

"Adversarial legalism" in the German system of industrial relations?

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Abstract

The US has a distinctive legal style, which Robert Kagan has called "adversarial legalism." It is marked by a pattern of political decisionmaking and conflict resolution in which the courtrooms and the law are systematically exploited as political arenas for making and implementing political settlements and policy outlines. In this article it is argued that a "German way" of adversarial legalism is about to emerge in the German industrial relations system. Economic liberalization, the fragmentation and decentralization of lawmaking authority in the political sphere, and the common-law-like nature of German labor law have contributed to the appearance of a judicialized pattern of governance. Nonetheless, Germany is not converging on the "American way of law" and major differences are expected to persist in the years to come.

Keywords: adversarial legalism, Germany, industrial relations, law, United States.

1. Introduction

Whether American law is becoming globalized has been a hotly debated topic in political science and socio-legal studies for several years. The US has a distinctive legal style, which Robert Kagan has called "adversarial legalism" (Kagan 2001). The "American way of law" is marked by a judicialized pattern of political decisionmaking and conflict resolution, in which the courtroom is systematically exploited as a political arena for making and implementing political settlements and policies. This dynamic is said to lead to formal and adversarial procedures, costly legal contestation, and frequent intervention by lawyers and judges in administrative affairs. By contrast, in other (especially Continental European) countries different approaches to regulation, interest intermediation, and dispute resolution seem to predominate: more cooperation between interest groups and the state, more reliance on administrative bureaucracies, a consensual style of decision making, and less involvement by courts or lawyers.

But scholars have questioned whether these differences are stable and whether adversarial legalism will remain uniquely American in the future. Certain authors argue that the American legal style has already started to spread around the world (e.g. Wiegand 1991; Kelemen & Sibbitt 2004). Some authors refer to previous waves of globalization of law and legal practice, such as the spread of Roman law (Wiegand 1991). Others refer to the establishment of constitutional courts in Europe after World War II, which has led to

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a more judicialized pattern of politics (Shapiro & Stone 1994; Tate & Vallinder 1995). Another group of authors cites more recent factors promoting the cross-border diffusion of American practices, especially the role of supranational or transnational actors. Global organizations and institutions, such as the World Trade Organization, the International Monetary Fund, and the World Bank, have contributed to the international diffusion of American law and legal style (e.g. Halliday & Carruthers 2007). Moreover, American law firms have become multinational companies and thereby entered foreign jurisdictions, which has accelerated the import of American legal practices, so the argument goes (Galanter 1983; Dezalay & Garth 1996; Shapiro 1998). Another body of literature points to the role of structural change. Intensified economic competition and liberalization have undermined traditional governance modes based on informal networks and trust (Kelemen 2006). And finally, not only international but domestic factors might lead to the emergence of adversarial legalism in foreign countries (Kelemen & Sibbitt 2004).

The convergence thesis is contested. Some scholars maintain that national legal styles are likely to persist as legal systems are deeply rooted in national traditions and cultures and in various forms and patterns of civil society organization (van Waarden 1995; Kagan 2007). Legal practices such as class action lawsuits, which are very important for the dynamics of adversarial legalism, are still relatively unknown in Continental Europe. Indeed, several German governments, for example, have explicitly decided against the adoption of class action rules to prevent the emergence of a quasi-American system. Other scholars argue on a more general level. Grounded in systems theory, they imply that the political and legal systems function independently of one another (Levi-Faur 2005). Even if legal concepts or practices enter foreign jurisdictions, they should not be conceptualized as "legal transplants." They function rather as legal irritants "which trigger a whole series of new and unexpected events" (Teubner 1998, p. 12). Hence, the result might not be convergence but new divergence. The discussion on legal convergence refers to and is embedded in the more general debate on globalization and national diversity (Berger & Dore 1996; Guillen 2001; Dezalay & Garth 2002).

All participants in this debate seem to agree that case studies, especially from European countries, are missing. These studies should provide a complex empirical picture with which to assess claims about the globalization of adversarial legalism. This article aims to fill the gap and presents a case study of Germany's industrial relations system. Kagan has pointed out that adversarial legalism does not prevail in all areas of American governance (Kagan 2001, pp. 12–13), and assumes that in European countries adversarial legalism is more likely to arise in some sectors than in others (Kagan 2007). This raises the question why some policy fields and/or economic sectors are open to the American legal style while others are not. This article deals with this issue by examining legal change in the industrial relations field in Germany.

