

The Strength of Weak States:
Adversarial Legalism in the US and the EU

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Litigation is a weapon of the weak – not of weak citizens, but of weak states. So it has been in the United States (US) since the 19th Century, so it is in the European Union (EU) today. To understand the central role that courts and litigation play in contemporary EU governance and the central role they have played in the US for decades, we can begin by posing a puzzle: How can an executive (the European Commission) with a staff of less than 25,000 regulate a modern polity with a population of nearly 500 million souls? The answer is that it cannot – at least not on its own. The European Commission – in anything near its present form – cannot hope to implement and enforce the accumulated body of Community law (the *acquis communautaire*) across the EU's twenty-seven member states. Yet, Member state leaders in the European Council, and even zealous Europhiles in the European Parliament, flatly refuse to increase the size and resources of the European Commission to anything near the level necessary to create an effective Weberian 'super-state' bureaucracy in Brussels.

This leaves the aspiring polity with a reach that exceeds its grasp. Prevented from developing anything approximating a traditional state, EU leaders have worked to expand the EU's regulatory capacity along two main fronts: one bureaucratic and one judicial. The bureaucratic front entails the ongoing project of establishing EU-level regulatory agencies that serve as the hubs of networks of national regulatory authorities (Kelemen 2002, 2005) – and more generally of the drive to 'Europeanize' national administrations (Knill 2001, Featherstone and Radaelli 2003). But it is the second front – the judicial one – that is the focus of this paper.

Because it cannot rely on a large centralized bureaucracy, the EU has addressed the puzzle of 'how to govern Europe' by enlisting national courts and private litigants as the agents of EU governance. In essence, the EU judicializes policy making and enforcement so that private parties can enforce EU law before national courts. This approach is not unique to the EU, nor is it a new one. Though the times and context differ greatly, the judicialization of contemporary EU governance echoes the approach taken by the early builders of the American state. As Skowronek explains in his pathbreaking study of state-building in the late 19th and early 20th Century US, "The courts became "the American surrogate for a more fully developed administrative

apparatus.”(1982, p. 24) If the early American state was, in Skowronek’s words ‘a state of courts and parties’, then the contemporary EU regulatory state is a state of courts and agencies.

Of course, the US state has strengthened in myriad ways since the early 20th century. Nevertheless, scholars of contemporary US regulatory politics continue to find that judicialization of the policy process acts as a substitute for a strong and centralized administrative state in the US. This is nowhere more clear than in Robert Kagan’s work on American legal and regulatory style. Kagan argues that fragmented structure of US political institutions – together with the fragmentation of economic power in the liberalized economy - generates incentives for policy-makers to rely on an approach to regulation that emphasizes transparency, juridification and the broad empowerment of private litigants to enforce policy – an approach he labels ‘adversarial legalism’ (Kagan 2001, p. 40-54). Dobbin and Sutton (1998), arguing along slightly different lines, also emphasize how the threat of decentralized litigation serves to strengthen an otherwise weak American state. Dobbin and Sutton argue that the administratively weak US federal government influences policy outcomes by generating complex and unpredictable regulations – and an associated threat of litigation – that pressure firms to ‘internalize’ the state by setting up legal divisions dedicated to regulatory compliance.

A central lesson of such analyses of US policy making is that the ‘adversarial legalism’ that characterizes so much of US regulation is not simply a product of some underlying litigiousness in American society or legal culture. Rather, adversarial legalism is rooted in the structure of US political and economic institutions. The combination of economic liberalization and political fragmentation encouraged the spread of adversarial legalism in the US decades ago. And likewise today, the combination of economic liberalization and political fragmentation produced by the process of European integration is encouraging the spread of a European variant of adversarial legalism as a mode of governance across the EU.

To appreciate how the spread of adversarial legalism is changing the nature of governance across the EU, we must clarify how adversarial legalism differs from the traditional European regulatory styles that it is supplanting. In the 1970s and 1980s, a

substantial body of literature in the field of comparative public policy demonstrated that the approaches to regulation – or modes of governance - that prevailed across western Europe differed substantially from the predominant approach to regulation the US (See Kagan 2001 for a summary of the literature). Compared to the approaches that prevailed across western Europe, American style ‘adversarial legalism’, was characterized by more 1) detailed prescriptive rules often containing strict transparency and disclosure requirements, 2) legalistic and adversarial approaches to regulatory enforcement and dispute resolution 3) costly legal contestation and multi-faceted ‘mega-lawyering’ techniques, 4) active judicial review of administrative decisions and practices and frequent judicial intervention, 5) frequent private litigation concerning regulatory policies (Kagan 2001, 2007).¹ Above all, American style adversarial legalism was and is distinguished by its emphasis on enforcing legal norms through transparency and the empowerment of private actors to assert their rights (Kelemen and Sibbitt 2005).

While national regulatory styles of course varied significantly across European states (Richardson 1982; Van Waarden, MS, University of Utrecht), a number of common attributes distinguished European approaches from the American. Compared to American-style adversarial legalism, approaches to regulation that long predominated across western Europe were more informal, cooperative and opaque and relied less on the involvement of lawyers, courts and private enforcement actions. Typically, opaque networks of bureaucrats and regulated interests developed and implemented regulatory policies in concert. Regulators could rely on more flexible, informal means of achieving regulatory objectives, with courts rarely challenging their decisions. In a number of states (particularly Austria, Sweden, Germany and the Netherlands), corporatist patterns of interest intermediation predominated (Lehmbruch and Schmitter 1982; Goldthorpe 1984; Kitschelt et al. 1999; van Waarden 1995, 1999). In France, elite government technocrats traditionally dominated regulatory policymaking (Hayward 1982, Suleiman, 1978). In the U.K., a pattern of cooperative, informal, "chummy" relationships between regulators and regulated entities prevailed (D. Vogel 1986; S. Vogel 1996; van Waarden 1999). In the consensual Dutch regulatory model, regulators relied on ‘flexible, pragmatic and tolerant’ approaches when working with regulated entities (van Waarden 2003).

‘Insiders’ in these regulatory networks had no incentive to resort to litigation; ‘outsiders’ had greater incentives, but neither regulatory statutes nor the courts themselves gave them substantial opportunities to do so. As a result, while ‘regulation through litigation’ (Viscusi 2002) was central to American regulatory governance, it played a decidedly more minor role in Europe. Law firms in Europe played a limited role in business affairs and in the regulatory process. Law firms tended to be small, and they focused on litigation, playing little role as intermediaries between business and government or as advisors on general business affairs (Trubek et al 1994, p.422). Law firms did not engage extensively in the ‘mega-lawyering’ (Galanter 1983; 1991) techniques associated with large American law firms, such as multi-jurisdictional litigation strategies, lobbying and other non-judicial forms of advocacy. In a host of studies, comparing regulation in the US with that in France, Germany, the UK, the Netherlands and other EU member states, European approaches to regulation were found to be less judicialized and litigious, less driven by legal formalities, less unpredictable, and less adversarial than the US approach to the policy area in question.²

More recently, a debate has emerged among scholars of comparative public policy and law as to whether American-style adversarial legalism – or something akin to it – may be taking root in Europe. Some have argued that adversarial legalism is spreading in Europe (Kelemen 2006; Kelemen and Sibbitt 2004; Kelemen 2008; Galanter 1992; Wiegand 1991; Shapiro 1993, 2001; Shapiro and Stone 1994), whereas others maintain that entrenched national legal institutions and cultures block any such convergence (Kagan 1997; 2007, 2008; Legrand 1996; van Waarden 1995).

The central argument of this paper and of the much broader research agenda I have been pursuing over the last few years is that a European variant of adversarial is spreading across the EU and that its spread is inextricably linked to the process of European integration. European integration has unleashed both economic and political pressures that are encouraging the spread of adversarial legalism as an approach to governance. The EU’s ongoing project of market integration and the EU’s institutional structure generate functional pressures and political incentives that have led policy-makers to enact detailed, transparent, judicially enforceable regulations backed by coercive public enforcement and widespread private enforcement. In short, adversarial

legalism is spreading as an unexpected - but understandable - byproduct of European integration.

Before elaborating this argument and presenting evidence to support it, a few important qualifiers are in order. First, it is important to emphasize that the argument here is not that we should expect European legal styles to converge completely on an American model. As the authors mentioned above suggest, pressures encouraging the spread of adversarial legalism will be channeled through and limited by entrenched national legal institutions and norms. As a result, the adversarial legalism emerging in the EU will have European characteristics – what we might label adversarial legalism *à la européenne* (Kelemen 2008). Nor is the argument that every policy undertaken by the EU has the characteristics of adversarial legalism. To argue that adversarial legalism is emerging as a dominant mode of governance in the EU is not to deny that the EU deploys other modes of governance. As Richardson (1982) recognized, policy style can vary within a political system across different issue areas (Also see Howlett and Ramesh 2003). The EU has a wide range of instruments and approaches in its regulatory repertoire, and it certainly does occasionally deploy flexible, informal approaches to regulation. Adversarial legalism is not the EU's only mode of governance, but it is emerging as its dominant mode of governance – a regulatory *leitmotif* to which the EU returns again and again across a wide range of policy areas. And finally, the argument developed here does not involve the causal mechanisms typically found in studies of policy diffusion - coercion, regulatory competition, learning or emulation (Kelemen and Sibbitt 2005; Simmons, Dobbin and Garrett 2008). Certainly, American influences have played some role in the spread of adversarial legalism, as we will discuss further below. The American legal system has become the most influential national legal system in the world. Many US legal norms have spread to other jurisdictions through a variety of diffusion processes, and US law firms active in the EU have also played an important role as transmission belts for American-style practices (Mattei 1994; Wiegand 1991; De Lisle 1999; Lester 1988; Ajani 1995; Dezalay and Garth 1995; Kelemen and Sibbitt 2005; Garth 2008). But while American regulatory style provides a salient model, it is referred to more often as an example to be avoided than as a model to be followed. Indeed, American-style adversarial legalism is often viewed with some revulsion – treated as a

virulent American disease against which Europeans must take pains to inoculate themselves. Ultimately, the primary underlying cause of the spread of adversarial legalism in the EU does not involve coercion by, competition with, learning from, or emulation of the US. Rather, the explanation for the spread of adversarial legalism is to be found in shifts within the political economy of Europe.

