The Americanization of the European legal space

Mary L. Volcansek

The legal style found in the United States has been characterized as unique, differing from the styles observed in other parts of the world and even from that of the United Kingdom, whose system of common law was inherited by the US. Robert Kagan (2001) has labelled this style of adjudicating disputes ‘adversarial legalism’. However, according to Keleman (2011), this peculiarly American style has been transported to Europe as a consequence of the development of the European Union (EU), creating what he calls ‘Eurolegalism’. I argue that aspects of law in Europe have indeed taken on some salient features of the American legal style, but not solely because of the EU. Rather, the increasing emergence of transnational regimes that regulate trade, environmental concerns and human rights in and among the nations that are signatories to various treaties and conventions – indeed, the phenomenon of globalization itself – has introduced what I refer to as a ‘cosmopolitan legalism’ that exhibits some characteristics that reflect the law and judicial processes found in the US. A similar trend towards a cosmopolitan law that ‘circumscribes and delimits the political power of independent states’ (Held and McGrew 2001: 326) has been identified; a form of cosmopolitan legalism would seem to be a natural outgrowth of this development. Interestingly, the transposition of American adversarial legalism is most evident in Europe. This essay explores how cosmopolitan legalism has manifested itself in Europe, introducing features that were once uniquely American and thereby, in certain significant ways, ‘Americanizing’ elements of European legal traditions.

The forces of globalization undoubtedly explain much of the recent change in how relationships between and even within nation-states are governed. Perhaps one of the most notable features of globalization has been the decision to regulate its impact through law, a form of law that includes significant elements of American-style adversarial legalism (Goldstein et al. 2000). Slaughter (2004) identifies a shift toward ‘judicial globalization’; similarly, Snider, in tracing commodity chains, finds many points of governance that depend on national law, transnational law, industry codes of conduct and international customs measures, which he calls ‘global legal pluralism’ (Snider 2001: 44–7). Thus, the local and the global are becoming progressively interconnected, a feature Rosenau (2003) refers to as ‘distant proximities’. This trend is also characterized by reciprocity: not only does transnational law influence national law, but national laws can also serve to restrain transnational actors (Ip 2010). The process whereby national and transnational laws blend into each other alters both the substance and the style of how laws are enacted and adjudicated, thus transforming the legal sphere with respect to both traditions and judiciaries.
Adversarial legalism and Eurolegalism

The terms ‘adversarial legalism’ and ‘Eurolegalism’ are largely synonymous, with ‘Eurolegalism’ simply representing a variant of adversarial legalism that has emerged on the European continent (see Box 8.1). In Kagan’s view, legal style refers to ‘implementing public policies, crafting and enforcing laws and regulations, conducting litigation, adjudicating disputes, and empowering courts’ (Kagan 2008: 22). ‘Adversarial legalism’, more commonly known as American-style legalism (as described by Kagan [2001]), hinges on two characteristics: formal legal contestation and litigant activism. The former refers to the ‘discovery of law’, or any resolution of a case in which disputants rely on ‘legal rights, duties and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation and/or judicial review’ (Kagan 2001: 9). Litigant activism, on the other hand, involves a form of contestation in which claims, legal arguments and the production of evidence are the responsibility of the litigants, not judges or government officials (Kagan 2001), a process Frank (1949: 80–1) refers to as the ‘fight theory’. According to Kagan (2001), litigant activism can lead to costly litigation and legal uncertainty, as it combines vigorous legal advocacy with relatively non-hierarchical decisional authority, rendering legal norms unpredictable. Kagan contrasts this style with what he calls European-style ‘bureaucratic legalism’, which is characterized by ‘uniform implementation of centrally devised rules, vertical accountability and official responsibility for fact-finding’ (Kagan 2001: 11), although he notes that this ideal judicial bureaucracy has softened. Indeed, this ideal type is increasingly difficult to find in contemporary democracies, since at least an interstitial evaluation forms part of any judicial interpretation (Guarnieri and Pederzoli 2002). The key distinction concerns who directs the gathering of evidence and decision-making: judges or litigants’ attorneys (Kagan 2001).

