



European
University
Institute

Robert Schuman Centre for Advanced Studies

EUI Working Papers

RSCAS 2008/37

**American-Style Adversarial Legalism
and the European Union**

R. Daniel Kelemen

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

American-Style Adversarial Legalism and the European Union

R. DANIEL KELEMEN

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s).
Requests should be addressed directly to the author(s).

If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

The author(s)/editor(s) should inform the Robert Schuman Centre for Advanced Studies at the EUI if the paper will be published elsewhere and also take responsibility for any consequential obligation(s).

ISSN 1028-3625

© 2008 R. Daniel Kelemen

Printed in Italy in December 2008
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
<http://cadmus.eui.eu>

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies (RSCAS), directed by Stefano Bartolini since September 2006, is home to a large post-doctoral programme. Created in 1992, it aims to develop inter-disciplinary and comparative research and to promote work on the major issues facing the process of integration and European society.

The Centre hosts major research programmes and projects, and a range of working groups and ad hoc initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration and the expanding membership of the European Union.

Details of this and the other research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, Distinguished Lectures and books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

Abstract

Adversarial legalism – an approach to regulation characterized by strict, legalistic enforcement of detailed legal norms, relying on active judicial intervention and frequent private litigation – has historically been viewed as a uniquely ‘American’ legal style. This paper argues that the process of European integration is encouraging the spread of adversarial legalism across the EU. 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.

Keywords

European law, adversarial legalism, litigation, judicialization, European Court of Justice

Introduction*

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 regulatory style, which Robert Kagan has labeled ‘adversarial legalism’, was (and still is) characterized by 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 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), 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. ‘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.

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. The argument here is not that

* This paper was originally presented at the Conference “The European Legal Field-Le champ juridique européen” organized by Bruno de Witte and Antoine Vauchez with the Robert Schuman Centre and the Academy of European Law (European University Institute, 25-26 September 2008).

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.

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).

Importantly, this argument does not rely on the sort of diffusion processes typically found in studies of policy diffusion (Kelemen and Sibbitt 2005; Simmons, Dobbin and Garrett 2008). Studies of policy diffusion typically emphasize the role of coercion, regulatory competition, learning or emulation in spreading policies across jurisdictions. 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 and many US legal norms have spread to other jurisdictions through a variety of diffusion processes (Mattei 1994; Wiegand 1991; De Lisle 1999; Lester 1988; Ajani 1995; Dezalay and Garth 1995; Kelemen and Sibbitt 2005; Garth 2008). US law firms active in the EU have also played an important role as transmission belts, spreading models of US legal practice to jurisdictions across Europe. Certainly, American regulatory style provides a salient model that is familiar to EU policy makers and interest groups in many issue areas, but US regulatory style is referred to at least as often as an example of what must be avoided as it is referred to 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.

European integration has encouraged forms of economic liberalization and political fragmentation that are encouraging European policymakers to turn to adversarial legalism as a mode of governance. In other words, adversarial legalism is emerging today in Europe for much the same reason it emerged decades earlier in the US. Where a political system fragments regulatory authority and where policymakers confront a liberalized economy, they have incentives to rely on an approach to regulation that emphasizes transparency, juridification and the broad empowerment of private litigants – in other words ‘adversarial legalism’ (Kagan 2001, p. 40-54). This occurred decades ago in the US, and is occurring today in Europe largely as a by-product of European integration.

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 creation of the single European market has been based on a dual process involving economic liberalization at the national level coupled with reregulation at the European level.

After the launching of single market initiative in the mid-1980s, flexible, informal and rather opaque systems of regulation at the national level increasingly have come into conflict with European economic integration. The economic liberalization unleashed by the Single Market initiative

introduced new actors, many of them foreign, into previously sheltered domestic markets. For these new market players, opaque systems of regulation that relied on insider corporatist networks or informal relationships between regulators and regulated actors did not ensure a level regulatory playing field. In practice, discretion, flexibility and informality for national regulators often translated into protectionism and bias in favour of incumbents. New market player, their state sponsors and the European Commission attacked informal, flexible regulatory practices at the national level for their lack of transparency and legal certainty. And aside from such critiques and legal challenges, the growing diversity of players in liberalized markets simply rendered traditional systems of regulation ineffectual. Systems that were both lubricated and bound together by trust and familiarity amongst repeat players – many of whom had gone to the same elite universities and had worked in the same areas for years – could not operate effectively in highly diverse, fluid and competitive markets.