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

The process of European integration has promoted the spread of adversarial legalism through two linked causal mechanisms, the first stemming from the economic liberalization associated with the Single Market project and the second a product of the fragmentation of power in the EU’s institutional design.

Economic Liberalization

The economic liberalization resulting from the 1992 Single Market initiative and ongoing efforts to complete the Single Market have undermined traditional approaches to regulation at the national level, through both direct and indirect means. Many national regulations have been struck down outright by the European Court of Justice (ECJ) as illegal non-tariff barriers to trade, and other informal, flexible regulatory practices are regularly attacked for their lack of transparency and legal certainty. In addition to such direct forms of deregulation (or ‘negative integration’ Scharpf 1996), economic liberalization has also undermined traditional approaches to regulation by introducing new actors, both foreign and domestic, into previously sheltered domestic markets. The growing number and diversity of players in these liberalized markets has subverted informal, opaque systems of regulation that relied on closed insider networks and trust.

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 and Parliament all attacked informal, flexible regulatory practices at the national level for their lack of transparency and legal certainty.

As traditional approaches break down, national and EU regulators seek new means by which to pursue their regulatory goals, means which are better suited to the liberalized environment. Therefore, liberalization leads to more than simple deregulation; it also creates pressure for re-regulation to enable government to enforce regulatory norms in a liberalized environment (S. Vogel 1996, Moran 1991). However, the new approaches to regulation differ greatly from the old. Following a fundamental insight of the sociology of law, as the social distance and distrust between regulators and regulated actors in liberalized markets increases, laws and regulatory processes tend to become more formal, transparent and legalistic (Black, 1976). In a dynamic Steven Vogel (1996, 2007) has identified in a number of political systems, ‘freer markets’ actually require ‘more rules’ and deregulation is often followed by ‘juridical reregulation’.³ This cycle of market liberalization followed by juridical reregulation creates greater demand for lawyers to protect the interest of their clients through guidance, advocacy and dispute resolution as contracts replace handshakes and courtrooms replace smoke-filled rooms.

The EU has followed this pattern. Flexible, informal and rather opaque systems of regulation have proven largely incompatible with European integration. They are dismantled at the national level because they threaten the operation of the Single Market, and they cannot be resurrected at the EU level. With a greater volume and diversity of players and demands for even-handed regulation, the EU cannot rely on the informal systems based on closed insider networks and trust. To be effective and legitimate, EU regulation must ensure equal treatment for new entrants and foreign actors. Thus traditional approaches to regulation at the national level are replaced with pan-European regulatory frameworks that are more formal, inflexible and judicialized.

Political Fragmentation

A vocation for adversarial legalism is programmed into the very institutional foundations of the European Union. Political fragmentation was programmed into the EU's institutional structure from its founding, and the EU has grown more fragmented over time with EU enlargement and the growing legislative power of the European Parliament. In Tsebelis' (2002) terms, the EU is a polity replete with veto players. Authority is divided vertically between the EU and member state governments and horizontally at the EU level between the Council, the Parliament, the Commission and the ECJ. The EU has a powerful judiciary, but is otherwise a weak state with extremely limited implementation and enforcement capacity. This fragmented institutional structure has generated strong political incentives to rely on adversarial legalism as a mode of governance across a wide range of policy areas (Dobbin and Sutton 1998).

Democracies vary considerably and systematically in the specificity of the legal obligations (statutes, contracts, court rulings) and in their reliance on litigation as a means of enforcement (Kagan, 2001). Comparative research suggests that the fragmentation of political power is a primary cause of judicial empowerment in general (Shapiro, 1981; Ferejohn, 2002; Ginsburg, 2003) and of adversarial legalism as a policy style in particular (Kagan, 2001; Kelemen and Sibbitt, 2004). By contrast, systems of informal, 'non-judicialized' regulation are most likely to be found only in political systems in which political authority is concentrated in the hands of a small number of like-minded veto players (Tsebelis 2002, pp. 235-239). Where political authority is concentrated, political leaders (the principals) need not resort to codified, legalistic means to control their regulatory bureaucracy or private self-regulatory bodies (the agents) and achieve their regulatory aims. Instead, they can establish less formal incentive structures, backed by monitoring mechanisms that encourage the bureaucracy to pursue their goals faithfully (Ramseyer and Rosenbluth 1993, pp. 107-119). If political leaders are unhappy with actions undertaken by the bureaucracy, they can readily rein them in. Moreover, where political authority is concentrated, courts tend to play a weak role in oversight of the bureaucracy; therefore, recourse to judicialization as a means of controlling the bureaucracy would be futile (Shapiro 1981; Moe and Caldwell 1994; Ferejohn 1995; Cooter and Ginsburg 1996).

By contrast, as political authority becomes more fragmented, adversarial legalism becomes a more attractive mode of governance for lawmakers. Political fragmentation creates agency problems and simultaneously offers a tempting solution to them. As fragmentation increases (i.e. as the number of veto players increases), lawmakers will have greater difficulty assembling the political coalitions necessary to pass new legislation or to otherwise rein in bureaucratic agents to whom they have delegated power. Recognizing the likelihood of political gridlock and the durability of legislation, lawmakers have an incentive to draft legislation in a manner that will insulate their policies against potential manipulation by the bureaucracy (bureaucratic drift) or by political forces that may come to power later (political drift) (Moe 1990; Horn 1995; McCubbins, Noll and Weingast 1999). Lawmakers also recognize that the fragmentation of power insulates the judiciary against easy legislative overrides and other forms of political backlash and that courts may, therefore, be willing to play an active role in constraining bureaucratic discretion (Shapiro 1981; Moe and Caldwell 1994; Ferejohn 1995; Cooter and Ginsburg 1996). Lawmakers draft statutes that specify in great detail the goals that bureaucratic agencies must achieve, the deadlines they must meet and the administrative procedures they must follow. They create legally enforceable rights for private individuals and legal persons (i.e. firms or interest groups), assuring that their allies will have access to the courts to hold the executive accountable (McNollgast 1987, pp243-277, Moe 1990). When lawmakers rely on such a judicialization strategy as a means to control the bureaucracy, they encourage the development of an inflexible, adversarial and litigious approach to the implementation and enforcement of regulatory policy.

Finally, fragmentation of political authority also encourages adversarial legalism by creating multiple openings through which interest groups can access political power. The existence of multiple access points encourages groups to engage in political and legal forum shopping and multi-pronged lobbying and litigation strategies (Weaver and Rockman 1993, 445---461). In a fragmented system, if one political authority does not accede to a group's demands, they need not necessarily reach a negotiated compromise; instead, they can shift their efforts to another source of political or judicial authority.

As in other polities, the fragmentation of power between lawmakers in the EU encourages them to adopt laws with strict goals, deadlines and transparent procedural requirements and to rely on a judicialised approach to enforcement (Prechal, 1995, pp.109-113; Franchino, 2004, pp.339-476; Kelemen 2004). The European Parliament is generally the strongest backer of this approach. It recognizes that member states will have incentives to shirk on their EU commitments, and therefore demands legislation that includes detailed, legally enforceable provisions and individual rights that will encourage the Commission or private parties to take enforcement actions against laggard states (Kelemen 2004, Franchino 2004). The Commission too favors this approach, in particular the emphasis on encouraging private enforcement of EU law, as it recognizes its limited capacity to enforce EU law from Brussels. Even member state governments regularly favor this approach, willingly tying their own hands and exposing themselves to enforcement litigation as a commitment device. Member states support this approach because they doubt one another's commitment to implementation and fear becoming the 'sucker' that implements costly EU policies while others shirk (Majone 1995). To make their commitments more credible, they regularly support strict EU laws that create justiciable rights that can be monitored and enforced by the Commission and private parties before European and national courts. More generally, all players in the EU's legislative process recognize the difficulty of adopting or amending EU legislation and anticipate the difficulty in exercising political control of (other) member states' administrations after an EU law is adopted. Therefore, they try to program controls into the EU laws they draft and invite the ECJ, national courts and private litigants to play a central role in the implementation process. Finally, the fragmentation of power has enhanced the power of the ECJ, emboldening 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. Divisions between the Council, the Parliament and the Commission make it difficult for these political branches to act in concert to rein in the ECJ. The ECJ can take an assertive stance in expanding the scope of EU law and enforcing EU law against non-compliant member states with little fear of political backlash (Pollack 1997; Alter 1998; Garrett, Kelemen and Schulz, 1998).

The EU's weak administrative capacity also encourages EU policymakers to rely on adversarial legalism. The EU's budget capped at roughly 1.25% of the collective GDP of the member states. Also, for all the criticisms of the EU's supposedly burgeoning bureaucracy, with roughly 25,000 employees the Commission actually employs roughly the same number of bureaucrats as the administration of a mid-sized European city. With its modest budget and diminutive bureaucracy, the EU cannot hope to adopt significant distributive policies or to establish large-scale programmes implemented by Eurocrats (Majone 1993). Moreover, EU policymakers recognize that they lack even the capacity necessary to enforce EU laws and regulations from Brussels and that member states will never permit them to establish an EU level bureaucracy of the size necessary to implement and enforce EU law effectively. Working within the confines of this 'weak state', EU policy-makers that wish to affect outcomes 'on the ground' within member states have an incentive to create rights for private parties and to enlist national courts to apply them. Recognizing the limits on centralized enforcement from Brussels, EU policymakers have actively sought to promote private enforcement of EU law, encouraging citizens and economic actors (i.e. firms) to bring litigation to enforce their EU rights before national courts and to access the EU judicial system via the preliminary ruling procedure. By presenting policy goals as individual rights that private actors and state governments are obliged to respect and that national courts are obliged to enforce, the EU can readily shift the costs of compliance to the private sector, member state governments and courts.

Finally, in addition to the impact of the structural features of the EU polity discussed above, mounting criticism of the EU's supposed 'democratic deficit' and public distrust of 'faceless Eurocrats' has further encouraged the spread of adversarial legalism. Critics of the democratic deficit have called for increasing transparency and public participation in the EU's regulatory processes (Harlow 1999; Shapiro 2001; Bignami 2003, Vogel 2003; Hartnell 2004,p.:81, Schepel and Blankenburg 2001).⁴ While citizens long seemed willing to tolerate, or at least to ignore, the opacity of regulatory processes at the national level in their own countries, they demand far more transparency from the EU today. EU policymakers have responded by enhancing transparency, formalizing

procedures for public participation and increasing ‘access to justice’ for aggrieved parties (Shapiro 2001; Kelemen 2006).