Keleman views Eurolegalism as a more muted version of adversarial legalism in which ‘policymaking, policy implementation and dispute resolution’ take place by means of ‘lawyer-dominated litigation’ (Keleman 2011: 3). Eurolegalism involves complex legal regulations, formal adversarial procedural rules, expensive litigation, strong, punitive legal sanctions, judicial review of and intervention in administrative decisions, political controversy over rules, fragmented decision-making systems and an unstable and uncertain legal environment (Keleman 2011). In this process, private actors enforce regulations through litigation. Thus, adversarial legalism represents a method of governance as well as of dispute resolution (Kagan 2001). Keleman (2011) demonstrates the existence of this trend in European securities regulation, competition policy and disability rights. Strünck (2008) identifies Eurolegalism in the arena of consumer protection, but Bignami (2011) finds no evidence of it in the field of data privacy.

Box 8.1 Adversarial legalism and Eurolegalism

Adversarial legalism is characterized by (1) formal legal contestation, whereby the resolution of any case hinges on duties and procedural requirements, and (2) litigant activism, in which the litigants (rather than judges or public officials) present the legal arguments and produce the evidence.

Eurolegalism is a more subtle form of adversarial legalism in which policymaking, dispute resolution and policy implementation occur through lawyer-instigated and lawyer-dominated litigation. Private actors enforce the rules throughout the litigation process.
Adversarial legalism in the US is readily evident in the criminal justice system, in particular because of its non-hierarchical judicial structure. However, a more exaggerated form can be observed in the American civil judicial process, in which a ‘large, entrepreneurial, and politically assertive legal profession’ rather than the government actively serves as the regulator for a variety of civil actions (Kagan 2001: 100). Especially in the area of torts, adversarial legalism shapes both the law and the penalties. Elsewhere, according to Kagan (2001), governments provide alternatives to litigation to resolve many forms of disputes; in contrast, in the US, particularly since the 1960s, Americans have asserted their rights and sought to create new rights through litigation.

Sources of cosmopolitan legalism in Europe

Where I diverge from Keleman’s (2011) analysis is my assertion that the EU is not the sole vehicle by which certain sectors or aspects of European legal space have been altered; rather, the membership of all EU member states in the Council of Europe (CoE), which administers the European Convention on Human Rights (ECHR) adjudicated by the European Court of Human Rights (ECHR), and in the World Trade Organization (WTO), with its Dispute Settlement Understanding, has also grafted aspects of American-style legal adversarialism onto European legal traditions.

Numerous transnational legal regimes and regulatory bodies have altered how rights are claimed and enforcement is achieved, and many if not all of these rely on litigant enforcement in an adversarial, lawyer-dominated forum. At the end of 2004, the Project on International Courts and Tribunals counted 19 international or transnational judicial bodies, 37 quasi-judicial control and dispute settlement boards, 7 non-compliance or monitoring bodies (all dealing with environmental concerns) and a number of international claims and compensation bodies (PICT 2004); many of these relied to some extent on formal legal contestation and litigant activism. Although many transnational treaties reflect standard international relations through which national governments can veto or influence agendas, adjudication and enforcement, a significant number of other fora for dispute resolution operate independently of national governments (Keohane et al. 2000). Political fragmentation and the absence of a hierarchical decision-making authority have led to multi-level governance in a variety of sectors, often relying on litigation to enforce compliance. Progressively, the enforcement of international agreements has shifted from the hands of diplomats and international bureaucrats to legal advocates and courtrooms.

Transnational courts were created to enforce agreements between nations and to preclude defection by signatories (Carrubba 2005), thereby (at least in theory) reducing transaction costs by completing gaps in treaties and monitoring compliance (Alter 2006b: 28). The ‘old’ international courts, such as the International Court of Justice, did not embrace a multi-level system of governance, nor did they foster rights or enforce policies; they lacked compulsory jurisdiction and sought only to resolve disputes. The ‘newer’ international courts and tribunals, on the other hand, feature compulsory jurisdiction, enforcement jurisdiction and access for non-state litigants (Alter 2006b: 23–5). A survey in 2006 indicated that some 26 truly transnational courts were in existence; these bodies had been responsible for more than 15,000 decisions, 69 per cent of which were issued after 1990 (Alter 2006a: 34).