My explanation of the German sectoral development is in two parts. First, I will demonstrate why adversarial legalism has emerged especially in the policy area of industrial relations. Second, I will show why the rail transportation sector has been more affected than any other economic sphere in Germany. My aim is to show how the interaction of global pressures, domestic structures, and actors' perceptions has given rise to a more legalistic style of conflict resolution.

I argue that in the German case of socio-legal change there is neither stability nor radical change in relation to the American pattern. But there might be a third way of

incremental change in which the old model of industrial relations no longer exists but, nevertheless, convergence does not occur. The German model of decisionmaking and conflict resolution in the industrial relations field has notably shifted away from the corporatist tradition. It has become more "adversarial" and more "legalistic." Nevertheless, it is far removed from the "American way of law." Instead, a particular German path of adversarial legalism seems to be unfolding. These findings are consistent with those on the transformation of German capitalism (Streeck & Thelen 2005).

The remainder of this article is organized as follows. Section 2 clarifies the concept of adversarial legalism and identifies the institutional and cultural roots of the American style of interaction between the political system and the legal system. Sections 3 to 5 explore the international as well as the domestic roots of the current more legalistic approach in the German system of industrial relations. Section 6 illustrates the German dynamics with a case study of the strike staged by the German locomotive engine drivers' union (Gewerkschaft Deutscher Lokomotivfuehrer [GDL]) in 2007. The final section summarizes the main results and distinguishes the German from the American way of adversarial legalism.

2. Adversarial legalism in the US

What is adversarial legalism? Its meaning has been a topic of discussion and criticism. It is more or less a "composite variable" (Levi-Faur 2005, p. 454) describing the functioning of the US legal sphere and its interaction with the political arena. Kagan has been criticized for mixing up too many different and, to some extent, ambiguous dimensions (e.g. Epp 2003). While I do not wish to participate in this debate, I have learnt from it that we should clarify what we mean by adversarial legalism.

According to Kagan, adversarial legalism is a metaphor for a judicialized pattern of policymaking, implementation, and conflict resolution (see also Cioffi 2009; van Waarden 2009). It involves at least four crucial aspects: the organized use of courts and the legal system by interest groups as a second channel of interest politics (i), hence a high level of court intervention in politics (ii), which eventually leads to the inability of both decisionmaking arenas (legislative and judicial) to produce binding decisions and to end political controversy (iii), because interest groups always have the option to shift from one channel to the other and back to achieve "better" results (iv) (Kagan 2004, pp. 17–18).

The process may be formal or informal. It may or may not lead to exceptionally high (and expensive) rates of litigation and policy stalemates. In addition, it may manifest itself in more detailed and prescriptive rules. I do not deal with these aspects in this article; instead, I wish to confine my analysis to the political dimension of adversarial legalism and to the particular mode of interaction it creates between the political and the legal arenas.

How can we explain the emergence of American adversarial legalism? According to Kagan, the American way of law has resulted from the institutional and cultural heritage of the US, which makes up its political and legal governance structures (Kagan 2001, pp. 14–16). In a nutshell, Kagan argues that there is a mismatch between the institutional legacy of the US governmental structure and modern expectations of the regulatory state. At the same time, the legal system and judicial activism offer an alternative lawmaking channel.

According to Kagan, several features of the political system are responsible for the emergence of adversarial legalism in the US. First, the fragmentation and decentralization

of power in the US political system – between the national government and the states and among the branches of government at all levels – constrain the process of decisionmaking and hinder the enforcement of nationwide standards. More than 95% of all legislation introduced is defeated at some point (Schubert 2004, p. 200). And most of American law is state law (Fletcher & Sheppard 2005). This governmental structure reflects the liberal roots of the American Revolution and the traditional distrust of centralized political authority. But it collides with the demands of social groups for the enforcement of collectively binding rules, demands that have grown over the years, especially with the rise of the modern welfare state. Social actors who are interested in the establishment of nationwide compulsory norms have an incentive to address the courts, because in many policy fields the US Supreme Court is the only unitary actor at the federal level that is clearly able to impose national standards.

