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R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION (Harvard Univ. Press 2011). Pp. 378. Hardcover. $49.95.

INTRODUCTION

R. Daniel Kelemen has written a superb book that deserves wide readership. As its title suggests, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, takes European law and policy as its empirical focus, and for this reason it will obviously interest students of the European Union (EU).[1] Kelemen's arguments, however, transcend the book's subject matter. They simultaneously engage fundamental issues concerning the relationship between law and society as well as macro-level theories of state-building and judicialization.[2] Oddly enough, this book merits attention from socio-legal scholars with an interest in the ways in which legal rules shape human behavior and comparativist political scientists who are interested in large-scale processes of political development. Elaborating on arguments that he has made elsewhere, Kelemen offers a compelling structural-functionalist account of recent developments in European law and policy. Yet readers may be left wondering what insights could be gained from paying greater attention to legal and political agents.

Kelemen advances two core arguments. First, he asserts that a more legalistic and adversarial approach to domestic policy, "Eurolegalism," has supplanted traditional European policy styles that featured cooperative, informal, and opaque arrangements.[3] The term itself expressly refers to the concept of "adversarial legalism" that Robert Kagan devised to capture a distinctly American mode of regulatory policy, one that relies principally on private enforcement of legal rights through the courts.[4] In making this argument, Kelemen challenges a rival account that portrays the EU's new form of governance as voluntary, deliberative, and cooperative in nature — the very antithesis of

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1. R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION (2011).

2. *Id.*

3. *Id.* at 15.

4. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

Eurolegalism.[5] He also disputes claims that deeply-entrenched countervailing legal rules, institutional practices, and cultural norms will thwart the development of adversarial legalism in Europe.[6] These factors, according to Kelemen, will exert a moderating force — hence the term "Eurolegalism" suggests that a difference in kind and not simply geography distinguishes the European and American variants of this mode of governance — but they will not stop adversarial legalism's advance.[7]

Because most Europeans regard the United States (U.S.) as an anti-model, the development of Eurolegalism is puzzling. The book's second argument addresses this puzzle. Kelemen attributes Europe's policy transformation to the interaction of political demands driven by European economic integration and the EU's fragmented institutional structure, in which a weak state and a strong court feature prominently. Acting in tandem, the resulting "political incentives and functional pressures" create powerful incentives for the construction of legalistic policy regimes that are privately enforced by means of justiciable rights.[8] Thus, rather than emerging by design, Eurolegalism develops in spite of the professed intentions of its political architects. This argument ties the book to the broader works on the processes and politics of state-building, including those of Robert Kagan, Stephen Skowronek, Martin Shapiro, and Frank Dobbin and John R. Sutton.[9] It challenges explanations that attribute Europe's increasingly legalistic and adversarial policy-style to various forces of policy diffusion, including "coercion, competition, learning, or emulation."[10]

Kelemen offers two types of evidence to support his arguments. In Chapter Three, he presents a "panorama of overarching indicators" that illustrates the "spread of adversarial legalism across Europe."[11] As Kelemen notes, these indicators are both qualitative and quantitative in nature and "cannot be neatly divided into independent and dependent variables."[12] A series of chapter-length case studies comprise the remainder of the book. In these, Kelemen develops both of his arguments. He elaborates on the transformation of securities regulation, competition policy, and disability policy in four countries — France, the Netherlands, Germany, and the United Kingdom (U.K.) — and using process-tracing, he explains the central role that the EU played in these transformations. Despite traversing some technical and complicated terrain, the book is written in an engaging and accessible style that renders it suitable for those who are not

5. KELEMEN, *supra* note 1, at 28-30.

6. *See* Robert Kagan, *Should Europe Worry about Adversarial Legalism?* 17 OXFORD J. LEGAL STUD. 165, 179-183 (1997); Robert Kagan, *The 'Non-Americanisation' of European Law*, 7 EUR. POL. SCI. 21, 24-26 (2008).

7. KELEMEN, *supra* note 1, at 7-8.

8. *Id.* at 37.

9. *See* KAGAN, *supra* note 4, at 40-54; Martin Shapiro, *The Institutionalization of the European Administrative Space*, *in* THE INSTITUTIONALIZATION OF EUROPE 94-112 (Alec Stone Sweet et al. eds., 2001); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982); Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441, 441-44 (1998); Martin Shapiro, *The Institutionalization of European Administrative Space* 1-3 (Univ. of Cal., Berkeley, Center for Culture, Organizations and Politics, Inst. for Research on Labor and Emp't., Nov. 10, 2004), *available at* http://escholarship.org/uc/item/4b839871.