Many of these transnational regimes rely on what has been termed ‘legalism’ to implement regulation and enforcement (Abbott and Snidal 2000; Abbott et al. 2000; Smith 2000), allowing nations to attempt to achieve a balance between treaty compliance and domestic policy discretion (Smith 2000: 138). James McCall Smith (2000) has proposed a method of describing different varieties of transnational law along a continuum from ‘soft’ to ‘hard’ legalism. According
to Smith, ‘hard’ legalism uses precise, binding legal obligations and the delegation of authority to interpret and apply the law, whereas ‘soft’ legalism lacks these attributes. Hard legalism includes the automatic right of review, based on directly binding obligations enforced by a standing tribunal of judges, and rulings have a direct impact on domestic law (Smith 2000: 143). Soft legalism reflects more a traditional system of international relations based on diplomacy and weak enforcement; hard legalism, in contrast, emphasizes transnational politics and third-party adjudication. The element of third-party adjudication opens the door to adversarial legalism. The seeming advantages of the legalist approach to transnational regulation stem from the ability of tribunals to resolve disputes more credibly than the parties themselves; in addition, these rulings stigmatize any retaliatory actions by the losing party (Kono 2007: 749). Naturally, any given transnational agreement will fall somewhere between the extremes of soft and hard legalism; for example, the EU system would be ranked as relatively hard, while the Australia–New Zealand Closer Economic Trade Agreement of 1983 is closer to the soft pole (Kono 2007: 748).

However, with regard to both commercial transnational legalism and human rights concerns, another force is clearly at work behind the progressive proliferation of transnational legalism. This force is globalization – the increasing interconnection of the world through markets, communication and the movement of people, information and ideas. As nations, businesses and individuals are forced to react to this enhanced interconnectivity, rules must be agreed upon and mechanisms designed to ensure compliance. The result has been a growth in multi-level and fragmented governance and a turn towards public and private litigation for enforcement. At least at the transnational level, a rise in adversarial legalism has followed. To what extent have these forces altered legal traditions and judiciaries in Europe?

The European Union has undoubtedly been a source of change, not only for European economic systems but also in terms of legal traditions and judiciaries. Economic competition, neo-liberalism and cross-border transactions have shifted the economic system of Europe closer to that of the United States; even Kagan (2008) concedes that as other countries begin to emulate the American political economy, incentives to imitate American legal practices will also emerge. Indeed, the EU has already succeeded in blending six related but divergent legal traditions (Lenz 1996), and convergence in the private law sector was significant even in the early decades of the EU (Werro 1996). More importantly, as Keleman (2011) demonstrates, in at least three fields of law the EU has altered how disputes are adjudicated in the courts of its member states. Although some scholars have treated law as a dependent variable in the process of integration, Dehousse (1994) describes the dynamics of the development of EU law as largely independent of extra-legal factors.

Because membership in the EU requires that member states surrender their authority to act autonomously in a number of important sectors, a body of law delineating the powers and responsibilities of all national parties and the transnational institutions of the EU is essential. In the case of the EU, ‘the law does provide the basic setting in which decisions are made’ (Nugent 2006: 281). At least in theory, EU law is definitively interpreted by the European Court of Justice (ECJ) in Luxembourg, but national courts can have a strong influence, a role that they have used strategically (Hix 2005). Thus, even though some hierarchical judicial authority theoretically resides with the ECJ, how EU law will be applied by national courts lacks predictability and certainty. Some scholars claim that national courts have adopted a strategy for self-empowerment within national political contexts (e.g. Weiler 1991, 1994), while others argue that these courts have employed EU law to enhance their own power and prestige (Alter 2001). Notably, as part of the accession process of the newest members of the EU from Central and Eastern Europe, the EU has established judicial and legal training programmes for the new member states, including healthy doses of EU law. The theory behind this approach is that
‘a legal culture is more the effect of judicial training and legal education than the cultural background in which judicial training . . . [is] shaped’ (Piana 2010: 176).