A second factor that has contributed to adversarial legalism is the "hyperpluralism" of political parties and interest groups. Loose organizational structures and a lack of party discipline promote ideological diversity and weaken control over policy formulation. Political decisionmaking becomes more complicated, and party-political infighting might end up in the courtroom if a party in one state makes a completely different decision from the same party in another state or at the federal level. The same argument applies to judges, who might adjudicate differently on similar cases even if they share the same party affiliation. Pluralism in the sphere of organized interests promotes competition instead of coordination between different interest groups. Moreover, due to the absence of corporatism, it makes sense for interest groups to fight for access to the political process by addressing the courts whenever possible.

To sum up, the overall fragmentation of the US political system makes it difficult to set compulsory and national standards. At the same time, the court system, with the US Supreme Court at its apex, offers alternative ways to achieve political ends. Yet the court system can be used as a forum for interest group politics only to the extent that legal actors have the political room to maneuver. Therefore, not only is the shape of the political system responsible for the emergence of adversarial legalism, but central aspects of the legal system also have to be taken into account. Kagan emphasizes two factors.

The separation-of-powers model Kagan assumes for European countries distinguishes between lawmaking actors on the one hand and law-adjudicating courts on the other. This distinction does not apply to common law countries, in which judges do not merely adjudicate on cases but also create law. Historically, judges decided cases, rules slowly evolved and became known as judicial precedents, which began to be written down and followed. Hence, American law has grown in a bottom-up manner. For this reason, a checks-and-balances approach predominates, with the courts as the third branch of government. Judges have a great deal of leeway to make political decisions, especially in those areas where no written law exists.

The prominent role of courts as political actors and of the legal system as a political arena also derives from several procedural rules which invite litigation instead of preventing it. In many policy fields, plaintiffs are enabled to translate legal misbehavior into claims for damages. Hence, by addressing the courts, litigants often aim not only for reaching a verdict but for obtaining financial compensation too. Contingency fees, under which a lawyer earns a percentage of the damages received, might drive up the financial demands. The rule that losing litigants generally need not reimburse the winner's legal fees reduces the risk for the plaintiff. And last but not least, the feasibility of class action

lawsuits provides a means of collective action in the legal system that can complement or even replace political collective action. Thus a vicious circle can emerge, as various case studies of the huge number of asbestos-based tort claims in the US have shown, where a lack of effective health policy standards in the political arena has prompted affected victims to look for remedies in the courtroom. But this has hindered the emergence of collective action in the political realm all the more (Barnes 2006). Hence, adversarial legalism can lead to a vicious circle in which deficiencies in the political system lead to legal action, which further blocks political reform.

Finally, in Kagan's account, private lawyers are key actors who keep adversarial legalism alive because it serves their material interests. They practice and further promote "litigant activism," thereby benefiting from the active role of lawyers in the court procedure. As the assertion of claims, the search for legal arguments, and the submission of evidence are dominated not by judges but by the disputing parties, and lawyers have substantial leeway, the adversarial character of the process is enhanced.

The following section seeks to explain why we should expect more adversarial legalism in German labor relations in the future and why the rail transportation sector presents the first empirical case. The emergence of a judicialized pattern of conflict resolution results, it will be seen, from the interaction of international and domestic factors.

3. Adversarial legalism in Germany: The impact of economic liberalization

Kelemen (2006) has argued that adversarial legalism is likely to spread in Europe because of the economic liberalization resulting from the European Union (EU)'s Single Market initiative. Increased competition and a growing number and diversity of players in the markets undermine traditional, informal, and cooperative patterns of regulation based on networks and trust. According to Kelemen, market-based governance leads to social distance and a more legalistic style of policymaking and conflict resolution. His argument refers to the work of the socio-legal scholar Black (1976), who has shown that growing social distance contributes to a more legalistic approach and to higher litigation rates. The causal chain suggested by Kelemen can explain my German case study very well. In Europe, telecommunications, public utilities, and rail and air transportation are the economic sectors most affected by growing economic pressures, as their privatization was one of the key projects of the European Single Market. And Stephen Vogel's comparative analysis of the changing governance modes in those economic fields supports Kelemen's argument, because he finds that competition has led to more legalistic (rather than informal) control by ministries and banks (Vogel 1996).

