to accelerate the spread of adversarial legalism across a number of policy areas. The final section concludes.

## **WHY EUROPEAN INTEGRATION PROMOTES ADVERSARIAL LEGALISM**

Together, the EU’s institutional structure and its ongoing project of market integration generate political incentives and functional pressures that have led policy-makers to enact transparent, judicially enforceable regulations backed by strict public enforcement and increased opportunities for private enforcement. In other words, adversarial legalism is emerging in Europe for much the same reason it emerged earlier in the US. As Kagan himself (2001: 40–54) has emphasised, in the US case ‘Fragmented Governmental Authority’ and ‘Fragmented Economic Power’ were both crucial factors behind the emergence of adversarial legalism. So too in Europe.

To understand why adversarial legalism is spreading and to appreciate how its spread is changing the nature of the

policy process, we must begin by understanding the traditional legal styles that it is supplanting. While national, legal and regulatory styles varied across EU member states in many very significant ways (Richardson, 1982), we can identify a number of common attributes that distinguished European legal styles from the American. The approaches to regulation that long predominated across Western Europe were more informal, cooperative and opaque and relied less on the involvement of lawyers and courts than those in the US. Across the variety of systems of regulation found in EU member states,<sup>2</sup> closed networks of bureaucrats and regulated interests developed and implemented regulatory policies in concertation, and regulators were free to pursue informal means of achieving regulatory objectives, with courts rarely challenging their decisions.

These flexible, informal and rather opaque systems of regulation have proven largely incompatible with European integration. The economic liberalisation unleashed by the Single Market initiative introduced new actors, many of them foreign, into previously sheltered domestic markets. For these ‘outsiders’, opaque systems of regulation that relied on insider networks could not help but skew the playing field in favour of domestic players. These new actors, their state sponsors and the European Commission all attacked informal, flexible regulatory practices at the national level for their lack of transparency and legal certainty. And aside from such attacks and legal challenges, the growing diversity of players in liberalised markets simply rendered traditional systems of regulation unworkable.

However, the creation of the single market has not stopped with simple deregulation; rather, deregulation at the national level has been complemented with re-regulation at the European level. The EU presents a clear case of the

dynamic Steven Vogel (1996) identified, in which 'freer markets' actually require 'more rules'. National regulations that impeded the operation of the single market are replaced with pan-European frameworks that often increase the intensity of regulation. EU level regulation cannot rely on the informal systems based on closed insider networks and trust. The increased volume and diversity of players and the demands from market participants and governments alike to ensure a 'level playing field', pressurises EU policy-makers into relying on a more formal, transparent approach to regulation, backed by vigorous enforcement.

The very institutional structure of the EU also encourages adversarial legalism. The EU is a highly fragmented regulatory state, with authority in many policy areas divided vertically between the EU and member state governments and horizontally at the EU level between the Council, the Parliament, the Commission and the European Court of Justice (ECJ). The EU has a powerful judiciary, but is otherwise a weak state with extremely limited implementation and enforcement capacity. Across a wide range of policy areas, these institutional factors generate strong political incentives to rely on adversarial legalism as a mode of governance (Dobbin and Sutton, 1998).

The fragmentation of power between institutions at the EU level encourages lawmakers to adopt laws with strict, judicially enforceable goals, deadlines and transparent procedural requirements. The European Parliament is perhaps the strongest backer of this approach, as it trusts neither the member state governments nor the European Commission to implement and enforce EU law effectively, unless subject to strict judicial oversight. The Commission too favours this approach, as it recognises its limited ability to enforce EU law from the centre. Even member state governments often favour this approach: they willingly

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tie their own hands and expose themselves to enforcement litigation, because they doubt one another's commitment to implementation and seek to ensure that laggards will be forced to comply. Finally, the fragmentation of power shields the ECJ from political backlash and thus emboldens it to make expansive interpretations of EU rights, to stand up to laggard member states and to play an active role in the policy process more generally.