Many proponents and critics alike have depicted the Single Market project as largely an exercise in deregulation and economic liberalization. In reality, however, deregulation at the national level was linked with reregulation at the European level. Policy-makers sought to replace national regulatory regimes, which tended to fragment the market and distort trade, with pan-European regulatory regimes erected at the EU level. However, the new EU level regulatory regimes differed profoundly from their national predecessors. The EU followed a dynamic that Steven Vogel (1996, 2007) has identified in a number of political systems whereby the creation of ‘freer markets’ actually requires ‘more rules’ and where deregulation is often followed by ‘juridical reregulation’. Following a fundamental insight of the sociology of law, as the social distance and distrust between regulators and regulated actors in larger liberalized markets increases, laws and regulatory processes tend to become more formal, transparent and legalistic (Black, 1976). 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 courtroom proceedings replace discussions in the proverbial ‘smoke-filled rooms’. In short, the growing number and diversity of market players and their demands for a ‘level playing field’ undermined informal national styles of regulation based on closed, insider networks and trust and pressured EU policy-makers to turn to more a formal, transparent and juridified approach to regulation.

Political Fragmentation

As EU policy-makers have pursued ‘reregulation’ at the European level, they have done so within the context of an institutional structure that generates strong political incentives to rely on adversarial legalism as a mode of governance. The EU is a highly fragmented regulatory state. In Tsebelis (2002) terms, it is a polity replete with veto players. Authority in many policy areas is divided both 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 is also a weak regulatory state, in that while it does benefit from a strong and independent judiciary, it otherwise has an extremely limited administrative capacity to implement or enforce its own policies. A large literature suggests that in polities with these institutional characteristics, policy-makers will be tempted to rely on approaches to governance associated with adversarial legalism.

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). In polities where political authority is highly concentrated, political leaders (the principals) can rely on a variety of non-judicial tools to control their bureaucracy (the agents) and can readily rein them in when necessary (Ramseyer and Rosenbluth 1993, pp. 107-119; Shapiro 1981; Moe and Caldwell 1994). But 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, lawmakers have greater difficulty assembling the political coalitions necessary to rein in bureaucratic agents to whom they delegate power.

Simultaneously, political fragmentation insulates the judiciary from political interference and tends to enhance the independence and assertiveness of the judiciary. Recognizing this, lawmakers have an incentive to draft legislation in a manner that will insulate their policies against potential manipulation by the bureaucracy or by political forces that may come to power later, and to invite the courts to play an active role in enforcing legislation (Moe 1990; McCubbins, Noll and Weingast 1999; Shapiro 1981; Ferejohn 1995; Cooter and Ginsburg 1996). Therefore, lawmakers will tend to draft statutes that specify in detail the goals that bureaucratic agencies must achieve, the deadlines they must meet, the procedures they must follow, and that establish enforceable rights for private parties – inviting them to take legal action 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.

These dynamics can be seen at work in the EU. The European Parliament is generally the strongest backer of this approach. It recognises 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 favours 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 between EU lawmaking bodies (the Council, Parliament and Commission) 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. 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 bureaucracy, the EU cannot hope to adopt significant distributive policies or to implement large-scale programmes (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 do so. Working within the confines of this 'weak state', EU policy-makers that wish to affect outcomes 'on the ground' within member states have sought to create rights for private parties and to promote private enforcement of EU law before national courts (Dobbin and Sutton 1998). 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 and state governments. As a result, as Tridimas (2000, p. 35) puts it, "The Community legal order is supported by a decentralized system of justice... the primary venue for the assertion of Community rights are the national courts." An extensive

literature in political science and law confirms this observation, emphasizing the role that litigation brought by private parties before national courts has played in the enforcement of European law and indeed in spurring courts to extend the scope of European law through expansive interpretations (Alter 2001; Cichowski 2007; Conant 2002; Schepel and Blankenburg 2001; Stone Sweet 2004; Harlow and Rawlings; Kelemen 2006).