Liberalization has not only contributed to changing patterns of interaction between firms and banks or political institutions; it has, of course, also had an impact on labor relations. The case of Deutsche Bahn AG illustrates this very well. Transforming a state-owned service provider into a private company involved a massive change for all groups of actors. Deutsche Bahn AG had to face competition as new companies entered the market, although the number of competitors is still limited. Some new railway companies operate in the German market, specializing in freight and local passenger transport. They account for approximately 10–15% of all transport (European Foundation 2006, p. 30). More important than the existence of new competitors was the fact that changing market conditions induced intra-company transformation processes. To increase competitive-

ness, the structure of Deutsche Bahn AG was reformed. It is now a holding company with five divisions: passenger transport, transport and logistics, passenger stations, track infrastructure, and services. Some of the top managers have been replaced by personnel with experience in the private sector, such as auto manufacture (Engartner 2008, p. 140).

Labor conditions changed substantially. As long as the company was state owned, job security for the employees had been very high. When the privatization process started in 1993, almost 50% of the workforce was engaged as civil servants (*Beamte*). According to the German tradition, people performing essential functions on behalf of the state are regarded not as employees but as state agents. This involves a particular status whereby the working conditions of the *Beamte* differ markedly from those of regular employees. Labor relations in this area are not regulated by contract law but by public law, and the *Beamte* have lifetime security of tenure. In the privatization process at Deutsche Bahn AG, they were legally protected from unemployment, but in return they were confronted with high expectations with regard to functional and regional mobility. For those employees who were not engaged as civil servants, job uncertainty emerged and has been the predominant issue since. To date, more than 170,000 jobs have been abolished. Other personnel measures include outsourcing and increased labor mobility.

As a consequence, the social distance between the management and the workforce has grown. Trust and the traditional patterns of coordination and cooperation have weakened. New managers implement new management strategies. The workforce has had to cope with new uncertainties. Works councils report that many employees have suffered from dramatically worsening labor conditions and increasing pressure. Many of them have even left the company "voluntarily" (Kirchner 2008, pp. 154–155).

But economic competition and growing social distance do not *necessarily* lead to higher conflict levels and legalistic dispute resolution because social distance is a matter of perception. Quite the contrary: in many German companies capital and labor have responded to tough market conditions by building cross-class coalitions. Social pacts at the plant level involving wage concessions or other cost-saving measures in return for job guarantees from management have spread throughout the German economy (Rehder 2003). Some unions and many works councils regard and defend them as positive-sum games. They emphasize the shared interest in adapting the firm to the new market conditions. And they justify the workers' concessions as an indispensable investment in the future well-being of the company.

Again, the case of Deutsche Bahn AG illustrates this very well. The major union of the company, Transnet, has clung to the traditional pattern of close cooperation with management. In this context, it has made a whole raft of concessions since 1993 (Kirchner 2008). But this strategy has not gone undisputed among the employees. Some of them perceive the privatization process as a zero-sum game in which the management realizes its interests at the expense of labor. A smaller craft union which organizes engine drivers (GDL) has adopted an oppositional stance and initiated a deep conflict not only with the management but also with the larger union (see Section 6). Hence, interest-group pluralism can increase the likelihood of social distance leading to legalistic disputes if some interests are not well integrated in the intra-firm bargaining process. In line with Kagan's argument, interest-group pluralism promoted competition instead of coordination between the different unions. The engine drivers' union favored a more aggressive strategy toward the management and fought for access to the political process. It therefore addressed the courts whenever possible, as the labor courts are very important players in

the industrial relations field. Both of these domestic structural variables – rising interest-group pluralism and the role of courts in the governance structure – are relevant pre-conditions for the emergence of adversarial legalism in this empirical case, and they will be discussed in the following sections.

4. Adversarial legalism in Germany: The emergence of hyperpluralism?

One feature of the American political system that Kagan maintains is responsible for the judicialized pattern of politics is the overall fragmentation of the decisionmaking structure, which expresses the traditionally high level of distrust vis-à-vis the state but no longer corresponds to modern interests of nationwide regulation. This tension directs political attention toward the US Supreme Court as a powerful actor at the federal level.