10. KELEMEN, *supra* note 1, at 33-34.

11. *Id.* at 39.

12. *Id.* at 40.

experts on European law and policy, including undergraduates in upper-division courses as well as graduate and law students.

THE RISE OF EUROLEGALISM

In substantiating his claim that adversarial legalism has taken root in Europe, Kelemen faces two critical tasks. He must first demonstrate that public policy has changed at both the national and supranational levels, and second, he must show that the new policies are actually reshaping societal practices, even where supposed barriers to litigation remain. After presenting general evidence on these points in Chapter 3, Kelemen systematically develops each point in the chapter-length case studies that round out the book.[13] These chapters begin with a similar tale of transformation in which opaque, flexible, discretionary, and politicized policy regimes are supplanted by new juridified regimes at the supranational and national levels.[14] Kelemen then assesses the extent to which various obstacles to litigation have been undermined (or not), and he illustrates how actors are increasingly turning to courts for redress, often through novel mechanisms.[15] According to Kelemen, the legal and behavioral changes that he recounts constitute a "more restrained and sedate" version of adversarial legalism than that which is found in the U.S.[16]

Drawing on Kagan's work, Kelemen articulates the defining features of adversarial legalism. These features include "legal norms characterized by detailed prescriptive rules" that are framed in terms of "individual rights" and contain "strict transparency and disclosure requirements" as well as "detailed substantive and procedural requirements."[17] Provisions for judicial enforcement, especially by private actors, also figure prominently.[18] In Chapter 3, Kelemen marshals an array of secondary sources to support his general claim that EU law, including the European Court of Justice's (ECJ) jurisprudence, increasingly embodies key elements of adversarial legalism.

Kelemen also recounts three specific policy transformations. First, national securities policies that once "relied on flexible, informal self-regulation based on trust between closed networks of repeat market players" were replaced by detailed legal regimes that feature transparency, disclosure requirements, independent regulatory agencies, and shareholders' rights that may be protected through private litigation.[19] Second, competition policy that historically employed a flexible "administrative control model" characterized by "vague legal norms," limited judicial review, little private enforcement, and regulators that possessed "wide discretion" to negotiate informally with industry to protect the public interest was supplanted by "heavily juridified" policies that feature "the prospect of rigorous judicial review" and growing potential for private enforcement.[20] Finally, a new American-style, civil rights model replaced the

13. *Id.* at 17-18.
14. *Id.* at 95-98, 143-44, 187, 196.
15. *Id.* at 123-24.
16. *Id.* at 8.
17. *Id.* at 41.
18. *Id.* at 40-41.
19. *Id.* at 94-95.
20. *Id.* at 144-45, 150-51.

traditional - and paternalistic - "medical/welfare model" that had characterized disability policy.[21] It emphasizes a privately enforceable, individual right to nondiscrimination as opposed to social welfare policies, including income support and state-subsidized or quota-based private employment programs.[22]

In rendering these policy summaries, Kelemen condenses considerable material and must necessarily employ a number of generalizations. Policy experts may question his portrayal of the various reforms as well as the policy *status quo ante* in each country. Yet, Kelemen mounts an impressive, and to this reader persuasive, case that national policy in the three areas that he surveys has become significantly more legalistic and adversarial in nature.[23]

Skeptics, including Kagan, maintain that Europe will not succumb to adversarial legalism despite the foregoing sorts of changes because legal systems there make litigation difficult, unaffordable, and unrewarding.[24] Kelemen shows that the supposed barriers are themselves being transformed in ways that rob them of their dissuasive force. For example, the "loser pays" rule is subject to an increasing number of exceptions and offset by growing use of "protective cost orders."[25] The absence of contingency-fee arrangements also matters less in light of the growing popularity of legal expenses insurance and the creation of alternative payment schemes, including "conditional fee agreements" in Britain, "'no win, no fee'" arrangements in the Netherlands and Italy, and other novel litigation-funding schemes that increasingly allow third parties to bankroll litigation across Europe.[26] Finally, a widening array of damages is available in European courts, and member states are experimenting with new mechanisms that permit collective lawsuits.