ASSESSING THE SPREAD OF ADVERSARIAL LEGALISM

Adversarial legalism is what social scientists call a ‘thick concept’ (Coppedge 1999). That is to say, it is a multidimensional concept that cannot be reduced to a single indicator. Convincing evidence of the spread of adversarial legalism in the EU can only come from piecing together indicators of its many manifestations and from cumulating the findings of careful studies of the transformations in regulatory style across a host of policy areas. A handful of policy area case studies in fields as diverse as competition policy, environmental policy, securities regulation, consumer protection, anti-discrimination policy, contract law and administrative law more generally have presented convincing evidence of the EU relying on adversarial legalism as a mode of governance (Kelemen 2003, 2004, 2006; Hodges 2006; Wils 2003; Djelic 2002, Riley 2002; Shapiro 1998, 2001; Mabbett 2005). For the purposes of this paper, while I will mention some key findings from such studies, space constraints preclude an in-depth examination of individual policy areas. Instead, I shall focus on examining a number of overarching indicators of the spread of adversarial legalism and of the role of the EU in this process. While no single measure can capture the spread of adversarial legalism, we can nevertheless pull together a number of indicators – both qualitative and quantitative - that together provide a composite picture of the trend.

Most of the indicators discussed in this chapter cannot be neatly divided into independent and dependent variables, or in other words the causes and consequences of adversarial legalism. Rather, many of the reforms and trends discussed below are best understood as both products of the spread of adversarial legalism and catalysts for its further growth. Some can be taken as evidence of adversarial legalism, others simply show that changes in the European legal field necessary to underpin the future growth of adversarial legalism are falling into place. For instance, the European legal services industry is growing rapidly and transforming its forms of organization in ways that both reflect the growth of adversarial legalism, and will further accelerate its spread. Likewise, procedural reforms such as the spread of class actions reflect political pressure

to increase access to justice, and these reforms will in time open the way for more private enforcement of EU law.

Though many of the developments discussed in this paper are closely intertwined, we can divide them into three broad categories: first, the growing catalogue of EU rights and other judicially enforceable legal norms; second, policies, procedures and institutions that support access to justice; and third, indicators of legal activity. Across a wide range of For the EU to harness adversarial legalism as a means through which to govern the European polity, there must first be enforceable rights and legal norms upon which public and private actors can base legal claims. Second, for private enforcement to play a meaningful role, there must be effective access to justice for private parties to enforce those norms. Finally, to assess the growth of adversarial legalism we can look to manifestations of legal activity, including direct indicators such as litigants, but also more indirect indicators associated with the growth of the legal services industry.

EU Rights

Before turning to EU law in action, we can start by looking at EU law on the books. If policy makers are to rely on adversarial legalism as a mode of governance, they need to put in place laws that public officials and private actors can readily enforce in court. In his analysis of the US, Kagan identifies legal norms characterized by detailed prescriptive rules, often containing strict transparency and disclosure requirements, as a defining feature of adversarial legalism. To encourage enforcement litigation, laws need to establish detailed substantive and procedural requirements, the violation of which can serve as the basis for legal claims. They also need to include transparency provisions that make it easier for potential litigants to identify breaches of the law. Finally, laws that establish individual rights and that are clearly framed in the language of rights will be particularly conducive to adversarial legalism

EU regulation is replete with detailed judicially enforceable provisions, and EU Treaties and secondary legislation establish a host of rights that individuals have been empowered to enforce before national courts. Responding to critiques of the excessive detail and formality of EU regulation, EU policy-makers have repeatedly promised to make EU regulation simpler, more flexible and less formal. Delors announced a 'New

Approach' to regulation, Santer to 'do less in order to do it better', and Prodi and Barroso embraced 'better regulation' initiatives (Kelemen and Menon 2007). And yet, for all the talk about new approaches and new modes of governance, the bulk of EU regulation continues to be characterized by highly detailed legally enforceable requirements, and in fact places increasing emphasis on procedural formality and transparency (Prechal 1995; Senden 2004; Kelemen 2006; Knill Lenschow et al. 2008). Indeed, as the European Parliament's legislative power has grown, it has worked to make EU directives more precise, constraining and judicially enforceable (Franchino 2006). The persistent tendency of the EU to produce detailed, action-forcing legislation and to rely on judicial enforcement is unsurprising in light of the dynamics described above. The fragmentation of power at the EU level generates political incentives for EU policy-makers to craft legislation in this manner.

One of the most significant manifestations of this tendency is the EU's proclivity for pursuing policy objectives by creating individual rights and encouraging private parties to enforce those rights. Repeatedly, and, The EU has pursued rights-based approaches to policy in a strikingly diverse range of policy areas, including in areas where rights-based approaches were by no means the norm at the national level.

Community law has long provided individuals with a wide variety of economic, social and political rights (De Búrca 1995; Geddes 1995; Aziz 2004; Maas 2005). These rights have taken three principle forms: 1) rights established in the EC Treaties, such as the rights to free movement of goods, capital, services and labour, equal treatment of the sexes and later EU citizenship rights, 2) fundamental rights that the ECJ divined in its case-law from the 'common constitutional traditions' of the Member States, 3) 'statutory' rights created in EU secondary legislation (regulations and directives), such as various consumer rights, shareholder rights, worker rights and social rights.

The range of rights protected under Community law continues to grow apace. Two streams of demands for EU rights – one focusing on fundamental civil rights and the other focusing on social and economic rights – converged powerfully in the 1990s. First, with the expansion of EU power under the Single European Act (1986) and Maastricht Treaty (1992), member state governments and EU policymakers realized that they could no longer rely solely on ECJ case law as the basis for fundamental rights protections.⁵

As critics questioned the legitimacy of the EU extending its authority to new, more political sensitive policy areas, EU policymakers put in place stronger, more visible guarantees that the EU would protect fundamental rights. The Single European Act included language affirming that EU member states would protect fundamental rights and the Maastricht Treaty went a step further, establishing the notion of European citizenship and affirming that the EU would protect the fundamental rights of European Citizens (Article 6 and Article 2).

Meanwhile, another stream of criticism suggested that the Single Market program threatened to undermine the European Social Model and that the EU needed to do more to protect social and economic rights. In 1988, European Commission President Delors, with the strong backing of the European Parliament, proposed a Community Charter of Fundamental Social Rights for Workers, which was signed by all member states except the UK in 1989.⁶ However, neither the social rights charter nor the fundamental rights language in the Maastricht Treaty constituted an enforceable European 'Bill of Rights', and they failed to satisfy critics who argued that in light of the dramatic expansion of its powers, the EU needed to greatly strengthen its commitment to rights protection.

These two streams of rights demands converged powerfully in the run-up to the Amsterdam Treaty negotiations. A broad coalition of rights campaigners and their allies in the European Parliament called for a unified approach to rights, arguing that the Treaties should not distinguish between civil and social rights (McCrudden 2001, Menendez, Mabbett 2005, p.100). Member states were increasingly open to these demands for new EU rights; first because they recognized the need to enhance the legitimacy of the EU in the eyes of skeptical citizen, and second because concerns over racism and xenophobia in East European applicant states made them anxious to strengthen EU rights protections before proceeding with enlargement. Ultimately, Member States agreed to include a broad provision on anti-discrimination rights (Article 13) and provisions concerning the role of human rights in the process of acceding to – or being suspended from – the European Union in the 1997 Amsterdam Treaty (McCrudden 2001).

In 1999, the Member States tasked a body ("the Convention") with preparing a Charter of Fundamental Rights for the EU. The Convention agreed to a lengthy

catalogue of EU rights, including classic civil liberties as well as social, economic and political rights. Member states were unwilling to incorporate the Charter into the 2000 Treaty of Nice, but the Presidents of the European Parliament, the Council and the Commission recognized and ‘solemnly proclaimed’ the Charter on December 7, 2000.⁷ That proclamation put the Charter in a kind of legal limbo – recognizing it as a statement of legal principles, but not as enforceable law. The Constitutional Treaty would have put an end to that limbo, incorporating the text of the Charter and making it legally enforceable. After the Constitutional Treaty was rejected by French and Dutch voters in 2005, the status of the Charter became a major source of contention in the negotiation of the Lisbon Treaty (aka the Reform Treaty) in 2007, with Britain and Poland demanding opt-outs from the Charter and Germany insisting that the new treaty must make the Charter legally enforceable. Ultimately, negotiators crafted a compromise whereby the actual text of the Charter was removed from the Treaties, but an article was included giving the Charter legal force while promising that this would, “not extend in any way the competences of the Union.” (Article 6, para.1). To further assuage the UK and Poland, an ‘opt-out’ Protocol was appended to the Treaty stating that the Charter would not create any new rights in the UK or Poland.⁸

Far beneath the rarified air of these constitutional deliberations, EU law makers have quietly continued to expand the catalogue of substantive EU rights through directives and regulations. Perhaps the most dramatic recent expansion of substantive EU rights has come in the area of anti-discrimination rights. Article 13 of the Amsterdam Treaty empowered the EU to "combat discrimination based on [...] racial or ethnic origin, religion or belief, disability, age or sexual orientation." While this Article was drafted explicitly to not create direct effect (Flynn 1999:1132), secondary legislation enacted pursuant to Article 13 – such as the Race Directive and the Framework Equal Treatment Directive - established a number of directly effective provisions. Thus today, the right to equal treatment in the employment sphere, which was pioneered in the field of sex equality, has been extended to a number of other classes of persons, such as the aged and disabled (Mabbett 2005; Vanhala 2006). Moreover, existing anti-discrimination rights – such as the right to equal treatment of the sexes – have been extended by secondary legislation and ECJ interpretations (Cichowski 2007). Likewise, the scope of

consumer rights protected by EU secondary legislation is expanding; in addition to the array of general, horizontal rights guaranteed to all consumers concerning issues such as product liability, advertising, unfair commercial practices (Weatherill 2005; Weatherill and Bernitz 2007), there are a number of sector specific rights, for instance for air passengers (Karsten 2007) or consumers of medical services (Kaczorowska 2006). And the scope of social rights protected by EU law has grown similarly, both through secondary legislation and ECJ case law (de Búrca and de Witte 2005; Hervey and Kenner 2003; Fredman 2006; Conant 2006). In the field of securities regulation, EU secondary legislation has established a wide range of rights for shareholders that they can enforce when confronted with corporate malfeasance (Kelemen 2006). And strikingly, in the field of competition policy, the Modernisation program launched in 2004 was premised largely on encouraging private parties – both competitors and consumers – to take legal action in national courts against firms that violated EU competition law (Riley 2003; Wigger and Nolke 2007).