A somewhat similar constellation is to be found in the German industrial relations system. The role of the national government is traditionally weak. Statutory legislation sets only the broad framework in which the parties to collective bargaining (unions and employers' associations) act. The main parameters of the working conditions are fixed by collective agreements at the industrial level, which are then binding upon the member firms as if they were enacted in law. Hence, the state delegates its lawmaking authority to organized interests. The state is absent from the field of industrial relations for historical reasons. German labor law was designed by Social Democratic jurists, most of all Hugo Sinzheimer, in the "Kaiserreich," and it was enacted in the Republic of Weimar (Sinzheimer 1916). The lawyers aimed to integrate the working class into the new republic, which was a difficult task because many union activists and Social Democrats had been persecuted during the empire. As most administrative and judicial bureaucrats were still in office, distrust and hostility toward the state remained high. Sinzheimer wanted to establish a system of labor law that was virtually free from state intervention. He hoped that if the people had "their own" area of law for their most urgent daily needs they could be reconciled with the new state and its old bureaucrats. This idea was confirmed after World War II by the Anglo-American occupying powers, as state-free collective bargaining reflected their own tradition of decentralized political authority (Nautz 1985).

Although collective bargaining takes place at the industrial level, vertical and horizontal coordination has traditionally been remarkably high. Until the 1990s, almost 90% of the German workforce was covered by a collective agreement. This was possible because the bargaining parties, especially the employers' associations, were highly integrated and well organized. Horizontal coordination was provided by the mechanism of pattern bargaining. One leading union (namely, the metalworkers' union) set the bargaining path for the other industries because it had developed its bargaining strategies with regard to both the performance of the metal sector and the performance of the overall economy. Hence, bargaining results were transferable from one industry and region to the others, which made for one of the highest levels of income equality in the world.

But that was yesterday. Since the 1990s the situation has changed dramatically. Unions and employers' associations have lost their organizing capacities, with the result that today only 62% of the workforce is still covered by a collective agreement (Streeck & Rehder 2005). Moreover, approximately one third of the companies that have stayed with the system do not fully comply with the collective agreement standards – with or without the permission of the collective bargaining parties. As already mentioned, social pacts at

the plant level have gained ground. Employees make concessions on wages or working hours, while employers guarantee employment security (Rehder 2003).

There are many reasons for this development. The impact of growing international competition in the context of economic liberalization and deregulation has already been mentioned (Wever 1995). But some domestic factors play an important role too. German reunification weakened the industrial relations system, as many East German workers and companies never joined the interest organizations (Artus 2001). Furthermore, the German unions have always had more difficulty than other European unions in adjusting to structural change. While organizational density among blue collar workers is still high, unions have problems in organizing service sector employees, female workers, and young people (Ebbinghaus 2002). Rising mass unemployment has also contributed to the weakening of the system.

In both camps, capital and labor, the traditional structure of the collective bargaining system has come into question. Germany has witnessed a revival of craft unions (e.g. Hartwich 2007). Highly qualified and powerful groups of employees, such as pilots, engine drivers, medical doctors, or air traffic controllers, have abandoned or have never joined the German system of unitary and industrial unions. They prefer to bargain on their own. As already mentioned, this constellation is to be found at Deutsche Bahn AG, and will be explored in more detail in Section 6. Moreover, many employees at the plant level are willing to accept wage concessions to secure their jobs even if their union is resistant. Hence, organizational tensions have emerged in different directions. The situation is even more acute among the employers' associations. Small and medium-sized companies in particular are unable or unwilling to continue to meet the standards of collective agreements. Therefore, many of them have abandoned the employers' associations, no longer having to fear union power (Schroeder 2007). As a result, some associations have started to offer a new type of membership that no longer obliges companies to comply with collective agreement standards (Haipeter & Schilling 2006).

In a nutshell, we are observing the fragmentation of regulatory authority and to some extent the evolution of what Kagan has called "hyperpluralism." Bargaining strategies vary between interest groups. The chemical union is much more cooperative toward the employers' interests, while the metalworkers are still struggling to find a new strategy. And some of the smaller unions pursue a rather adversarial style, like the media workers' union or the craft unions already mentioned. Bargaining strategies also vary *within* the unions. Here, German federalism comes into play as unions and employers' associations are organized not only by industry but also by state (*Bundesland*). Today, the bargaining policies of the metalworkers' union in North Rhine–Westphalia differ remarkably from those of the same union in Saxony or in Baden–Württemberg. While the latter embraces a concession bargaining strategy to keep the system alive, the metalworkers in North Rhine–Westphalia have refused to follow this path any longer. Moreover, the East German unions work under completely different conditions than those of any West German organization.