Finally, mounting criticism of the EU's supposed 'democratic deficit' and public distrust of distant, '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).² While citizens long seemed willing to tolerate opaque 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' (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. 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.

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

EU Rights

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. 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.³ 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.⁴

EU administrative law is, for the most part, judge made law, crafted through the case law of the ECJ.⁵ 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).⁶ 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

3 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.

4 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

5 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),

6 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).

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*⁷), that imposed time-limits for instituting judicial proceedings (*Emmott*⁸ and *Levez*⁹), that restricted interim injunctive relief for plaintiffs while litigation was pending (*Factortame*¹⁰), or that limited state liability (*Francovich*¹¹).

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*,¹² 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 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.¹³ 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

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

8 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.

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

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

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

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

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

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.¹⁴ The reregulation necessary for the creation of the Single Market, coupled with the fragmented nature of EU institutions¹⁵ 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 Tesauro who stated, “the obligations of the Member States and of the Community institutions are directed above all... to the creation of rights for individuals.”¹⁶ As we will see below, in the name of protecting individual rights and ensuring

14 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)

15 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.

16 AG Opinion, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur 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)

adequate judicial protection, the EU has launched a number of initiatives designed to enhance ‘access to justice’ for private parties before national courts.

Financing litigation

For a regulatory regime that relies on decentralized enforcement by private parties to operate effectively, these private parties must be able to afford to go to court. For wealthy individuals or corporations, financing litigation may present little difficulty. However, for most potential litigants – whether they be individuals or collective actors such as interest groups – costs may present a significant deterrent. National legal systems have adopted a variety of mechanisms to help plaintiffs finance litigation, including legal aid schemes, legal expenses insurance, conditional fee arrangements and procedural devices such as class actions. 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. 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.

By contrast, some of the rules governing litigation finance that have long prevailed in most European jurisdictions tended to discourage litigation. In particular, the absence of American-style contingency fee arrangements and the presence of the loser pays rule – also known as the ‘English rule’ – made up front costs and potential costs (should the litigant lose) very high. However, recent changes to these rules – propelled to a large extent by pressure from the EU – are improving the financial perspectives for potential litigants. Moreover, European legal systems have long provided alternative means of supporting litigation. Government funded legal aid continues to play a far greater role in financing litigation for low income earners in Europe than it does, for instance, in the US (ADD CITE). Also, across Europe, legal expenses insurance provides an important – and growing – alternative means of finance for millions of policy holders. In short, systems for funding litigation are developing in Europe in ways that will reduce the costs facing would-be plaintiffs. Often, these shifts are looked at in isolation. However, the perspective advanced in this paper suggests that they should be understood as part of a broad restructuring of the legal field, linked closely to the process of European integration, a restructuring which both reflects and will encourage the spread of adversarial legalism.

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 cases¹⁷. 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).

17 *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)

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.¹⁸ 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.¹⁹ 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, 2006a).

18 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.

19 *Code of Conduct for lawyers in the European Union*, Conseil des Barreaux de l'Union Européenne (CCBE), para 3.3. See 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*²⁰ 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).²¹

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

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

21 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.

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.²² 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.

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. In recent years, England and Wales, Sweden and the Netherlands introduced fully fledged class actions. France, Germany, Italy, Ireland, Finland, Norway and Sweden, and several others are currently considering doing so (Hodges, 2006a, p.117). Even the EU itself has expressed support for the idea of introducing a collective action mechanism across the Union and has commissioned a detailed cross-national study on the issue to be delivered this year (Hodges 2007; Parker 2007 Euractiv 2008). The spread of class-action rules across the EU promises to increase litigation opportunities for diffuse interests and other plaintiffs who might otherwise lack the resources necessary to litigate. And the impact of new class action mechanisms may be heightened by contagion from across the Atlantic, as leading US class action firms are expanding their European operations in anticipation of new litigation opportunities opened up by the reform of class action rules (Peel 2007; Jacoby 2005).