The EU's weak administrative capacity and its perceived 'democratic deficit' also encourage EU policy-makers to rely on adversarial legalism. Recognising that they will never be permitted to establish an EU level bureaucracy of the size necessary to implement and enforce EU law effectively, EU policy-makers have actively sought to encourage citizens and economic actors (i.e. firms) to enforce their EU rights before national courts. The EU's institutional predisposition to adversarial legalism has only been intensified by the EU's response to the criticism that its policy-making processes suffer from a 'democratic deficit': EU policy-makers have responded by enhancing transparency, formalising procedures for public participation and increasing 'access to justice' for aggrieved parties (Shapiro, 2001).

## **ASSESSING THE SPREAD OF ADVERSARIAL LEGALISM**

While there is a widely held view that countries across Europe are experiencing

a dramatic growth of all things 'legal', including litigation rates, numbers of judges and lawyers, and spending on legal services (Blankenburg, 2001), existing work on judicialisation suffers from a massive *data deficit*. Quite simply, there are very few aggregate, comparable, longitudinal data on litigation rates, spending on judiciaries and other measures of judicialisation. Some of the clearest evidence for the spread of adversarial legalism can come from case studies of the transformation of legal style in particular policy areas. Elsewhere I have identified movement towards adversarial legalism in policy areas as diverse as environmental protection, securities regulation, consumer protection and anti-discrimination policy (Kelemen and Sibbitt, 2004; Kelemen, 2003, 2004, 2006). Others have identified similar trends in competition policy (Hodges, 2006b; Wils, 2003) and contract law (Shapiro, 1998). I am involved in an ongoing research project designed to collect aggregate measures of adversarial legalism, but for the purposes of this brief paper, I can present only some preliminary data and findings.

Even this preliminary evidence strongly suggests that adversarial legalism is spreading as a mode of governance in the EU. No single measure can capture the spread of adversarial legalism, but we can pull together a number of indicators that together provide a composite picture of the trend. Some measures provide direct indicators of adversarial legalism, but others are more indirect, simply showing that necessary underpinnings for the expansion of adversarial legalism are falling into place.

### **FINANCING LITIGATION**

In the study of legal systems, as in the study of so many aspects of politics, one does well to 'follow the money'. Though adversarial legalism is about far more than litigation, the threat of potential

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litigation is a key element in this legal style. For decentralised enforcement by private parties to flourish, these private parties must be able to finance litigation. Historically, the financing arrangements available in most European jurisdictions tended to discourage litigation. The absence of contingency fee arrangements and the presence of the loser pays rule made 'up front' costs and potential costs (should one lose) high. The one area of litigation finance where EU member states did surpass the US was legal aid, and the EU itself has encouraged this with its Legal Aid Directive (Directive 2002/8/EC), putting pressure on member states to increase their legal aid provision, at least for cross-border disputes. However, legal aid was always subject to eligibility requirements and unavailable to many litigants. By the late 1990s, austerity pressures led to cutbacks and led policymakers to seek out budget neutral ways to facilitate 'access to justice'. Recent reforms and current reform debates suggest that they are turning to new financial arrangements, such as contingency fees, that may encourage litigation.

Historically, contingency fees have been prohibited by law or bar associations' codes of self-regulation across Europe. However, such prohibitions are increasingly being challenged and circumvented. Scotland and Ireland have permitted 'no win, no fee' arrangements for years and, in 1999, the British government introduced its own version of Conditional Fee Arrangements (CFAs) for England and Wales. These arrangements

fall short of fully fledged contingency fees in that lawyers cannot set their fee as a percentage of the judgement or settlement, but they do allow lawyers and litigants to enter into 'no win, no fee arrangements'. CFAs proved popular, but generated confusion and difficulties for many litigants, leading some experts in the UK to call for the introduction of fully fledged contingency fee arrangements in England and Wales (Hodges, 2006a). In recent years, proposals for the introduction of contingency fees have been made in Sweden and the Netherlands. Though none of the many proposals for contingency fees have yet been adopted, creative litigants are finding ways to circumvent the formal prohibitions. For instance, as Chris Hodges (2006a: 6) explains, 'in Germany and the Netherlands, a non-lawyer promoter of litigation (who may be a lobbying or consumer organisation) may enter into a normal fee contract with a lawyer (which might quietly not be enforced in the event of failure), and the promoter enters into a contingency fee arrangement with one or more clients, who are the claimants'. While such complex arrangements will hardly open the floodgates, they do suggest that the levee has been breached.