The EU has not only established substantive rights, but also through the development of EU administrative law a host of procedural rights and remedies. For more than thirty years, the ECJ has emphasized that member state legal systems enjoy ‘procedural autonomy’ when implementing acts of Community law, both with regard to the procedures involved in enforcement and the remedies available to citizens.⁹ And yet, the EU has developed an extensive body of administrative law guaranteeing European citizens a host of procedural rights and increasingly forcing national authorities to respect common rules of administrative procedure. The direction of the EU’s influence on national administrative law is unmistakable: EU law is encouraging greater transparency, accountability and judicial intervention in administrative affairs. In short, the EU is promoting principles of administrative law that underpin adversarial legalism. Or as Harlow puts it, using the broader language of juridification, EU administrative law, “creates pressure for judicial resolution of every problem and denies its rightful place to the extra legal tradition.” (2000, p.74) She and other critics worry that this tendency will undermine national administrative traditions that relied on more informal approaches to redress and will place unsustainable burdens on national judiciaries.¹⁰

EU administrative law is, for the most part, judge made law, crafted through the case law of the ECJ.¹¹ Ironically, despite the fact that EU administrative law was itself distilled from national administrative law traditions, it is now reshaping those very traditions, imposing new constraints on national systems of administrative law and encouraging convergence from above (Schwarze 1996, 2000, p. 164-65; Harlow 1998). Bignami (2005) notes that while many of the procedural rights enshrined in EU administrative law have their origins in the national legal traditions of the member states, once transferred to the EU level, “they afford citizens a greater set of entitlements against European government than in their place of origin.”

Two legal principles - the principles of equivalence (which requires that national systems of administrative law can not make it harder to exercise EU rights than purely domestic rights) and effectiveness (demands that domestic administrative procedures must not make it excessively difficult or practically impossible to exercise EU rights) – together provide the foundation stones upon which the edifice of EU administrative law is built (Kilpatrick 2000, p.3).¹² These seemingly minor exceptions to the general rule that states should have procedural autonomy have opened the door to significant ECJ influence over national administrative procedures and remedies. In the 1980s and 1990s, the ECJ and CFI asserted an interventionist interpretation of effectiveness, ruling that national courts were obliged to ensure the full and effective protection of EU rights – altering national rules of administrative procedure or rules concerning remedies where necessary to do so. To ensure this full and effective legal protection, the ECJ and CFI have imposed on national administrations a number of requirements concerning national procedural rules and remedies (See for instance Van Gerven 1995; Ward 2000,p.216; Eilmansberger 2004; Tridimas 1999; Prechal 1998; Curtin and Mortelmans 1994). For instance, the ECJ restricted or outlawed national rules that limited the availability of judicial review of administrative acts (*Johnston*¹³), that imposed time-limits for instituting judicial proceedings (*Emmott*¹⁴ and *Levez*¹⁵), that restricted interim injunctive relief for plaintiffs while litigation was pending (*Factortame*¹⁶), or that limited state liability (*Francovich*¹⁷).

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*, the Court

emphasized that damages function not only as a form of redress but also as a deterrent to future harm. In *Marshall II*,¹⁸ the ECJ ruled that member states must allow full compensation for damages concerning violations of the Equal Treatment Directive, and therefore cannot maintain statutory caps ceilings on damage awards. In *Simone Leitner*, 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. While damage awards in Europe remain far lower than those in the US (Sugarman 2006) and are sure to remain so, it is nevertheless clear that European law is creating pressure for increases in both the amount and the range of damages recognized by national courts. Such legal developments can only increase incentives for private parties to bring litigation to enforce their EU rights.

Also, the ECJ has extended one of the few administrative law provisions explicitly mentioned in the EU Treaties – the Giving Reasons Requirement. Article 253 (ex Art. 190) of the EU treaties requires that organs of the European communities ‘give reasons’ for their rule-making decisions.¹⁹ The ‘giving reasons requirement’ is a powerful tool of judicial oversight, strengthening both the transparency and accountability of the administrative process. By the mid-1990s, the ECJ and CFI had moved to a strict reading of the giving reasons requirement, engaging in detailed analysis of the reasons given by the Commission for its decisions and rejecting those it found inadequate (Shapiro 2001, p. 103-04). Likewise, the ECJ has extended the giving reasons requirement to national administrations on matters that affect EU law (Schwarze 2000, p. 170). The ECJ has also encouraged the spread across Europe of a ‘proportionality test’ for discretionary administrative decisions. By spreading the principle of proportionality across the EU, the ECJ has invited courts to engage in stricter judicial scrutiny of discretionary administrative decisions.

How can we explain the development of EU administrative law and its impact on national legal systems? Certainly, there is a clear line of legal reasoning behind the trajectory of ECJ jurisprudence. In a sense, the very notion that one level of government (the EU level) could establish and guarantee substantive rights while another level of

government (the national level) maintained exclusive control over procedures and remedies was implausible from the outset. If national procedures governing the exercise of EU rights or national remedies for breach of those rights were inadequate, this could render EU rights dead letters. Thus, national procedural autonomy threatened to undermine the rule of law in the EU and the fundamental legal principle *ubi jus, ibi remedium* – for every right, there must be a remedy. If the EU was serious about guaranteeing EU citizens rights, it had to guarantee them access to justice and remedies as well (Kilpatrick 2000, p.6) Thus it took only a very small doctrinal leap for the ECJ to assert that national courts must ensure full and effective protection of EU rights, offering individuals the opportunity to assert those rights and offering them adequate remedies where those rights are violated. The ECJ moved slowly, but ineluctably to this conclusion and national procedural autonomy has been steadily reduced in the process (Harlow 2000, p.72).

However, if we move beyond a hermetically sealed legal account and consider the political context, we can see that the direction of EU administrative law is consistent with the explanation of the spread of adversarial legalism in the EU presented above. Martin Shapiro has offered an analysis of the development of EU administrative law that is entirely consistent with this argument. Shapiro explains that the development of EU administrative law in the 1980s and 1990s was driven by the confluence of two cross-cutting phenomena: 1) a need to adopt a ‘huge apparatus of European-wide regulations’ to help complete the common market and 2) a growing distrust of technocracy and growing demand for transparency and participation. Shapiro argues that in the EU of the 1980s and 1990s, as in the US of the 1960s and 1970s, the judiciary interposed itself in the administrative process of market building, addressing public concerns over the regulatory process and business demands for a level playing field by developing principles of administrative law that emphasize transparency and accountability. Shapiro specifically links these trends to the fragmented structure of the European Union and its ‘distance’ from citizens and regulated entities.²⁰ The reregulation necessary for the creation of the Single Market, coupled with the fragmented nature of EU institutions²¹ and the public distrust of Eurocrats all encouraged the development of an administrative law that would ensure transparency, accountability, enhanced access to justice and the

uniform application of Community law. This has encouraged placing increasing limits on administrative discretion at the national level and juridifying administrative procedures (See Harlow 1998).

Arguably it is the role of individual rights that distinguishes the EU legal system from other international or supranational legal orders and gives it its unique quasi-federal character. EU and the ECJ have established a host of individual rights under Community law, and they have relied on the need to ensure effective judicial protection of those rights to justify the EU's incursion into the legal systems of its member states (Ward 2007, pp.1-15; Burley and Mattli 1993). To put it plainly, the ECJ justifies telling national courts that they must change national administrative procedures or remedies by saying that doing so is necessary to protect the individual rights enshrined in EU law. Perhaps no one has put it so boldly as the ECJ's own Advocate General Tesouro who stated, "the obligations of the Member States and of the Community institutions are directed above all... to the creation of rights for individuals." ²² As we will see below, in the name of protecting individual rights and ensuring adequate judicial protection, the EU has launched a number of initiatives designed to enhance 'access to justice' for private parties before national courts.

Access to Justice and the European Judicial Space

For a system of governance based on adversarial legalism to take root, it is not enough for legislators and judges simply to establish enforceable legal norms and rights. For law on the books to translate into law in action, there must be both opportunities and incentives for litigants to bring legal claims. Private parties must enjoy access to justice that is affordable, timely and effective. For wealthy individuals and large corporations, financing litigation may present little difficulty. However, for most potential litigants – whether they be individuals, small businesses or diffuse collective actors such as consumers or environmental groups – costs may present a significant deterrent.

Traditionally, many of the rules and institutions that prevailed in European civil justice systems have discouraged litigation. The prevalence of the loser pays rule made the potential cost of litigation (should the litigant lose) very high. The absence of American-style contingency fee arrangements kept the up front costs of litigation high.

The weakness - or in some cases the absence - of procedures for collective actions made it difficult for diffuse groups of litigants such as consumers to band together to take legal action.²³ Even if litigants were able to access the courts and prevail in their legal action, the range of remedies and level of damages litigants could secure were often quite limited. Despite these hurdles and disincentives, the volume of litigation exceeded the capacity of many inefficient national civil justice systems. In the 1990s there was a widespread view that systems of civil justice across Europe were in crisis – wracked by extensive delays and high costs that limited access to justice for citizens (Zuckerman 1999). To be sure, legal aid systems financed litigation by some lower income litigants in all EU countries and legal costs were kept in check by fixed fee scales in some countries, such as Germany (Blankenburg 1992). However, legal aid coverage was limited and costs and other procedural hurdles remained a significant deterrent for many potential litigants across Europe. In short, European civil justice systems discouraged adversarial legalism because litigation costs were high, delays were protracted, potential benefits tended to be low and procedural devices that might have facilitated litigation were weak or absent. Such obstacles are precisely what many scholars have in mind when they suggest that European legal systems provide inhospitable soil for adversarial legalism to take root.