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 damage awards and remedies – appear to be increasing.

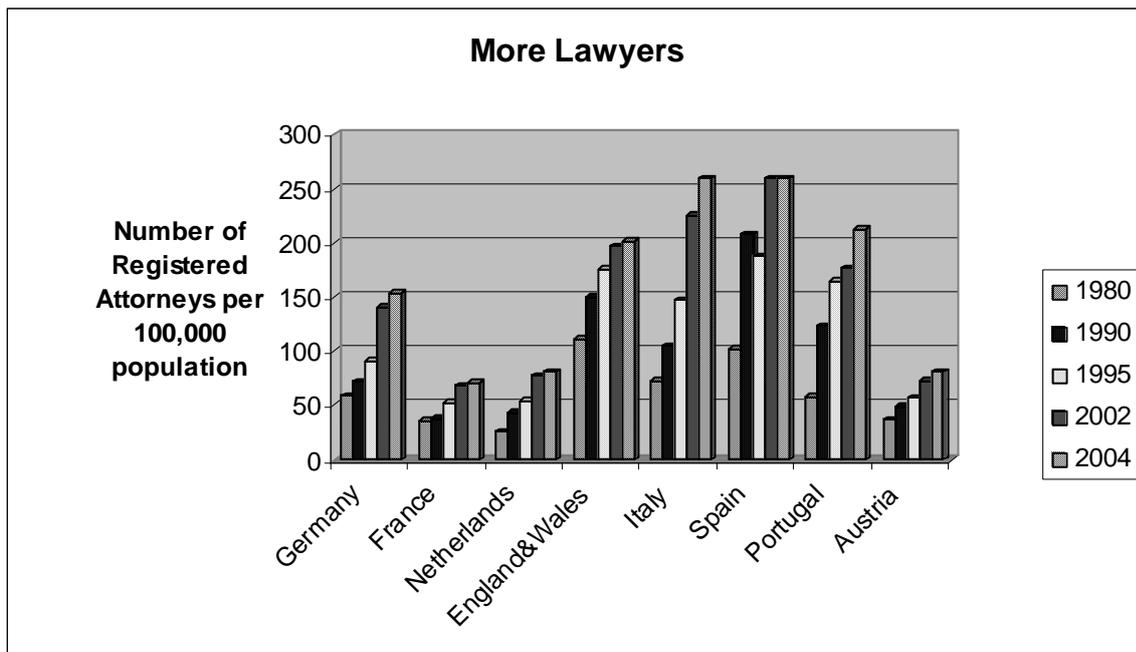
22 Ibid.

Indicators of Adversarial Legalism: 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. 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).

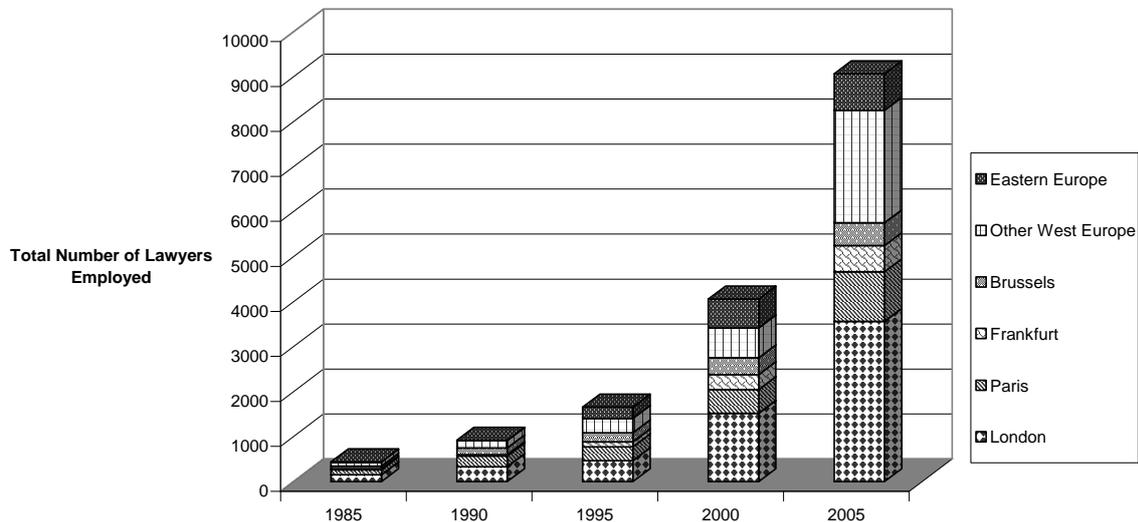
Table 1



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 members 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).