The EU has also empowered private litigants through the doctrine of direct effect, invoking and thereby enforcing EU law through private litigation in national courts. This has encouraged entrepreneurial lawyers to use litigation as an enforcement mechanism in member-state courts (Hix 2005). One mechanism for enforcing EU rights in national courts is the preliminary reference procedure. When an EU norm and its interpretation are material to a case before a national judge, the judge may ask the ECJ for a definitive interpretation of the law; preliminary references are obligatory for national courts of last resort (Stone Sweet 2000). Although no statistics are available to show how often EU law has been claimed in domestic courts (successfully or unsuccessfully), preliminary reference requests from national judges provide an indicator of the frequency with which these judges have determined that an interpretation of EU law is central to the resolution of a case, and of the extent to which adversarial legalism has permeated national judiciaries.

The World Trade Organization (WTO), which has been characterized as one of the ‘deepest’ international agreements (Carrubba 2005: 670), and its Dispute Settlement Understanding grew out of the 1947 General Agreement on Tariffs and Trade (GATT). The core principle of the GATT regime was non-discrimination, whereby each member nation granted every other member nation most-favoured trade status. The GATT was replaced by the WTO at the conclusion of the Uruguay round of negotiations in 1995, but the same basic principles have been maintained. Under the GATT, from 1948 to 1989, only 88 disputes between nations were decided by the GATT’s panels of diplomats. In the 1980s alone, 47 panel decisions were issued, but full compliance by the offending nation was achieved in only 40 per cent of these cases (Barton et al. 2006).

The replacement of the GATT with the WTO constituted an institutional shift towards hard, adversarial legalism as a method of enforcement. A new panel system relying on lawyers rather than diplomats created enforcement mechanisms and established an Appellate Body to which the decisions of panels could be appealed. The creation of the Appellate Body has allowed the development of a consistent jurisprudence in trade law, as well as the potential opportunity to ‘constitutionalize’ the treaty (Cass 2005). The WTO Dispute Settlement Understanding, unlike its predecessor, is ‘obligatory, automatic and apolitical’ (Barton et al. 2006: 71); in addition, whereas the implementation of GATT panel reports required consensus, now consensus must be achieved to block the issuance of a report. Thus, the WTO Dispute Settlement Understanding has created national rights that are judicially enforceable, using litigation as a means of enforcement. Even stronger incentives for compliance with decisions resulting from the Dispute Settlement Understanding system were also put into place. A winning complainant nation may legally retaliate by raising tariffs on imports from the losing country to levels that will make these imports undesirable; however, such retaliation must be proportionate (Barton et al. 2006).

The objective of the Dispute Settlement Understanding is the promotion of trade cooperation by means of the threat of a definitive settlement by a third party in an adversarial legal process. Consequently, when new nations apply for membership the WTO member nations prefer to admit only those with a history of cooperation. For example, the admission of Russia met with considerable resistance, not because of ‘any particular Russian misdeed but from a broader perception that Russia is an unreliable trading partner’ (Kono 2007: 748). This history of compliance is important for the WTO because – as is frequently the case with treaties – there is a certain degree of ambiguity in the language regarding, for example, what is considered to be an illegal export subsidy or the appropriate use of an escape clause. Without the WTO dispute settlement system, disagreements would have to be resolved through bilateral negotiations that
might or might not be successful. Decisions reached through the Dispute Settlement Understanding legitimize retaliation, stigmatize unwarranted retaliation and increase the reputational costs of non-compliance (Kono 2007: 757).

One unusual aspect of the WTO Dispute Settlement Understanding is the fact that only nation-states may sue; in the judicial apparatus of the EU and the ECHR, individuals, commercial parties and nations may all petition the courts. Under the WTO, commercial interests that are being damaged by the trade policies of other nations must lobby their executive branch to take legal action. In this fashion, legal adversarialism becomes a part of national governance, opening the door to entrepreneurial lawyers pressing their industry’s case with the national executive.