But the *terroir* is changing. Slowly and subtly, national justice systems are being transformed in ways that facilitate adversarial legalism.²⁴ These changes have attracted little attention from scholars of European politics and governance. Topics like the harmonization of civil procedure and changes in rules concerning litigation finance elicit little more than a polite nod and a disguised yawn from most political scientists.²⁵ The legal scholars who do focus on these issues typically examine particular developments – for instance of class actions, of contingency fee arrangements, or of legal aid – in isolation and largely ignore their political dimensions (for important exceptions see Hodges 2007; Hartnell 2004). The perspective advanced here suggests that access to justice initiatives and changes in civil procedure should be understood as part of a broad restructuring of the ‘legal field’ (Vauchez 2008) closely linked to the process of European integration - a restructuring which both reflects and will encourage the spread of adversarial legalism.

Certainly, not all these changes originate at the EU level. Given mounting domestic frustrations with the inefficiency and high cost of their civil justice systems (Zuckerman 1999), many EU member states launched reform efforts during the past decade, which they would have pursued absent any EU involvement.²⁶ And yet, it is no mere coincidence that so many EU Member States have taken major steps - in many cases very similar steps - to reform their civil justice systems in recent years. Specific EU initiatives and general pressures associated with European integration have significantly contributed to most of these developments, encouraging member states to undertake reforms designed to facilitate access to justice.

The EU is leading a sustained, multi-faceted effort to expand access to justice for citizens across the EU and to promote the harmonization of procedural law (Hartnell 2002; Hodges 2007, p.97).²⁷ Today, this broad agenda is being pursued under the banner of creating a 'genuine European area of justice' or 'European judicial space', a goal enunciated by the European Council at its 1999 summit in Tampere Finland.²⁸ The current drive to create a European Area of Justice is linked to process of market liberalization. Proponents explain that free movement in the internal market requires equal and effective to justice across EU member states and that this can only be achieved through a substantial harmonization of national civil justice systems. Opaque, costly and ineffective national civil procedures discourage cross-border movement of persons and commerce, as citizens and businesses fear they will not enjoy adequate legal protection abroad. And beyond distorting the Single Market, such problems in national justice systems can undermine the rule of law in the Community and the assurance that citizens can realize their rights under EU law anywhere in the EU. As national leaders put it in 1999 when announcing the 'Tampere Milestones', "individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of the legal and administrative systems in the Member States." (Presidency Conclusions of the Tampere European Council, Oct. 15-16, 1999) Bulletin E.U. 10-1999, Section I.8.28.) To that end, "Better compatibility and more convergence between the legal systems of the Member States must be achieved." (Ibid. para I.3.5).

The EU's supranational institutions, quite predictably, have embraced and sought to expand on this vision. The Commission and Parliament have emphasized that

harmonization of civil justice systems is necessary not only to make the internal market function, but to ensure the equality of European citizens (Commission 1998, European Parliament 1998) The Commission's ambitions, though often expressed in understated language, are grand. In a 1998 Communication the Commission called on member states to address: "the substance of the problem of litigation in Europe, not just in terms of cooperation between courts but in much broader terms of equal access to rapid efficient and inexpensive justice."(Commission 1998zz, para. 11) Summarizing the series of policy initiatives launched by the Commission in this field, Hodges concludes that, "the Commission is quietly signaling an ambition to harmonise civil justice matters" (2007, p. 113).

In promoting harmonization of civil justice systems, the Commission's goal - and in a broader sense the EU's goal - is to strengthen the ability of private litigants and national courts to serve as agents of European governance. The EU's civil justice project, as Hartnell explains, is designed to enhance "the capacity of Member State Courts to participate in generating European governance through the process of judicialization" and "can be expected to establish the conditions that will encourage further litigation driven integration." Hartnell 2002, p.130). The EU's efforts to promote reform of civil justice, along with initiatives emanating from the national level, are transforming funding mechanisms and procedures governing litigation and are improving the financial perspectives for potential litigants.

Legal Aid: For persons with low incomes, publicly funded legal aid has long been a major source of litigation finance in many EU countries. Across the EU, legal aid for low income citizens is framed by its proponents as a matter of basic human rights and social justice. The right to counsel in civil cases has been established both by statute and by constitutional interpretation in a number of EU member states (Johnson 2000), and during the 1970s and 1980s, many member states expanded their legal aid programs in an effort to enhance access to justice. At the pan-European level, the European Court of Human Rights (ECHR) has ruled that the right to a "fair hearing", guaranteed in Art. 6 of the European Convention on Human Rights, requires governments to provide legal aid to the poor in criminal and civil cases²⁹. In the 1990s, funding for legal aid in civil matters

in a number of EU member states by far outpaced that in the US: in France and Germany per capita funding was two-and-a-half times that in the U.S., in the Netherlands, four times as much, in England seventeen times as much (Johnson 2000).

The EU has had a hand in these developments, pressuring member states to increase their support for legal aid. In 2002, the Commission proposed an Access to Justice Directive (COM(2002) 13 final) that would have required member states to provide legal aid to individuals who could not meet the cost of litigation in cross-border disputes and to fund litigation by public interest organizations (such as consumer groups). The Parliament strongly supported the proposal and called for the guarantee of legal aid to be extended to all civil and commercial cases, not just those with a cross-border dimension. The EU's competence to regulate purely domestic cases is – to put it mildly – dubious, and the Council of Ministers ultimately adopted a watered down directive (2002/8/EC) that was limited to cross-border disputes and only guaranteed aid for 'natural persons' (not for public interest groups). Nevertheless, the directive did place some pressure on laggard states to strengthen their legal aid systems.³⁰ While legal aid continues to play a role in supporting litigation, its heyday is past. By the late 1990s, with legal aid costs rising and fiscal austerity pressures mounting, policy-makers increasingly turned to privatized, budget neutral ways to facilitate 'access to justice'.

Conditional Fee Arrangements: Historically, contingency fee arrangements – referred to formally in European legal circles as a *pactum de quota litis* - have been prohibited by statute or by bar associations' codes of self-regulation across Europe. Even the Code of Conduct for European lawyers drawn up by the Council of Bar Associations of the European Union prohibits contingency fees.³¹ However, such prohibitions are increasingly being challenged and circumvented.

Governments across the EU have been caught in a cross-current: they face political pressure from domestic groups and supranational bodies to increase access to justice for their citizens, while they simultaneously face fiscal pressures to keep the costs of publicly funded legal aid in check. Conditional fee arrangements present an attractive means to escape this conundrum. They offer a privatized alternative to legal aid, which allows governments to increase access to justice for their citizens without footing the bill.

This shift is illustrated most dramatically in the case of England and Wales. Throughout the 1990s, the England and Wales had maintained the most generous legal aid system in the EU, and the ready availability of legal aid for civil matters had spawned a litigation industry and what critics suggested was a growing ‘compensation culture’ among the public at large. Enterprising lawyers had eagerly taken on cases on behalf of low-income plaintiffs, safe in the knowledge that they would be paid by the legal aid system (and that the loser pays rule would be waived for those on legal aid). As a result, the costs of the legal aid system in England and Wales spiraled ever higher in the 1990s, overwhelming efforts to contain costs. Eventually the government turned to an entirely new, privatized approach. With the 1999 Access to Justice Act (and the subsequent conditional Fees Agreements Regulations of 2000), legal aid was cut back drastically and offered only on a discretionary basis (not as a right). As a substitute for legal aid, the 1999 act significantly expanded the scope for plaintiffs to rely on Conditional Fee Agreements (CFAs) with lawyers. CFAs, which had been introduced on a limited scale with the Courts and Legal Services Act of 1990, were essentially a tempered, British version of American contingency fees. CFAs fall short of fully fledged contingency fees in that lawyers cannot set their fee as a percentage of the judgment or settlement, but they do allow lawyers and litigants to enter into ‘no win, no fee arrangements’ and allow lawyers to levy a ‘success fee’ (typically twice their normal fee) should they prevail. CFAs have proved popular but have generated confusion and difficulties for many litigants, leading some consumer advocates and legal experts in the UK to call for the introduction of fully fledged contingency fee arrangements in England and Wales (Hodges 2007).

Looking beyond the English case, Scotland and Ireland have permitted ‘no win, no fee’ arrangements for years. The Dutch Bar lifted its ban on ‘no win, no fee’ (aka ‘no cure, no pay’) arrangements in 2004. In July 2006, the Italian government adopted the Bersani Decree, a package of reforms of rules governing the professions, which for the first time allows lawyers to work on a contingency fee basis and to advertise their services. Calls for the introduction of contingency fees have also been made by prominent Law Reform Commissions in Sweden and Ireland, though these have been rejected to date (Hodges 2007).

Even where formal prohibitions on contingency fees remain in place, lawyers and plaintiffs have found creative ways to circumvent them. For instance, in Germany and the Netherlands, a practice has emerged in which an organization promoting litigation (such as a consumer group) acts as an intermediary between individual plaintiffs and lawyers: the organization promoting the litigation enters into a contingency fee arrangement with the individual claimants and the organization simultaneously enters into a normal fee contract with the lawyer (which would typically not be enforced if the plaintiffs lose). Thus, through this chain, the claimants enjoy the benefits of contingency fee arrangements, while the lawyer never formally violates the ban on entering contingency fee arrangements with clients (Hodges 2007). Across the new member states in east central Europe, formal bans on contingency fees are routinely violated. Legal aid systems across the post-Communist world are underdeveloped and poorly funded, and authorities have turned a blind eye as lawyers and litigants resort to contingency fee arrangements as an alternative means to finance litigation (Hodges 2007).

Loser pays and Legal Expenses Insurance: 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, exceptions to the loser pays rule are proliferating and increasingly potential plaintiffs have access to legal expenses insurance that may cover the costs of litigation – including added charges incurred where the case is lost. Generally, loser pays rules are waived for plaintiffs who are supported by legal aid (and in any case the beneficiary of legal aid would not cover the costs themselves). Thus, as the scope of legal aid schemes grew in recent decades, so too did the number of plaintiffs exempt from loser pays rules. More recently, a new form of exemption has been introduced in the UK, as British courts have allowed plaintiffs who are not relying on legal aid to request 'Protective Cost Orders'. In this procedure, the plaintiff – often a public interest group – can request during an early stage of legal proceedings that the Court issue a Protective Cost Order, relieving them of the duty to pay the legal costs of the defendant should they lose (See for instance the 2005 *Cornerhouse*³² ruling).