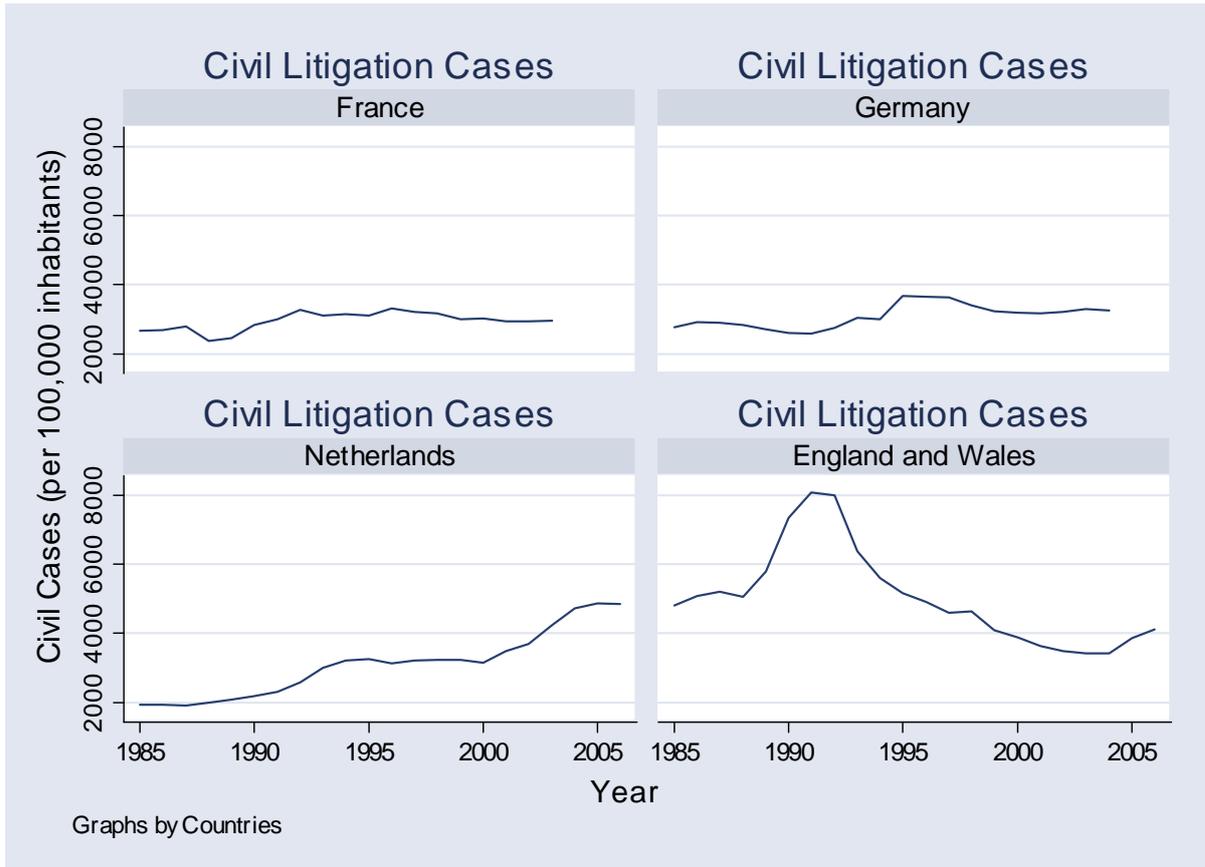
Litigation

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 political institutions 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.²³ 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*.

23 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.