Weaker organizing capacities do not mean that there is no longer any need for or interest in compulsory standards. The collective bargaining system became famous for providing many benefits for both workers and employers, as it enhanced social peace and contained competition among workers and companies (Mueller-Jentsch 1997, p. 204). The unions know very well that they have to limit non-compliant firm behavior to prevent a race to the bottom. The same argument applies to the employers' side. Although

many small and medium-sized companies have deserted the interest organizations, many large firms still persevere with the collective bargaining system. They are afraid of jeopardizing social peace: as their workforce is usually highly organized, the firms would be the first to be injured by strike activities (Hassel & Rehder 2001). In addition, smaller industries have discovered the virtues of economic and political coordination: several meat processing firms, for example, have asked legislators for help because of the ruinous competition prevalent in their industry.

To sum up, there is a mismatch between the demand for compulsory regulation and the lack of regulatory authority. We find a governance structure which approximates the American one in terms of fragmentation and decentralization. Because the federal government is absent and the quasi-lawmaking capacity of unions and employers is crumbling, the only actor that is clearly able to set national standards is the Federal Labor Court.

5. Adversarial legalism in Germany: The common law nature of labor law

According to Kagan, adversarial legalism arises only to the extent that the legal system can be used for political ends and judges have enough leeway to make political decisions. One might not usually expect this to happen under a codified legal system like the German one but this assumption is clearly wrong. One particular German feature is the specialized court system (Blankenburg 1996). While in most countries general courts judge on any policy issue, Germany has five equal ranking court systems: ordinary courts, labor courts, social courts, tax courts, and administrative courts. This functional division of labor has been hotly disputed for decades (Rehder 2007). It implies that legal fields can evolve to some extent independently of one another. German labor law is more a common law than a civil law system. Due to the absence of the federal government as a decisionmaking authority, no unitary code of labor law exists, and state legislation is confined to the setting of a broad framework for the parties to collective bargaining – and the courts. The latter are major players in the German system of industrial relations. They not only settle disputes but also have to fill in the numerous gaps left by statutory law. Moreover, they have to create rules where no written law exists. For example, the rules of industrial action are judiciary driven law (Weiss *et al.* 1989). Strike law has been entirely made by the judiciary. This has involved core political questions, such as when and under what circumstances strikes are legitimate, to what extent lockouts are appropriate, and how long or to what extent external effects imposed on uninvolved third parties have to be accepted. To take another example, courts are the institutions that decide whether an organization of employees is acknowledged as a union and thus has particular rights (collective bargaining, industrial action). Due to the large amount of judge-based law, Franz Gamillscheg, a famous legal scholar, once noted that the judge was the real master of German labor law (Hanau 2004, p. 626).

A second similarity with the US legal system has to do with civil procedure. Kagan described the active role of the litigants as a driving force of adversarial legalism. Litigant activism involves the suing parties and their lawyers asserting claims, controlling the legal arguments, and so on, while the role of the judges is reduced to that of neutral arbiters who must ensure that the parties obey the rules of the game. The litigants actively pursue interest politics in the courtroom, which contributes to the adversarial character of the whole procedure. Conventional wisdom says that in code law systems this kind of litigant

activism does not exist; rather, judges control the process. Again, this assumption does not fully apply to German labor law. At least two mechanisms provide a highly active role for the litigants.

First, adjudication is exercised not only by professional judges but also by lay judges who are appointed by the unions and employers' associations. Hence, German labor courts are not only state agencies but also *arbitration* courts marked by corporatist structures. The lay judges' function is to advise their professional colleagues by giving them an idea of the daily needs of firms and employees at the plant level. At the district level, one professional judge is supported by two lay judges (one appointed by the unions and the other by the employers' associations). At the appellate courts and the federal level, professional judges are always in the majority on the bench (three professional judges to one lay judge nominated by the employers associations and one lay judge nominated by the unions). But this does not mean that the lay judges do not have any influence: they have the same decision rights as their professional colleagues, and they are not ordinary citizens but qualified experts, often with a law qualification. They build a bridge between the litigants and the courts by providing the judges with internal information about the litigant party they represent. Having a potential deputy on the bench is a perfect prerequisite for interest groups to engage in litigant activism.