Kelemen also shows that changes in the legal profession across Europe have produced a growing body of lawyers who are well-suited to exploit the new opportunities that the changing legal landscape presents. According to his figures, the number of lawyers grew by just under 300 percent between 1980 and 2006.[27] In addition, the organizational landscape changed significantly with the entry of large American firms into the European market. These firms "thrived" because their expertise fit well with the EU's shift to more adversarial and legalistic forms of regulation and because they offered what Marc Galanter has called "mega-lawyering techniques" that traditional European firms could not initially match.[28] Over time, European firms, beginning with those in the U.K., transformed through mergers and acquisitions in order to compete.

In demonstrating the societal effects of Europe's new adversarial and legalistic policy regimes, Kelemen confronts two challenges. First, as he observes, a "data deficit"

21. *Id.* at 210-11, 242.
22. *Id.* at 196-205.
23. *Id.* at 240-241.
24. *See* KAGAN, *supra* note 4.
25. KELEMEN, *supra* note 1, at 69.
26. *Id.* at 67.
27. *Id.* at 80.
28. *Id.* at 82; Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States, in* THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS 152, 153 (Robert Dingwall & Philip Lewis eds., 1983).

plagues this area of study.[29] Despite growing scholarly interest in judicialization and related phenomena, there remains a dearth of "comparable aggregate, longitudinal data" on key trends like "litigation rates, amounts spent on legal services, and other potential measures."[30] Importantly, Kelemen does not simply equate Eurolegalism with growing litigation rates, for as he observes, some European countries have historically displayed higher rates in some areas of the law than those observed in the United States. Instead, he emphasizes changes in behavior that suggest wider trends and transformations. In other words, *how* litigation occurs is as important as how often it occurs.

The second challenge derives from the relative recency of the policy transformations that Kelemen describes. In a couple of instances, reforms were initiated in the mid-to-late1980s or early 1990s, but in most areas, they did not commence until the late 1990s or early 2000s, and their full implementation generally took several years to complete. Thus, the societal effects of Europe's new adversarial and legalistic policies may not yet be fully discernible, and those that are discernible may not yet have been subject to scholarly analysis. For these reasons, Kelemen necessarily relies on anecdotal evidence, often drawn from recent media reports, where supportive secondary analyses are lacking.

Working within these empirical constraints, he assesses the societal changes that accompany Eurolegalism in two main ways. First, drawing on the work of Charles R. Epp, Kelemen emphasizes the strengthening of "legal support structure[s]" for litigation.[31] He therefore discusses the role of shareholders' associations in securities litigation and consumer associations in competition suits. Kelemen points to the "hundreds" of German lawyers who pursued claims on behalf of thousands of clients in securities cases against Deutsche Telekom in the early 2000s.

Second, Kelemen describes the weakening or decreasing relevance of various barriers that once impeded litigation. For example, enforcement of competition law by public bodies increasingly mitigates an absence of American-style, pre-trial discovery rules that facilitate litigation by private parties; for once these bodies uncover malfeasance, Kelemen explains, private parties can pursue "follow-on damage claims" in the national courts.[32] He also notes the emergence of new mechanisms for collective litigation. German law now allows consumers to "'assign' their claim to a third party, who can thereby assemble what amounts to collective claims on behalf of a group of similarly affected consumers."[33] With respect to securities litigation, Germany has experimented with a "model case" procedure that allows similar cases to be bundled together. In 2005 Dutch lawmakers adopted legislation that allows national courts to certify and enforce mass damages settlement agreements that are reached *extra*-judicially. The foregoing mechanisms do not replicate American-style class actions, nor do they eliminate bans on contingency fees. Yet, as Kelemen shows, in each instance, entrepreneurial lawyers have exploited these opportunities to pursue novel types of

29. KELEMEN, *supra* note 1, at 39.

30. *Id.* at 39-40.

31. *Id.* at 86. *See generally* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

32. KELEMEN, *supra* note 1, at 182.

33. *Id.* at 185.

litigation.

In contrast with the experience with new securities and competition policies, newly created national laws prohibiting disability discrimination have thus far generated relatively little litigation beyond the U.K., which was an early adapter of the disability rights policy model.[34] In terms of societal effects, disability policy thus presents the case of "the dog that didn't bark." Kelemen attributes low rates of litigation in France, Germany, and the Netherlands to myriad factors, including a lack of public enforcement (the relevant EU directive did not require member states to create national enforcement bodies) and a preference for resolving claims through mediation as opposed to litigation. Moreover, across all four countries, civil society organizations generally lack the expertise, capacity, and inclination to litigate.