Legal expenses insurance provides another important counter to the dissuasive effects of loser pays rules. In many EU countries, such as Germany, Austria and Sweden, it has long been common for households to have legal expenses insurance that can be used to cover the costs of civil litigation, including paying the other side's legal fees if the plaintiff loses. The market for legal expenses insurance has grown steadily across Europe in recent decades, spreading to countries where it was nearly non-existent twenty years ago. Between 1986 and 2007, the total value of Legal Expenses insurance premiums grew at a compound annual growth rate (CAGR) of 5.07%, or an inflation adjusted CAGR of 2.08% (CEA 2007). To put it another way, if we convert into Euros and adjust for inflation, the size of the legal expenses insurance industry increased by more than 50% in the last 20 years (from 3.061 billion to 4.719 billion).³³

The growth of legal expenses insurance, which is used primarily to cover costs associated with bringing litigation, may reflect a growing sense among consumers that they may become embroiled in legal disputes. Likewise, the growth of general liability insurance coverage, which covers both legal expenses and any liability payments imposed on losing defendants, reflects to some extent fear of litigation. Between 1992 and 2007, the total value of general liability insurance premiums issued in Eurozone countries has grown from 12.933 billion to 19.418, a fifty percent increase.³⁴ Rightly or wrongly, business leaders expect and fear an increase in litigation in coming years (Peel 2007; Lloyds 2008a, 2008b). Thus we should expect them to seek greater insurance cover for these perceived litigation risks. Where both sides in a dispute have insurance that will cover their legal costs, loser pays rules will have less dissuasive effects.

The insurance industry has demonstrated the ability to respond to demands for new forms of legal expenses coverage. Most legal expenses insurance takes the form of 'before-the-event' coverage: in other words, one must hold the insurance cover before event occurs that gives rise to the legal dispute. However, with the advent of CFAs in England and Wales after 1999, a market for 'after-the-event' legal expenses insurance grew rapidly. Litigants who wanted to enter 'no win, no fee' arrangements with attorneys still faced the risk of paying the other side's legal costs should they lose. Insurance companies therefore offered those who lacked legal expenses coverage to take out 'after-the-event' policies, enabling litigants to cover themselves against the risk of paying

defendants' costs should they lose their case. More generally, a variety of creative 'third party litigation funding' arrangements have emerged across Europe. As a recent report by Lloyd's explains, financiers in Europe have become involved in bank-rolling high risk litigation that typical insurance policies would not cover. In these arrangements, an investor funds the litigation in exchange for a percent of any damage award (Lloyd's 2008b, p.7-10).

Class Actions: In December 2007, a conference on the "Globalization of Class Actions" held at Oxford University attracted approximately 200 participants, most of them from Europe. They did not attend simply for the English food and medieval ambiance. They were drawn together, rather, by the growing understanding that moves are underway across a number of European jurisdictions, and at the EU level, to introduce some form of 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. Representative or Collective actions typically allow a government authorized public interest group (i.e. a consumer group) to bring legal action on behalf of the collective interests (i.e. consumers) that they represent. In such actions, the group bringing litigation cannot seek a damage award, but can obtain only injunctive relief forcing the offending firm to end their illegal practice.

This situation is changing. With increasing calls to facilitate access to justice for consumers and other diffuse groups, such as shareholders, steps have been taken across a number of member states and at the EU level to strengthen collective redress mechanisms. Governments across Europe and the EU itself have recently taken significant steps to strengthen collective redress mechanisms (Tait and Sherwood 2005, Hodges 2009). Laws establishing procedures for multi-party (class or representative) actions are being adopted across Europe (Hodges 2009a; Tait and Sherwood 2005, Tait 2008). New 'class-action'-type laws were adopted in England and Wales in 1999 (Hodges 2009b), in Spain in 2000 (Gutiérrez de Cabiedes 2009), in Sweden in 2003

(Lindblom), in the Netherlands (for settlements only) in 2005 (Tzankova and Scheurleer 2009), in Germany (for investors only) in 2005 (Baetge 2009), in Italy (for consumers only) in 2009 (Silvestri 2009) (and more generally see Hodges 2009a, Fleming 2004). Today, thirteen of the twenty-seven EU member states have some form of collective redress in place (Commission 2008, p.4; Stuyck 2007). In November 2008 the Commission published a Green Paper on Consumer Collective Redress (Commission 2008) outlining various options for establishing a collective redress mechanism at the EU level. The European Parliament has strongly endorsed the idea, calling on the Commission to find a, “coherent solution at European level, providing all consumers with access to collective redress” (Resolution on Consumer Policy strategy, A6-0155/2008).

These reform efforts are not being undertaken in order to emulate the US.³⁵ As Hodges (2009,p.55) explains, “Politicians like to claim that they have increased access to justice, but are sensitive to accusations that they have harmed voters by harming the economy. In this context, “class actions” and “contingency fees” are inflammatory words in Europe.” Not only have business groups warned against the dangers of importing American style class actions (Parker, Buck and Tait 2007), even groups representing consumers and shareholders are at pains to emphasize that they want to avoid importing the American model (Hollinger 2005).

Rather than resulting from emulation of the US, these reforms are linked to the process of economic liberalization and political fragmentation. The European Commission and many national governments have argued that facilitating ‘collective redress’ is necessary to enhance competitiveness and protect consumer rights. Essentially, strengthening collective action procedures is seen as a way of ‘reregulating’ a liberalized market. Regulation of competition, consumer protection and financial services is increasingly being delegated to consumers and other diffuse groups, such as shareholders, who often confront legal systems ill-equipped to handle multiple claims concerning the same issue. For such private regulation to work, collective action mechanisms must be strengthened and for regulated industries to face a level playing field, such mechanisms must be harmonized.

The spread of strengthened collective-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. And the impact of new class action mechanisms may be heightened by contagion from across the Atlantic, as leading US class action firms - including Milberg Weiss Bershad & Shulman LLP, Cohen, Milstein, Hausfeld & Toll PLLC, and Schiffrin & Barroway, Murray, Frank & Sailer LLP and Bryan Cave - are expanding their European operations in anticipation of new litigation opportunities opened up by the reform of class action rules (Peel 2007; Jacoby 2005; Parker, buck and Tait 2007).

Between the existence of legal aid for civil matters, the development of conditional fee arrangements, exceptions to the loser pays rule and the growth of legal expenses insurance, there are many means available to would-be plaintiffs to fund litigation. And just as the costs of litigation for many plaintiffs appear to be decreasing, the potential 'returns' on litigation – in terms of the trends in damage awards and remedies discussed above - appear to be increasing.

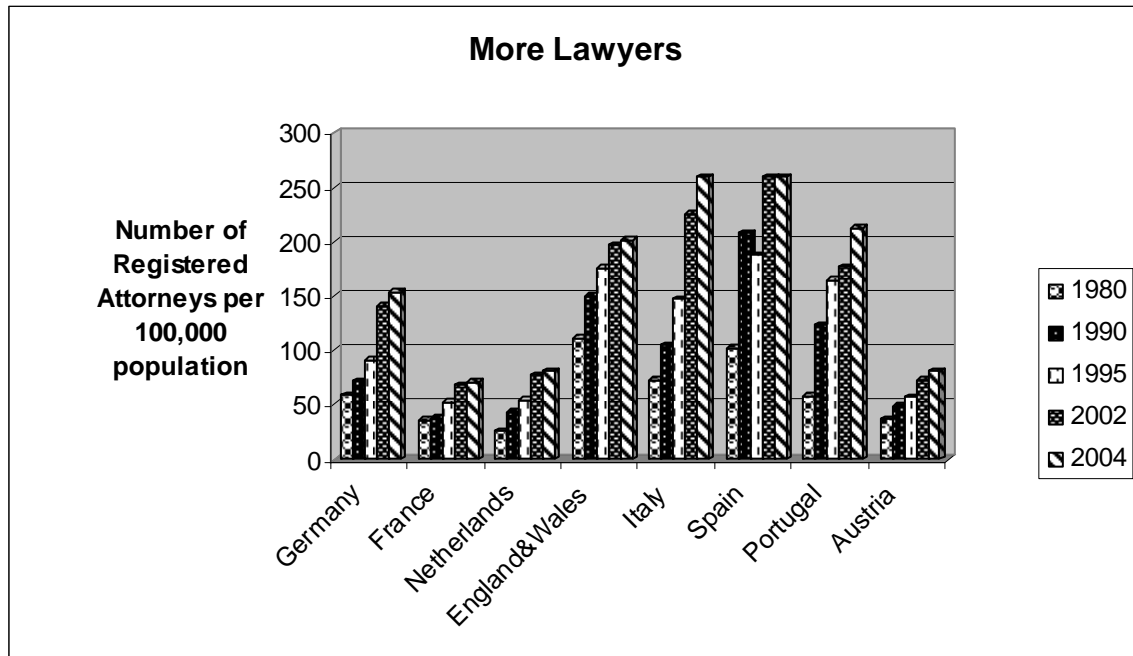
Indicators of Legal Activity: Lawyers, Legal Services and Litigation

While lawyers do not generate adversarial legalism by themselves (Kagan 1994), they are necessary for its operation and encourage its development. To date, the literature on European legal integration has largely ignored the role of legal professionals have played in structuring the European legal arena (Cohen and Vauchez 2007, p. 78). The European legal services industry is growing rapidly and transforming its forms of organization in ways that both reflect, and will further accelerate, the growth of adversarial legalism. The growth and reorganization of the legal services industry in Europe reflects the spread of adversarial legalism, in that shifts in regulatory and legal style have led to increased demand for new forms of legal services. Over time, through a positive feedback process, the providers of these legal services will themselves seek to increase demand for the services they offer, thereby encouraging the further spread of adversarial legalism. For example, after the growth of the EU competition law bar in the 1980s, law firms active in EU competition law became strong advocates of 'modernizing' the EU competition law regime in ways that would increase demand for their legal services (Wigger and Nolke 2007). In essence, we observe here an example of the common phenomena whereby new

policies stimulate the emergence of new political actors and interests, who then influence the politics in the issue area in question (Pierson 1993).