The World Trade Organization has thus resorted to a system of adversarial legalism in order to enforce its rules among the 160 member nations. Judicially enforceable rights have been created to prevent discrimination and protectionism in trade, and these rights are upheld through state-to-state, lawyer-dominated litigation. The WTO has also introduced another layer of multi-level governance, particularly for EU nations (which are all individually members of the WTO, as is the EU as a legal entity). Indeed, the EU has participated in 86 cases before the Dispute Settlement system as the complainant, 70 cases as the respondent and 104 as a third party; Belgium, the Czech Republic, Denmark, France, Germany, Hungary, Ireland, Poland, Portugal, Romania, Slovakia, Spain and Sweden have each been involved in WTO litigation independent from or in partnership with the EU (WTO 2012).

Transnational human rights regimes seem to have evolved from a different convergence of forces than trade arrangements. The ECHR is the adjudicatory body charged with deciding cases under the European Convention on Human Rights, which came into force in 1953. Initially, the Convention provided for a two-stage process: petitions alleging violations were lodged with a commission, which screened complaints and attempted to achieve informal resolutions. When petitions were found to be valid and beyond the commission’s ability to resolve, they were forwarded to the European Court of Human Rights, which became operational in 1959. In 1998, the part-time commission was eliminated, and the ECHR began operating on a full-time basis. The Convention was overhauled to convert the ECHR into a permanent professional body with compulsory jurisdiction over all individual petitions against the signatory states, without any special declaration required (Caflisch 2006: 403). The European Convention is weaker in some respects than EU law, as states are not required to uphold Convention-guaranteed rights in national courts. This represents less of a problem in states that embrace legal ‘monism’ (minimizing the divergence between national and international law) than in those that apply ‘dualist’ approaches that separate domestic and international law (Janis et al. 2008). Currently, 47 nations are signatories to the Convention, including all EU member states.

The ECHR is widely regarded as one of the most effective transnational adjudicative bodies in existence (Helfer and Slaughter 1997; Moravcsik 2000; Posner and Yoo 2005; Hawkins and Jacoby 2010). Some attribute this effectiveness to its extensive political integration within Europe (Posner and Yoo 2005), but only slightly more than half of the 47 nations comprising the Council of Europe (signatories to the Convention) are full members of the European Union. Compliance with the decisions of the ECHR, although sometimes only partial, is high (Hawkins and Jacoby 2010: 38), and about half of the nations that are signatories to the Convention have incorporated it into their domestic codes of law (Helfer and Slaughter 1997), including the United Kingdom and Denmark (Volcansek 2010). A more cynical explanation of the high rate of compliance would be that, at least in the human rights arena, adjudication has been most effective in countries that arguably need it least (Helfer and Slaughter 1997: 329); in addition, although no geopolitical bias is evident in the court’s decisions, the judges display inclinations toward policy rather than formalistic applications of Convention requirements (Voeten 2008: 431).
Like the European Union, the European Convention creates judicially enforceable rights and relies on adversarial litigation for the private enforcement of its norms. Because litigants must first exhaust the legal remedies available within their own domestic courts (Janis et al. 2008; Keller and Stone Sweet 2008), the European human rights regime also employs a system of multi-level governance and represents another example of political fragmentation. This fragmentation can extend beyond the national and transnational levels of governance, depending on the degree of law-making and judicial autonomy that a country grants its political subdivisions. Moreover, just as the caseloads of the EU’s judicial bodies, the European Court of Justice and the General Court, have steadily (almost exponentially) grown, so too has the number of disputes decided by the ECHR. To expedite the management of this increased caseload (some 116,250 cases were pending at the end of May 2013) (ECHR 2013), a new protocol was proposed in 2004 that would allow individual judges to act in certain specified areas. This proposal prescribed the use of three-judge panels in some cases, seven judges for others and 17 for sessions of the Grand Chamber (CETS 2009).