Kelemen's analysis suggests that societal change is occurring, but precisely how and why it is occurring remains open to question and further analysis. To be fair, it would ask too much to demand that Kelemen specify and systematically evaluate the causal mechanisms or pathways through which "law on the books" shapes "law in practice" across the four countries and three policy areas that he examines. His analysis, however, recognizes a number of variables (e.g., legal culture, a well-developed specialty bar, the identity of the aggrieved parties, legal entrepreneurship, etc.) that merit more fine-grained analysis. Much could be gained from paying greater attention to the ways in which specific agents and structure intersect under certain time-bound conditions to produce the societal effects that Kelemen describes.

Operating from the premise that those "things" that are recognized as "disputes" are actually "social constructs," a socio-legal approach, would focus on the transformative process of "naming, blaming, [and] claiming" that necessarily precedes litigation.[35] It would focus on the new laws' effect upon three potential agents of change — litigants, lawyers, and mobilizing organizations. Such analyses would emphasize an agent's identity and the ways in which identity shapes an agent's capacity and inclination to mobilize new laws.[36] Additionally, these analyses would specify how the institutional and cultural context shapes agents' capacity and inclination to mobilize the new laws.

WHAT'S DRIVING EUROLEGALISM?

Kelemen attributes the development of Eurolegalism to two "causal mechanisms" that derive from the larger project of European integration.[37] The first concerns national and supranational political demands that the effort to develop a single market generates. Economic integration requires liberalization and deregulation at the national policy level, and it simultaneously requires reregulation at the EU-level. Second, the fragmented institutional environment within which European regulations are developed leads policy makers to adopt a "more formal, transparent approach to regulation backed by vigorous

34. *Id.* at 232.

35. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 632 (1980).

36. *See, e.g.*, SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006).

37. KELEMEN, *supra* note 1, at 8.

enforcement, often by private parties."[38] Kelemen does not argue that European integration alone is driving Eurolegalism, but rather he contends that the EU played "a central and indispensable" role.[39]

The precise political demands generated by European integration vary across the three policy areas. With respect to securities policy, Kelemen argues that the cooperative and informal regulatory styles that had suited small, homogenous communities at the national level required a level of trust that could not be sustained among the more populous and diverse field of actors that comprise the transnational community.[40] In order to ensure that the new single market would provide a "level playing field," economic actors, who would be subject to the new regulations, as well as national governments, sought more formal rules and greater transparency in the enforcement of these rules, two defining features of adversarial legalism.[41] Here, Kelemen draws on the work of Donald Black and Steven Vogel, the latter of whom has shown that "'freer markets' actually require 'more rules.'"[42]

In the areas of competition and disability policy, the story is more complicated. By the mid-1980s, the EU had developed an expansive competition policy, which the Commission began to enforce vigorously in the 1990s. The Commission's inadequate resources led it to use "soft law mechanisms" and "opaque decision-making procedures" that drew criticism from industry and national governments alike, both of whom demanded greater transparency and legal certainty.[43] Modernization reforms in 2004 not only delivered the desired reforms, they also enhanced private enforcement.[44] The EU's pursuit of a rights-based disability policy in 1996 followed an earlier, failed effort by the Commission that relied on the medical model.[45] By the mid-1990s, transnational networks of disability rights activists, many of whom were influenced by the American experience with the Americans with Disabilities Act, added their claims for antidiscrimination rights to those on behalf of racial and religious minorities.[46] National governments ultimately endorsed a rights-based approach, in part, because they recognized that it was less expensive than the medical model.

Kelemen observes that the adoption of rights-based legal norms presents an especially puzzling development considering that rights did not figure prominently in the EU's founding.[47] He contends that in the 1990s, EU policy makers began to inject fundamental human rights and social rights into various supranational instruments as a means of addressing critics who challenged European expansion into "new, more

38. *Id.*
39. *Id.* at 97.
40. *Id.* at 23.
41. *Id.* at 8.
42. *Id.* at 23; DONALD BLACK, THE BEHAVIOR OF LAW (1976); STEVEN VOGEL, FREER MARKETS, MORE RULES: REGULATORY REFORM IN ADVANCED INDUSTRIALIZED COUNTRIES (Peter J. Katzenstein ed., 1996); Steven Vogel, *Why Freer Markets Need More Rules, in* CREATING COMPETITIVE MARKETS: THE POLITICS OF REGULATORY REFORM 25-42 (Mark K. Landy et al. eds., 2007).
43. KELEMEN, *supra* note 1, at 160-61.
44. *Id.* at 188.
45. *Id.* at 210-12.
46. *Id.* at 205-08, 213.
47. *Id.* at 46-48.