As Table 1 shows, the number of registered attorneys per capita has increased dramatically across EU member states over the last twenty-five years (Kelemen 2006).

Table 1



Not only are there more lawyers, they now organize themselves in different ways. European Law firms are consolidating and growing rapidly. Indeed, in Germany in recent years observers spoke of a ‘merger mania’ (*Fusionsfieber*) in the legal services industry. The upper echelon of law firms across Europe are reorganizing in an effort to better serve their clients – in particular large corporate clients – and to better compete with large British and American firms. A central aim of this reorganization is to enable European firms to offer the kind of one stop shop – with multiple legal specialties, advocacy and lobbying services, strategic advising and the ability to plan and execute multi-jurisdictional litigation strategies – that American firms have long offered (Kelemen and Sibbitt, 2004; Morgan and Quack, 2005; Trubek *et al*, 1994). One can see

some of the results of this trend in Table 2, which shows the growing size of the top ten law firms between 1997 and 2004 in the 15 EU (pre-2004 enlargement) member states.

Table 2:

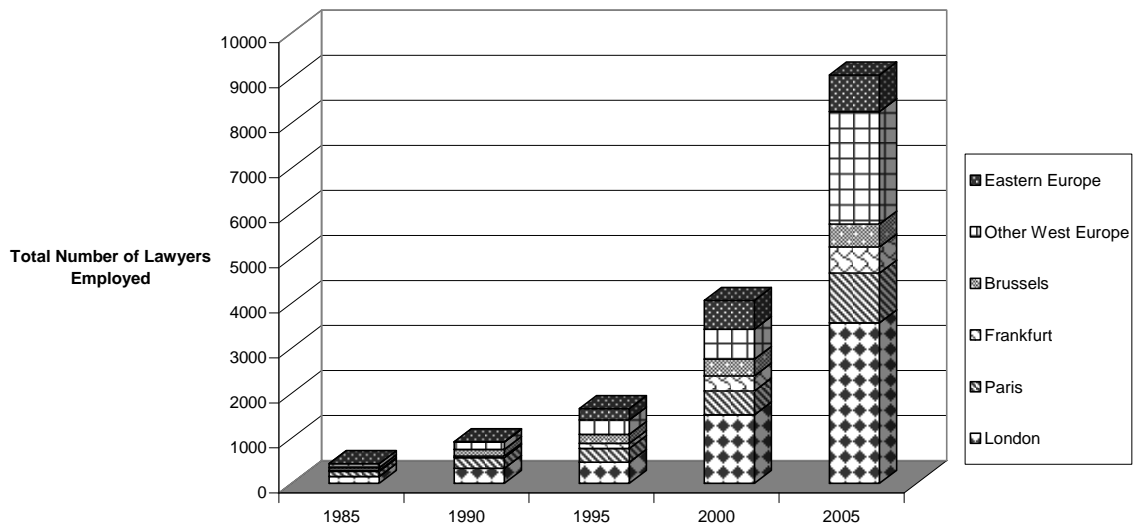


As noted above, the influx of American law firms has played a powerful role in transforming forms of organization and patterns of legal practice in the EU, at least in the field of corporate law. American firms saw opportunities in the European Economic Community from the outset, in connection with the EEC's emerging competition policy and with serving the interests of multinationals in the common market more generally. In

1960, Jean Monnet's close friend and confidante George Ball led the way for his American firm, Cleary, Gottlieb to open an office in Brussels (Bill 1997, p.41). Throughout the 1960s and 1970s, other US firms followed their multinational corporate clients abroad and established offices in Europe, primarily in London, Paris and Brussels. This trend accelerated dramatically after the mid-1980s, as Table 3 demonstrates. American firms expanded in Europe as they found that the EC's single market initiative created new opportunities for lucrative legal and advocacy work in which they might possess an advantage relative to smaller European law firms who had little if any experience in offering such 'mega-lawyering techniques' (Kelemen and Sibbitt, 2004; Morgan and Quack, 2005; Trubek *et al*, 1994). The roll of American law firms in spreading practices associated with adversarial legalism to Europe certainly suggests a form of diffusion. However, we must recall that their very entry into the European market was facilitated by the liberalization of the legal services market and that the reason they have thrived is that their brand of legal services was well-suited to the emerging regulatory environment in the EU – which was itself a product of economic liberalization and political fragmentation.

Table 3:

Number of Lawyers Employed by American Law Firms in Europe



If we go beyond the number of lawyers and structure of law firms, we can look also at the broadest possible indicator of the development of the legal services industry: gross revenues. Neither the OECD nor most national statistics offices have gathered this data systematically – typically grouping legal services with other professional services such as consultancy and accounting. However, market intelligence firms such as Datamonitor have gathered data on a few states. They find that the gross revenues of the legal services industry in Europe is increasing rapidly. Between 2002 and 2006, the legal services industries in France, Germany and the UK grew, respectively, by 20%, 23% and 18%. In all three countries, the growth of the legal services industry is forecast to accelerate between 2006 and 2011 up to 35%, 32% and 30% respectively (Datamonitor 2007).

The growth and reorganization of the legal profession across Europe is strengthening the 'legal support structure' (Epp 1998) for many forms of litigation. Skeptics might emphasize 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

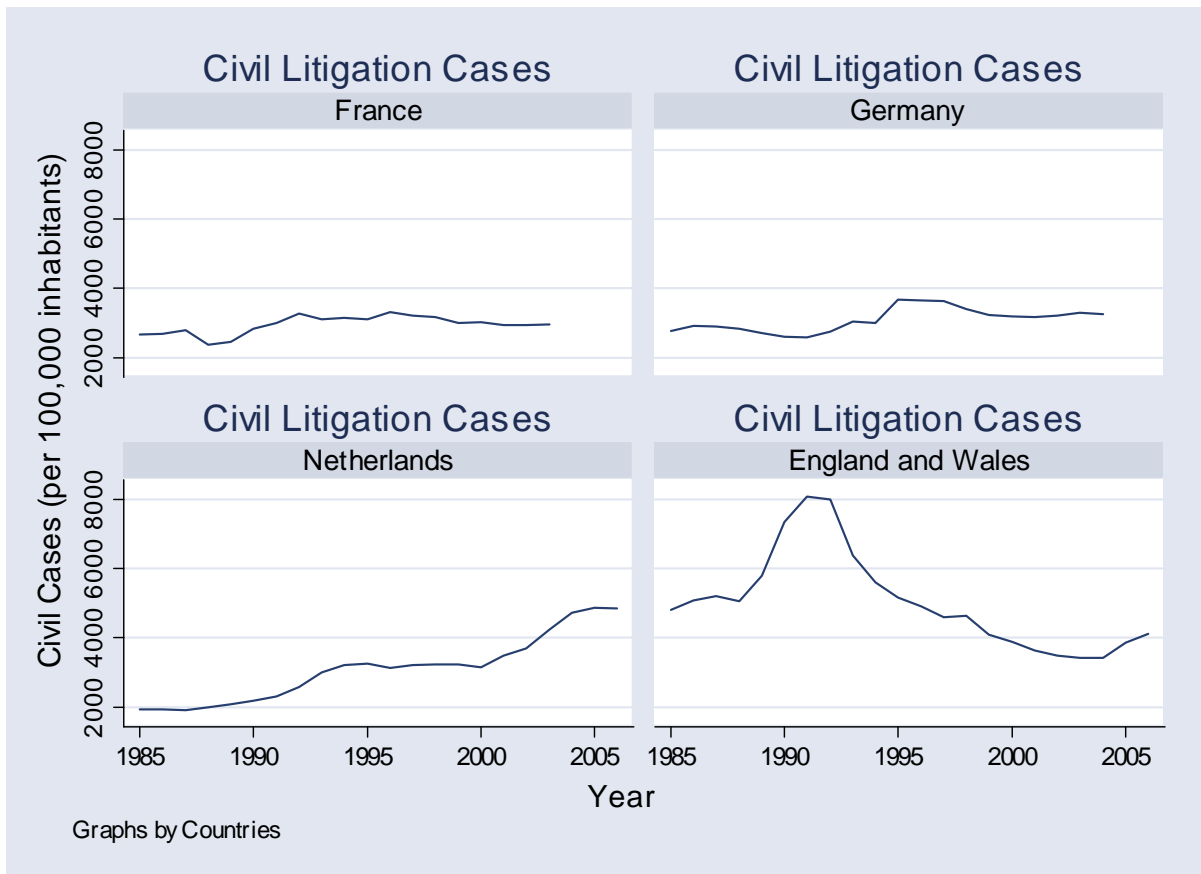
sector and only later spread to various areas of public interest law and policy advocacy (Kelemen, 2003; Galanter and Palay, 1991: 41–52; Epp, 1998: 44–8).

Litigation

Finally, we can turn to actual litigation. As many scholars of EU law and politics have shown (for instance, Burley and Mattli, 1993; Stone Sweet and Brunel, 1998; Alter, 2001; Fligstein and Stone Sweet, 2001; Cichoswki, 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. Taking all types of litigation into account, 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?

If we take the broadest sorts of measures of litigation rates at the national level, the answer would seem to be no. As Table 4 shows, we are not witnessing a consistent, cross-national increase in civil litigation rates. In fact, some states such as the UK have undertaken great effort to reform their civil justice system so as to discourage litigation.

Table 4:



While the data on litigation rates is informative, we can not take it as a reliable indicator of the spread of adversarial legalism as a mode of governance. 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 behavioral changes in the shadow of potential litigation, such as the increases in spending on legal services and legal expenses insurance discussed above. Aggregate data on civil litigation can not 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. Moreover, 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 spiraling out of control, or at least perceived to be (Zuckerman, 1999), governments introduced reforms aimed at promoting alternative dispute resolution or otherwise channeling potential cases away from their overloaded courts. This was clearly the case in England and Wales.