References²⁴

- Ajani, Gianmaria. 1995. By Chance and Prestige: Legal Transplants in Russia and Eastern Europe. *American Journal of Comparative Law* 43 (1):93---117.
- Alter, K. (2001) *Establishing the supremacy of European law*, Oxford: Oxford University Press.
- Blankenburg, E. (2001) 'Indicators of growth of the systems of justice in Western Europe of the 1990s.', Working Paper, The World Bank. Available at:<http://www1.worldbank.org/publicsector/legal/comparativedata.rtf>
- Börzel, T. (2003) 'Guarding the Treaty', in T. Börzel and R. Cichowski (Eds.) *The State of the European Union, Vol. 6*, Oxford: Oxford University Press.
- de Búrca, Gráinne. 1995. The Language of Rights and European Integration. In Jo Shaw and Gillian More, eds. *New Legal Dynamics of European Union*. Oxford: Clarendon Press.
- de Búrca, Gráinne and Bruno de Witte, eds. 2005. *Social Rights in Europe*. Oxford: Oxford University Press.
- Burley, A.-M. and W. Mattli (1993) 'Europe Before the Court: A Political Theory of Legal Integration', *International Organization*, 47:41-76.
- Cichowski, R. (2006) *The European Court, Civil Society and European Integration*, Cambridge: Cambridge University Press.
- Conant, L. (2002) *Justice Contained*, Ithaca: Cornell University Press.
- . 2006. 'Individuals, courts, and the development of European social rights', *Comparative Political Studies* 39: 76–100.
- Comité Européen des Assurances (CEA) (2003) *European insurance figures*, Brussels: CEA.
- Coppedge, Michael. 1999. Thickening Thin Concepts and Theories: Combining Large N and Small in Comparative Politics. *Comparative Politics* 31 (4):465---76.
- Curtin, D. and K.Mortelmans. 1994, Application and Enforcement of Community Law by the Member States." In D Curin and T Heukels eds, *Institutional Dyanmics of European integration*.
- DeLisle, Jacques. 1999. Lex Americana?: United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist World and Beyond. *University of Pennsylvania Journal of International Economic Law*. 20 (2):179---308.
- Dezalay, Yves and Bryant Garth. 1995. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: University of Chicago Press.
- Djelic, Marie-Laure. 2002. Does Europe mean the Americanization? The Case of Competition. *Competition and Change* 6(3): 233-250.
- Dobbin, F. and J. Sutton (1998) 'The strength of the weak state', *American Journal of Sociology*, 104, 441-476.
- Epp, C. (1998) *The Rights Revolution*, Chicago: University of Chicago Press.
- Euromonitor (2005a) *Legal Services in France*, London: Euromonitor International. Available at www.euromonitor.com