Another traditional disincentive to litigation in Europe was the loser pays rule, which has long existed, in some form, in every European jurisdiction. The risk of having to pay the defendants' legal costs and court fees dissuaded many potential plaintiffs. However, developments in the market for before-the-event and after-the-event legal expenses insurance increasingly provide litigants with protection against the risks created by loser pays. In many EU countries, such as Germany and Sweden, it is common for households to have legal expenses insurance that can be used to cover the costs of civil litigation. The market for legal expenses insurance has grown steadily

across Europe over the past decade. Between 1992 and 2001, the inflation adjusted growth rate of spending on legal expenses insurance across the EU was 3.1 per cent per year (Comité Européen des Assurances, 2003). The insurance industry has demonstrated the ability to respond quickly to demand in this regard: with the advent of CFAs in England and Wales from 1999, the market for 'after-the-event' legal expenses insurance grew rapidly, enabling litigants to cover themselves against the risk of paying defendants' costs should they lose their case. Where litigants' legal expenses are covered to start with and where they can insure themselves against the risk of having to pay a defendant's costs, the dissuasive effect of litigation costs is diminished.

## **DAMAGES**

Ultimately, questions concerning the costs of litigation cannot be separated from questions concerning damages and remedies. If the decision to litigate is based, at least partially, on a cost-benefit calculation, then all the issues of costs discussed above make up only half of the balance sheet. The damages, remedies or other policy victories that courts can order constitute the potential payoffs from litigation.<sup>3</sup> Traditionally, in Europe the high costs discussed above were coupled with limited potential benefits. But just as costs appear to be decreasing, the potential 'returns' on litigation appear to be increasing.

Damage awards in Europe are far lower than those in the US and will remain so, above all because judges and not juries determine damage awards. Moreover, certain forms of damages, such as punitive damages, are not recognised in European jurisdictions. Nevertheless, it is clear that European law is creating pressure for increases in both the amount and the range of damages recognised by

national courts. A series of ECJ decisions has increased the level and range of damages that litigants can claim under Community law. For instance, in *Von Colson*,<sup>4</sup> the Court emphasised that damages function not only as a form of redress but also as a deterrent to future harm. In *Marshall II*,<sup>5</sup> the ECJ ruled that member states must allow full compensation for damages concerning violations of the Equal Treatment Directive, and therefore cannot maintain fixed ceilings on compensation. In *Simone Leitner*,<sup>6</sup> the ECJ held that Article 5 of Directive 90/314 on package travel gave consumers a right to compensation for *non-material damage* (in this case, psychological damages resulting from 'loss of enjoyment of a holiday'), despite the fact that the directive had not explicitly mentioned non-material damages and the fact that no such damages existed in national (in this case Austrian) law. Taken together, such legal developments promise to increase incentives for private parties to bring litigation to enforce their EU rights.

### **CLASS ACTIONS**

In the US, class actions have long played a crucial role in facilitating litigation involving diffuse interests (i.e. investors, consumers or victims of discrimination). Many EU member states have long permitted forms of 'representative' or 'collective' actions in some policy areas (most often consumer protection), but these mechanisms fell short of US class actions in important ways.<sup>7</sup> This situation is changing. In recent years, England and Wales, Sweden and the Netherlands have already introduced fully fledged class actions. France, Germany, Italy, Ireland, Finland, Norway and Sweden, and several others are currently considering doing so (Hodges, 2006a). Even the EU itself has expressed support for the idea of introducing a class action mechanism across the Union and has commissioned a detailed

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cross-national study on the issue to be delivered later this year (Hodges, 2006a: 18). The spread of class-action rules across the EU promises to increase litigation opportunities for diffuse interests and other plaintiffs who might otherwise lack the resources necessary to litigate (Hodges, 2001; *Financial Times*, 7 January 2005, p. 7; *The Wall Street Journal*, 24 February 2004, p. 16; 2 September 2005, p. 1.)