The extent of adversarial legalism in Europe

How, then, might the WTO’s Dispute Settlement Understanding, the EU’s Court of Justice and the European Court of Human Rights be complicit in proliferating a form of adversarial legalism, and how might activities stemming from each of these transnational organizations form part of a larger phenomenon that has shaped Eurolegalism in Europe? Table 8.1 presents the annual numbers of preliminary rulings from national courts that have reached the ECJ, the number of judgments issued by the ECHR and the number of cases in which the EU or a member state has been a party in the World Trade Organization’s Dispute Settlement Understanding. The sheer quantity of litigation – all pursued in the American style of legal adversarialism – is substantial. More significantly, the numbers of these cases are generally increasing.

The ECJ’s early decisions on the supremacy of EU law over national law and the doctrine of direct effect (allowing individuals to enforce EU law through litigation in national courts) have obviously had some transformative effect, as Keleman (2011) contends. These developments have forced national judges and litigants and their advocates to devise new approaches and new remedies and to adopt more intrusive forms of judicial review. Thus, European economic integration through the EU not only introduced adversarial legalism but also paved the way for the reactions of national legal traditions and judiciaries to the jurisprudence of the European Court of Human Rights. The reception of European human rights law has been dependent on how Convention norms constrain and bind public authorities, the status granted to the Convention vis-à-vis national law and whether or not national judiciaries allow individuals to directly assert Convention rights. National judges play a pivotal role, since they have the last word on domestic remedies before a case proceeds to the ECHR. Moreover, national courts are also the bodies that harmonize national law with the jurisprudence of the ECHR after a violation has been identified. As a result, litigants, their lawyers and national judges have been key figures in the reception of the European Convention on Human Rights in national legal traditions and judiciaries (Keller and Stone Sweet 2008).

The World Trade Organization’s impact on the rise of adversarial legalism in Europe has been more tangential. Individual industries and other commercial interests cannot directly petition the WTO and may not be directly involved in the litigation of cases under the Dispute Settlement Understanding, since adjudication in this forum is exclusively state-to-state. However, the engagement of industry representatives in persuading national executives to file claims with the
Table 8.1 Comparison of involvement in adversarial litigation by year for 27 EU member states (1990–2011)

<table>
<thead>
<tr>
<th>Year</th>
<th>ECI preliminary rulings*</th>
<th>ECHR judgements**</th>
<th>WTO dispute party***</th>
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<tbody>
<tr>
<td>1990</td>
<td>142</td>
<td>1958–98 = 758</td>
<td>GATT regime</td>
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<tr>
<td>1991</td>
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<td>1992</td>
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<tr>
<td>2011</td>
<td>402</td>
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<td>3</td>
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</tbody>
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WTO reflects the adversarial system of entrepreneurial lawyers acting on behalf of their clients to pursue the punishment of violations.

Have the EU, the European Convention and the WTO altered how law is practised and how judicial decisions are rendered in Europe? Yes, but only in certain sectors. Keleman (2008) cites six areas of law that he anticipates will not be affected by any adversarial influence: judicial selection, the regulatory process, torts, social regulations, the tax code and criminal justice. I agree that these realms of law are so distinct and culturally determined that adversarial legalism is unlikely to influence them, particularly in the case of criminal justice – nor would Americanizing these sectors necessarily benefit the European legal system. In fact, the Americanization of European law, to the extent that it has occurred, may not prove to be a beneficial development for any tradition or judicial body.

Conclusions

American-style adversarial legalism, a system that relies on lawyer-dominated litigation to enforce laws, rules and regulations, has invaded European legal space. Keleman (2008) refers to this phenomenon as ‘Eurolegalism’ and attributes its proliferation to the mechanisms of the European
Americanization of European legal space

I argue that a larger trend can be identified: a cosmopolitan legalism that has been transferred to European courtrooms not only through the EU, but also via the European Court of Human Rights and the World Trade Organization. All 28 EU member states are also subject to the dictates of the ECHR, as well as those of the WTO Dispute Settlement Understanding. All of these arrangements rely on similar systems of litigant enforcement and lawyer-dominated proceedings that are quite distinct from traditional European bureaucratic legalism. Except in the case of the WTO, private litigants rather than states sue to enforce the organizations’ rules.

Bibliography