CONCLUSION

Adversarial legalism is emerging as a quite unexpected – and in many circles unwanted – stepchild of European integration. The political incentives and functional pressures generated by the ongoing effort to establish a Single Market and by the very structure of the EU's fragmented, weak regulatory state has both undermined more informal national styles of regulation and encouraged policy-makers to rely on adversarial legalism as a mode of governance. Robert Kagan (2006) has highlighted a series of entrenched institutions and norms that discourage the spread of adversarial legalism. Moreover, 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.³⁶

However, this paper suggests that many of the institutional impediments to adversarial legalism in Europe are eroding and that despite the intention of policy-makers to avoid the cost, uncertainty and adversarialism of the American model, the EU is taking significant steps toward it. Remaining institutional and cultural impediments and the desire of policy-makers to avoid the pitfalls of the American system ensure that the EU will never converge completely on the American model. And yet, the EU is developing its own brand of adversarial legalism *à la européenne*.

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¹ One should not conflate Kagan's specific concept of the legal/regulatory style associated with 'adversarial legalism' with the general concept of an adversarial or adversary system of justice typical of common law countries (as opposed to the inquisitorial system typical to civil law jurisdictions). The generic concept of an adversarial system of justice refers primarily to the process through which trials are conducted, whereas Kagan's concept refers to broad patterns of regulation.

² See for instance, comparative studies of environmental policy (Vogel (1986), chemicals and hazardous waste regulation (Brickman, Jasanoff, and Ilgen 1985; Badarraco 1985; Church and Nakamura 1994); product liability (Schwartz 1991); labor relations regulation (Bok 1971); workplace safety (Kelman 1981; Braithwaite 1985); corporate governance (Charkham 1994) and securities regulation (S. Vogel 1996).

³ For a similar argument, see Caporaso and Tarrow (forthcoming) who highlight parallels between the social 'embedding' of the contemporary Single European Market and the social embedding of the market the Polanyi identified in 19th century England. They too highlight the role of juridical reregulation in adding social content to the process of market building.

⁴ More generally on the democratic deficit, see Majone 1998; Moravcsik 2002 and Follesdal and Hix 2006).

⁵ Until the late 1980s, the EU had relied on ECJ case law to address questions of fundamental rights. Beginning in the 1970s, after national high courts had raised grave concerns regarding the failure of the EU's founding treaties to guarantee the protection of fundamental rights, the ECJ had affirmed that it would uphold fundamental rights – based on the collective constitutional traditions of the member states – as general principles of Community law.

⁶ The Charter then formed the basis for the Social Protocol which was appended to the Maastricht Treaty, with the UK again opting out.

⁷ After agreement by the Convention of a final text of the Charter, the Presidents of the European Parliament, the Council of the European Union and the European Commission proclaimed the Charter on the 7th December 2000 on the fringes of the Nice European Council.⁷

⁸ The ‘Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom’. Article 51 of the Charter of Fundamental Rights states that the Charter is addressed principally to EU institutions and, “to the Member States only when they are implementing EU law” and that the Charter, “does not establish any new power or task for the Community or the Union.” Though these provisions would seem to place a severe limit on the ability of litigants to invoke the Charter to expand the reach of EU law or to attack national laws or practices, experience suggests this is not the case.

⁹ See Case 33/76 *Rewe v. Landwirtschaftskammer Für das Saarland* [1976] ECR 1989, esp para.5 (See Kilpatrick, p.3) Case 158/80 *Rewe V. Hauptzollamt Kiel* [1981] ECR 1805, para.44. Harlow highlights the link between administrative procedures and remedies, in that administrative procedures constitute the means through which individuals can access remedies where their rights are violated. Thus, as she explains, “the ECJ reads remedy backward to include access.”(2000,p.74). See also Kilpatrick 2000.

¹⁰ The EU has applied this approach both with regard to direct implementation of Community law (that is implementation carried out by EU institutions) and indirect implementation of Community law (that is implementation carried out by national authorities on behalf of the EU). In other words, the EU has developed an administrative law that applies both to itself and to national administrations when they fulfill their role as the chief implementers of Community law. And ultimately, the impact of EU administrative law at the national level extends beyond instances in which national authorities are implementing EU law. For once a procedural right or remedy is granted in EU-related matters, it becomes difficult to withhold that right or remedy in purely national matters

¹¹ EU law makers have addressed procedural issues, though not in a comprehensive fashion. For instance, particular substantive directives sometimes include requirements concerning procedures and remedies. Also, there have been a variety of academic efforts to promote common codes of administrative and civil procedure for the EU (Storme 1994; Hartkamp et al 1994),

¹² Harlow 2000; K. Lenaerts and J. Vanhamme (1997) See for instance, Case C-120/97, *Upjohn Ltd. V. The Licensing Auth. Est. by the Medicines Act of 1968*, 1999 ECR I-223, para. 32. (also see Case-228/98 *Charalampos Dounias v. Ypourgos Oikonomikon*, 2000 ECR I-577, para. 58).

¹³ Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

¹⁴ Case 208/90 *Emmott v. Minister for Social Welfare and Attorney-General* [1991] ECR I-4629. But see Flynn (2000) for discussion of subsequent ECJ retrenchment on issue of national time-limits.

¹⁵ Case C-326/96 *Levez v. T.H. Jennings (Harlow Pools) Ltd* 1998] ECR I-7835

¹⁶ *R v. Transport Secretary, ex part Factortame (No.1)* [1990] 2 AC 85.

¹⁷ *Joined Cases 6, 9/90 Francovich and Bonafaci v. Italy* [1991] ECR I-5357.

¹⁸ Case C-271/91 *Marshall v. Southampton and SW Area Health Authority* [1993] ECR I-2367.

¹⁹ This requirement in effect establishes a right for parties involved in those proceedings to be given a reason for the administrative decision.

²⁰ Shapiro’s analysis is worth quoting at length: “The very indirectness, peculiarity, and complexity of Union decision-making processes acutely raises the problem of transparency... [At the national level] government regulators and business managers meet in closed and confidential sessions and collaboratively work out regulatory compliance arrangements. When regulation moves from national capitals to Brussels, some degree of opening and distancing takes place. ...as corporate managers begin to feel a little less intimately connected to regulators, the charms of transparency and participation grow.

Specifically for Union administrative law, all this means that not only the generalized anti-technocratic sentiment generally presses for pluralist transparency and participation changes in administrative law but also that there are particular persons with particular money to hire particular lawyers to bring particular lawsuits designed to persuade particular judges to produce a new administrative case law of the Union which will guarantee those now less on the inside what they now need: transparency and participation. (Shapiro 2001, pp. 97-98, emphasis added)

²¹ It is notable that the European Parliament – doubting the commitment of national administrations - has been a constant advocate of enhancing access to justice for citizens to enforce Community rights and ensuring the uniform application of Community law.

²² AG Opinion, *Joined Cases C-46/93 and C-48/93 Brasserie du Pecheur SA v Germany and the Queen v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I-1029, para 39. (check cites) cited in ward 2007, p. 7)

²³ In the US, contingency fee arrangements – whereby attorneys charge no fee if the litigant loses but take a percentage (typically 33 1/3%) of any settlement or judgment awarded – have played a crucial role in addressing the issue of litigation finance. In a 1990 study, Kritzer (1990) found that 87% of plaintiffs in tort cases retained their attorneys on a contingent fee basis, and he explains that contingency fees are “one of the hallmarks of litigation in the United States (Kritzer 2002,p.739). Likewise, procedural devices such as class actions - which allow attorneys to group together claims on behalf of dispersed individuals - have played a vital role in facilitating litigation by diffuse groups, such as consumers.

²⁴ In a paper published by the National Legal Center for the Public Interest, a conservative , a conservative nonprofit group that is highly critical of ‘excessive litigation’ in the US, Willett (2005, p.23) concludes that, “The procedural differences that distinguished European legal systems from that of the U.S., and provided some insulation from abusive litigation practices, appear to be eroding and creating a compensation culture that consumers and their lawyers find attractive.... The trend toward class action lawsuits, combined with emerging consumer friendly substantive laws and the availability of U.S.-style practices, for example, contingency fees and lawyer advertising, will create a new litigation landscape in Europe over the next few years.”

²⁵ Among political scientists that do study law and courts, research focuses overwhelmingly on issues such as judicial review of legislative acts or administrative decisions. Indeed, the subfield within political science concerned with law is called ‘public law’. Private law and civil procedure are treated with benign neglect, as issues of little direct interest to political science.

²⁶ For instance Spain, Germany, the UK, the Netherlands and Denmark have reformed their rules of civil procedure significantly in recent year with the intention of increasing the speed and efficiency of justice. See Commission 1993a.

²⁷ The EU’s efforts to expand access to justice can be traced further back, at least to the mid-1980s The intellectual vision behind these developments lies in the work of European legal scholars who, beginning in the 1980s, promoted the reestablishment of a European *Ius Commune*. The *Ius Commune*, or European Common law, derived mainly from Roman law and prevailed across Europe between the 12th and 18th centuries, until nation states introduced civil and administrative codes that fragmented the European legal order. Inspired by the various efforts to promote European integration in post-War Europe, a network of legal scholars emerged that hoped to resurrect the *Ius Commune*, and perhaps even craft a European Civil Code (van Dam 2007, pp.107—113

²⁸ The Finnish government had made “promotion of citizens’ access to justice” one of the five priorities of its EU Presidency in the second half of 2006.

²⁹ *Airey v. Ireland*, 2 Eur. Ct. HR Rep. 305(1979). Also see *Steel and Morris v United Kingdom* (Application No. 6841/01) 2005. By contrast, there is no constitutional right to legal aid in civil trials in the United States, see *Lassiter v. North Carolina* 452 U.S. 18 (1981)

³⁰ Though the directive was restricted to legal aid for cross-border disputes, it would of course be politically difficult for member states to provide lower levels of legal aid support for domestic cases than they did for cross-border cases.

³¹ *Code of Conduct for lawyers in the European Union*, Conseil des Barreaux de l’Union Européenne (CCBE), para 3.3. See Hodges 2007.

³² *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. Corner House.

³³ These figures were calculated using reports obtained from the Comité Européen des Assurances dating back to 1992. Raw data and procedures used for conversion are available with the author. For the latest annual report, see Comité Européen des Assurances, 2007.

³⁴ *Ibid.*

³⁵ It is striking that the EU and member state governments launched a series of initiatives to expand collective redress mechanisms in a period when the US federal government was attempting to restrict them (Tait and Sherwood 2005).

³⁶ See, for instance, 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, last accessed 21 August 2006.

³⁷ List of references is incomplete. More to be added in next draft.