### **LAWYERS, LAW FIRMS AND LEGAL SERVICES**

While lawyers do not generate adversarial legalism by themselves, they are necessary for its operation and encourage its development. The European legal services industry is growing rapidly and transforming its forms of organisation in ways that both reflect, and will further accelerate, the growth of adversarial legalism. The number of registered attorneys per capita has increased dramatically across EU member states over the last twenty years (Kelemen, 2006). In the corporate sector, large American and British firms have expanded across the Continent, and continental firms have organised themselves into larger firms that can offer many of the 'mega-lawyering techniques' familiar in the US (Kelemen and Sibbitt, 2004; Morgan and Quack, 2005; Trubek *et al*, 1994). The

gross revenues of the legal services industry in Europe is increasing rapidly. In France, the market for legal services grew by 44 per cent between 2000 and 2004, and the market is forecast to grow by an additional 41 per cent by 2009 (Euromonitor, 2005a). Likewise, in Germany, the legal services industry grew by 20 per cent between 2000 and 2004 (Euromonitor, 2005b). The growth and reorganisation of the legal profession across Europe is strengthening the 'legal support structure' (Epp, 1998) for many forms of litigation. Sceptics might emphasise that these developments are limited primarily to the realm of corporate law and that there are very few litigation oriented NGOs or the sorts of 'public interest' law firms found in the US. While this is true, it is worth recalling that in the US the legal practices that became hallmarks of adversarial legalism developed first in the corporate sector and only later spread to various areas of public interest law and policy advocacy (Kelemen, 2003; Galanter and Palay, 1991: 41–52; Epp, 1998: 44–8).

## **LITIGATION**

As many scholars of EU law and politics have shown (for instance, Burley and Mattli, 1993; Stone Sweet and Brunell, 1998; Alter, 2001; Fligstein and Stone Sweet, 2001; Cichowski, 2006; Kelemen, 2006; Börzel, 2003), the volume of litigation at the EU level, including enforcement actions brought by the Commission, direct actions brought by plaintiffs before the Court of First Instance (CFI) and 'preliminary ruling' requests stemming from cases brought before member state courts, has increased dramatically over the past two decades. The total volume of cases before the ECJ and CFI has more than tripled since the 1980s (Kelemen, 2006). Is the growth of litigation at the EU level reflected in similar increases in litigation at the national level?

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Just as the proof of the pudding is in the eating, some might argue that the proof of the adversarial legalism is in the litigation. Thus the only reliable longitudinal measure of increasing adversarial legalism would be long-term increases in aggregate civil litigation rates. This is not altogether convincing. While the data on litigation rates are informative, much of what is distinctive about adversarial legalism in the US, and what may be spreading to the EU, involves not litigation *per se*, but behavioural changes in the shadow of potential litigation. Aggregate data on litigation cannot capture many manifestations of adversarial legalism such as lengthy product safety warning labels, exhaustive due diligence in corporate transactions, high medical malpractice insurance premiums and the cancellation of public events due to local governments' fear of litigation. Contrariwise, aggregate data on litigation may reflect patterns and trends that have little or nothing to do with adversarial legalism.