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

- Euromonitor (2005b) *Legal Services in Germany*, London: Euromonitor International. Available at www.euromonitor.com
- Ewald, William. 1995. Comparative Jurisprudence (II): The Logic of Legal Transplants. *The American Journal of Comparative Law* 43 (4):489---510.
- Ferejohn, J. (2002) 'Judicializing Politics, Politicizing Law', *Law & Contemporary Problems*, 65 (3),41-68.
- Fligstein, N. and A. Stone Sweet (2001) 'Institutionalizing the Treaty of Rome', in A. Stone Sweet, W. Sandholtz and N. Fligstein, (Eds) *The Institutionalization of Europe*, Oxford: Oxford University Press.
- Galanter, M. (1992) 'Law Abounding: Legalisation around the North Atlantic', *Modern Law Review* 55 (1),1-24.
- Galanter, M. and T. Palay (1991) *Tournament of Lawyers*, Chicago: University of Chicago Press.
- Garth, B. 2008. The Globalization of the Law. In K. Whittington, R.D. Kelemen and G. Caldeira, the *Oxford Handbook of Law and Politics*. Oxford, UK: Oxford University Press.
- Geddes, Andrew. 1995. *Protection of Individual Rights under EC Law*. London: Butterworths.
- Ginsburg, T. (2003). *Judicial Review in New Democracies*. Cambridge: Cambridge University Press.
- Hilson, Chris. 2004. What's in a right? The relationship between Community, fundamental and citizenship rights in EU law. *European Law Review* 29(5): 636-651.
- . 2007. Legitimacy and rights in the EU. *Journal of European Public Policy* 14(4): 527-543.
- Hirschl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press.
- Hodges, C.J.S. (2001) 'Multi-Party Actions', *Duke Journal of Comparative and International Law*, 11, 321.
- Hodges, C.J.S. (2006a) *Europeanization of Civil Justice: Trends and Issues*. MS, Centre for Socio-Legal Studies, University of Oxford.
- Hodges, C.J.S. (2006b) 'Competition enforcement, regulation and civil justice: what is the case?', *Common Market Law Review*, 43(5): 1381-1407.
- Idema, T. and R. D. Kelemen (2006) 'New Modes of Governance, the Open Method of Coordination and other Fashionable Red Herring', *Perspectives on European Politics and Society*, 7(1): 108-123.
- Jacoby, Mary. 2005. Courting Abroad. For the Tort Bar, A New Client Base: European Investors. *Wall Street Journal*, September 2, 2005; Page A1.
- Kaczorowska, Alina. 2006. A review of the creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes. *European Law Journal* 12(3):345-370.
- Kagan, R. (1997) 'Should Europe Worry About Adversarial Legalism?', *Oxford Journal of Legal Studies*, 17(2), 165.
- Kagan, R. (2001) *Adversarial Legalism: The American Way of Law*, Cambridge: Harvard University Press.
- Kagan, R. 2008. The 'Non-Americanisation' of European Law. *European Political Science* (2008) 7, 21-31
- Karsten, Jens. 2007. Passengers, consumers and travelers: the rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy. *Journal of Consumer Policy* 30:117-136.

- Kelemen, R. D. (2003) 'The EU Rights Revolution: Adversarial Legalism and European Integration', in T. Börzel and R Cichowski (Eds.) *The State of the European Union, Vol. 6: Law, Politics, and Society*. Oxford: Oxford University Press.
- . (2004) *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond*, Cambridge, MA: Harvard University Press.
- . Suing for Europe: Adversarial Legalism and European Governance. *Comparative Political Studies*, 39(1), 101-127.
- . 2008 The Americanisation of European Law? Adversarial Legalism à La Européenne. *European Political Science* (2008) 7, 32–42.
- Kelemen, R. D and E.C. Sibbitt (2004) 'The Globalization of American Law', *International Organization*, 58(1), 103-136.
- . "Lex Americana? A Response to Levi-Faur" *International Organization* 59, 2 (2005), pp. 463-472.
- Kritzer, H. (2002) 'Lawyer Fees and Lawyer Behavior in Litigation', *Texas Law Review*, 80: 1943-1983.
- Langer, Maximo. 2004. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. *Harvard International Law Journal* 45 (1):1---64.
- K. Lenaerts and J. Vanhamme (1997) Procedural Rights of Private Parties in the Community Administrative Process, *Common Market Law Review*, 34, 531.
- Lester, Anthony. 1988. The Overseas Trade in the American Bill of Rights. *Columbia Law Review* 88 (3):537---61.
- Legrand, P. (1996) 'European legal systems are not converging', *International and Comparative Law Quarterly*, 45: 52-81.
- Maas, Willem. 2005. The Genesis of European Rights. *Journal of Common Market Studies* 43:5, pp. 1009-25.
- Mattei, Ugo. 1994. Why the Wind Changed: Intellectual Leadership in Western Law. *American Journal of Comparative Law* 42 (1):195---218.
- Morgan, G. and S. Quack (2005) 'Institutional Legacies and Firm Dynamics: The Growth and Internationalization of UK and German Law Firms', *Organization Studies* 26 (12): 1765-1785.
- Parker, George. 2007. EU considers consumer class action. *Financial Times*, 4 March.
- Peel, Michael. 2007. Class action lawsuits could take root. *Financial Times*, October 29.
- Richardson, J. (Ed.) (1982) *Policy Styles in Western Europe*, London: George Allen & Unwin.
- Riley, Alan. 2002. Cartel Whistleblowing: Toward an American model? *Maastricht Journal of European and Comparative Law* 9:67-102.
- . 2003. EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 1: Regulation 1 and the Notification Burden; Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1. *European Competition Law Review* 24:604-615 and 24: 657-672.
- Riley, Aland and John Peysner. 2004. Damages in EC Antitrust Actions: who Pays the Piper? Commentary submitted to European Commission Consultation on Green Paper on Damages Actions for Breach of the EC Antitrust Rules. Available at