politically sensitive policy areas" and its "neo-liberal bias."[48] A rights-based approach enabled EU policy makers to sell European integration to citizens and satisfy emerging constituencies, to shift enforcement away from a "weak administrative apparatus" to individuals and courts, and to launch processes through which EU authority may be further expanded over time at the expense of member states. In sum, it offered multiple political benefits at minimal political cost.

The second causal mechanism at work derives from the EU's increasingly fragmented institutional structure. "The vertical fragmentation between the EU and the member states and the horizontal fragmentation of power between institutions at the EU level," Kelemen argues, "generate principal-agent problems that encourage the adoption of laws with strict, judicially enforceable goals, deadlines, and transparent procedural requirements."[49] Lawmakers codify their policy preferences and arm individuals with legally enforceable rights with the expectation that national and EU judges will enforce and uphold their policy preferences. Moreover, by democratizing access to the courts in this way, Eurolegalism arguably redresses the EU's democratic deficit and thus serves an additional purpose.[50]

Kelemen argues that the European Commission, Parliament, and ECJ each drive Eurolegalism's development, albeit in different ways and for different reasons. The Commission pursues more detailed directives in order to limit the discretion of national authorities that are charged with their implementation, and it seeks stronger enforcement efforts in order to foster compliance by member states.[51] Parliament eagerly supports the creation of EU "rights" and mechanisms that promote "access to justice" on behalf of diffuse groups like consumers, shareholders, and victims of discrimination in order to deliver "the goods" to various constituencies and thereby enhance its institutional relevance.[52] Finally, the ECJ contributes to the rise of adversarial legalism through its development of an EU-level administrative jurisprudence that encourages "greater transparency, accountability, and judicial intervention in administrative affairs."[53] Its decisions have also increased the types and amounts of damages that are available.[54]

Kelemen invokes Skowronek's study of American state-building early in the book. Although both scholars offer structural-functionalist explanations for the development of strong courts within weak states, they employ very different approaches.[55] The processes through which Eurolegalism develops, as portrayed by Kelemen, appear astonishingly apolitical. This point struck me by the second chapter. Kelemen refers repeatedly to a generic cast of agents, with national and EU "policy makers," "leaders," and "lawmakers" foremost among them. By contrast, Skowronek details how particular reform efforts served particular political interests in late nineteenth and early twentieth century America. As a result of this difference, Kelemen's book makes for relatively

48. *Id.* at 48, 213-16.
49. *Id.*
50. *Id.* at 28, 44.
51. *Id.* at 113-15.
52. *Id.* at 60, 77-78
53. *Id.* at 53.
54. *Id.* at 54, 56, 72-73.
55. *Id.* at 27; *see* SKOWRONEK, *supra* note 9.

easier reading, but readers should consider whether its parsimony comes at too high a cost. For example, might a convergence (or divergence) of political forces shape the timing of particular developments or the menu of policy choices? And, what about the role played by lawyers in large-scale change? Kelemen intermittently refers to lawyers as an "epistemic community."[56] Of course, the challenge is to incorporate attention to agency not simply for its own sake, but rather because it contributes new insight to the analysis.

CONCLUSION

Perhaps of greatest interest to legal scholars, Kelemen's book points to new areas that merit further empirical inquiry. It illustrates a need for wider efforts to develop measures of judicialization and collect systematic data.[57] Such efforts need not be quantitative alone. Based upon the anecdotes that Kelemen provides, it would seem that now is the time for scholars to pursue descriptively rich, anthropological studies of the individuals who are responding (or not) to the emergence of new legalistic and adversarial policy regimes. Moreover, just as Shapiro's work on EU administrative law directed the attention of political scientists to a subject that was considered technical and mundane, Kelemen directs our attention to the significant consequences that can emanate from seemingly obscure rule changes. Thus, rules concerning civil procedure and litigation finance merit scrutiny beyond the sort of black-letter legal analysis that they have traditionally attracted.[58]

56. KELEMEN, *supra* note 1, at 173.
57. *See id.* at 39.
58. *See id.* at 57.