For instance, in countries where a substantial amount of litigation is employment related, economic downturns and lay-offs will lead to a spike in litigation rates (and economic booms the opposite). More generally, the best cross-national data on litigation rates compiled in the 1990s showed that Germany, Sweden and Austria, all three of them corporatist countries, all had higher aggregate civil litigation rates than the US, the very paragon of adversarial legalism (Wollschläger, 1998; Kritzer, 2002). Finally, in assessing shifts in litigation rates longitudinally, one runs into the difficulty that, precisely because litigation rates were spiralling out of control, or at least perceived to be (Zuckererman, 1999), governments introduced reforms aimed at promoting alternative dispute resolution or otherwise channeling potential cases away from their overloaded courts. Thus, we might expect a pattern in which litigation rates climb gradually, and then dip in the wake of reforms, only to begin another gradual increase thereafter.

Whatever the shortcomings of such data, I am nevertheless leading an ongoing effort to gather longitudinal data on civil litigation rates in EU member states. However, for the reasons discussed above, we should not expect aggregate data on civil litigation to yield great revelations concerning trends towards adversarial legalism. Increases in litigation are important indicators, but the spread of adversarial legalism must ultimately be assessed with case studies of particular policy areas.

## CONCLUSION

Robert Kagan (2006) has highlighted a series of entrenched institutions and norms that discourage the spread of adversarial legalism. I agree with him that nearly all of these are, or at least have been until recently, significant

impediments. However, this paper suggests that many of these barriers are giving way. They are eroding principally under the stream of changes unleashed by the process of European integration. The political incentives and functional pressures generated by the dual process of deregulation and re-regulation in the EU are undermining national legal styles. They are also pressurising member states into relying on more detailed, transparent regulations, to take a more adversarial approach to public enforcement and to permit more private enforcement of legal norms.

There is a long tradition of EU leaders promising, but failing, to simplify EU regulation (Idema and Kelemen, 2006). Will efforts to control litigation and other aspects of adversarial legalism prove any more successful? Many EU policy-makers are well aware that the EU's approach to regulation in many policy areas may spark a considerable amount of litigation and are keen to prevent EU member states from experiencing the worst excesses of American legal style.<sup>8</sup> They are performing a difficult balancing act. On the one hand, they are creating new EU rights, removing barriers to access to justice and encouraging potential litigants – including weary air travellers, disgruntled consumers, firms injured by others' anti-competitive behaviour and victims of workplace discrimination – to vindicate their rights, sometimes actively advertising these rights and even training potential litigants.<sup>9</sup> On the other hand, they hope to avoid the high costs, uncertainty, adversarialism and 'litigation culture' they associate with the US system. As Kagan argues, entrenched institutions and norms will likely shield EU member states from some of the extremes of the American way of law. Nevertheless, legal style in Europe is taking significant steps down the path of adversarial legalism.

## Notes

- 1 I thank Erhard Blankenburg for suggesting this title.
- 2 See Kelemen (2006) and Kagan (2001) for more detailed reviews of national regulatory styles.
- 3 I leave aside for the purposes of this paper other 'payoffs' from litigation, such as publicity, which may accrue regardless of the court's ruling.
- 4 Case 14/83 [1984] ECR 1891.
- 5 Case C-271/91 [1993] ECR I-4367.
- 6 Case C-168/00, ECR [2002] I-02631.
- 7 Typically, such mechanisms empowered approved consumer organisations to seek injunctive relief on behalf of consumers; however, they could not seek damages.
- 8 See speech by Competition Commissioner Neelie Kroes advocating more private enforcement of competition policy, in which she explained she wanted to use private enforcement to promote a 'competition culture, but not a litigation culture', European Commission, SPEECH/05/533. Available at [www.europa.eu.int](http://www.europa.eu.int), last accessed 21 August 2006.
- 9 Consider for instance the posters the EU has placed in airport terminals across Europe notifying passengers of their rights to compensation for delays and overbooking, or the training seminars the EU has sponsored for disability NGOs and practising lawyers to examine 'Effective Test Case Strategies' under the equal treatment framework directive. Information available at [http://www.nuigalway.ie/law/Disability\\_summer\\_school/index.html](http://www.nuigalway.ie/law/Disability_summer_school/index.html), last accessed 21 August 2006.

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