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_green_paper_comments/riley_peynser.pdf

- Shapiro, M. (1993) 'The Globalization of Law', *Indiana Journal of Global Studies*, 1(1), 37-64.
- Shapiro, M. (1998) 'Globalization of Freedom of Contract,' in H. Scheiber, Ed., *The State and the Freedom of Contract*, Stanford: Stanford University Press, pp. 269-298.
- . 2001. 'The institutionalization of the European administrative space', in A. Stone Sweet, W. Sandholtz and N. Fligstein, (Eds.) *The Institutionalization of Europe*, Oxford: Oxford University Press.
- . 2005. Rights in the European Union: Convergent with the USA? In *State of the European Union, (Vol. 7) With US or Against US?* Edited by Nicolas Jabko and Craig Parsons, Oxford University Press, (2005), pp.173-189.
- Shapiro, M. and A. Stone. (1994) 'The New Constitutional Politics of Europe', *Comparative Political Studies*, 26(4) 397-420.
2008. B. Simmons, F. Dobbin, G. Garrett, editors. *The Global Diffusion of Markets and Democracy*. New York : Cambridge University Press.
- Stone Sweet, A. (2000) *Governing with Judges*, Oxford: Oxford University Press.
- Stone Sweet, A. and T. Brunell (1998) 'Constructing a supranational constitution', *American Political Science Review*, 92 (1), 63-81.
- Stephen D. Sugarman. "A Comparative Law Look at Pain and Suffering Awards" *DePaul Law Review* 55 (2006): 399-434.
- Tate, C. N. and T. Vallinder, eds. (1995) *The Global Expansion of Judicial Power*, New York: NYU Press.
- Trubek, D., et al. (1994) 'Global restructuring & the law', *Case Western Law Review*, 44: 407-98.
- Vogel, D. (1986) *National Styles of Regulation*, Ithaca, NY: Cornell University Press.
- Vogel, S. (1996) *Freer Markets, More Rules: Regulatory Reform in Advanced Industrialized Countries*, Ithaca: Cornell University Press.
- Ward, Angela. 2007 *Judicial Review and the Rights of Private Parties in EU Law*, 2nd Ed. Oxford: Oxford University Press.
- Watson, Alan. 1993. *Legal Transplants: An Approach to Comparative Law*, 2d ed. Athens: University of Georgia Press.
- Wiegand, W. (1991) 'The Reception of American Law in Europe', *American Journal of Comparative Law*, 39 (2), 229-249.
- Wigger, Angela and Andreas Nölke. 2007. Enhanced roles of private actors in the EU business regulation and the Erosion of the Rhenish Model of Capitalism: the case of antitrust enforcement. *Journal of Common Market Studies*, 45(2): 487-513.
- Wils, W. (2003) 'Should Private Antitrust Enforcement Be Encouraged in Europe?', *World Competition*, 26(3): 473-488.
- De Witte, Bruno. 2005. The Trajectory of Fundamental Social Rights in the European Union. In Gráinne de Búrca and Bruno de Witte, eds. 2005. *Social Rights in Europe*. Oxford: Oxford University Press.
- Weatherill, S. 2005. *EU Consumer Law and Policy*. Cheltenham: Elgar European Law.

Weatherill Stephen and U. Bernitz. *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*. Oxford: Hart Publishing

Wollschläger, C. (1998) 'Exploring the Global Landscapes of Litigation Rates'. in J. Brand and D. Stempel (eds), *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60.*

Zuckerman, A. (1999) *Civil Justice in Crisis*, Oxford: Oxford University Press.

R. Daniel Kelemen
Rutgers University
Department of Political Science
89 George St.
New Brunswick, NJ 08901, USA
Tel: 732 932 1920
Fax: 732 932 7170
Email: dkelemen@polisci.rutgers.edu