Second, for historical reasons and due to their particular character, the labor courts often use the method of *Interessenjurisprudenz*, in which the judges try to balance the interests of the litigants (for the historical development of judicial methodology see Graf 1993, pp. 118–138). Sticking to legal doctrine and to the plain meaning of the statutes is insufficient because in many cases no statutes exist. The judges also try to determine what the interests of the litigants are and whether there might be a way of reconciling these interests to preserve social peace. This approach gives them a lot of room to maneuver, therefore the litigants have an incentive to advance their interests offensively in order to convince the judges.

Despite these similarities, major differences with US procedural rules persist. First, in contrast to the US, law firms and their material interests are of minor importance in the field of German labor law, for several reasons. Traditionally, unions and employers' associations provide (and pay for) legal advice for their members. The role of law firms is confined to those litigants who are not willing to join the organizations. But in recent years this has changed to some extent. The unions have privatized their lawyers, for financial and political reasons. The DGB Rechtsschutz GmbH is today a more or less private firm which has to take commercial self-interest into account. The privatization process has also caused unions to rely more frequently on the assistance of specialized private law firms. A further increase in the importance of private law firms stems from the shrinking organizational capacities of the unions. The case study of the engine drivers' strike presented in Section 6 will demonstrate the increasing role played by commercial law firms in this policy area.

Be that as it may, the dynamic of lawyer involvement seems to differ dramatically from the American case because not much money is involved in German labor law, at least not for the lawyers. While court rulings clearly have remarkable distributive consequences for the litigants, a labor lawyer will not become rich. Contingency fees are unknown, although the German government passed a bill in 2007 that allows flexible pay schemes within limits and under certain conditions. Even if contingency pay played a more important role in Germany, a German attorney who wants to make a lot of money simply would not become a labor lawyer.

Another difference from the US system is that it is impossible to bring a class action lawsuit. At first glance, this seems to be a main barrier to adversarial legalism. But the absence of class actions does not mean that there is no way for interest groups to file collective lawsuits. In certain (but restricted) areas of law, collective action in the legal sphere is possible. This applies especially to collective labor law, notably strike law. Moreover, a functional equivalent has very slowly emerged in some policy areas since the 1960s: the so-called *Verbandsklage*, the right of an interest association to sue on behalf of its members. The difference between a class action lawsuit and a *Verbandsklage* is that the *Verbandsklage* requires processes of formal interest organization while class action lawsuits could replace them. In Germany these lawsuits are directed by interest groups, while in the US law firms might perform the task of bringing potential plaintiffs together.

Traditionally, the German legal system has recognized only individual litigants, not collective actors. This procedural rule has discouraged litigation, especially in the field of labor law, because it means that individual employees who want to file a lawsuit against their employer must have the courage to put their cards on the table. But in the course of a long historical process, which cannot be explored in detail in this article, the idea of group litigation has steadily gained ground. As a result, some interest groups can now use the courtroom (at least in particular cases) as a forum for interest politics. This was first pioneered in environmental law. Environmental groups were permitted to enforce the so-called *altruistische Verbandsklage*, the right of an interest organization to sue for altruistic purposes, which was codified in most German states from the 1980s. Subsequently, in the 1990s, the extended version, the *egoistische Verbandsklage*, the right to sue for self-interest purposes, was established for associations of disabled people. And by the end of the 1990s, the unions had succeeded in fighting for their right to defend their collective agreements before the court if a company failed to comply with their standards (BAG 1999).

6. Case study: Adversarial legalism and the train drivers’ union strike

The dynamics of an emerging adversarial legalism in Germany, and more precisely the interaction of internationally induced economic liberalization with domestic structural variables, can be illustrated by the strike of the train drivers’ union in 2007. The fragmentation of political authority and interest group pluralism have always been greater in the railway sector than in other economic spheres in Germany (Hoffmann & Schmidt 2008). And both trends have intensified since the 1990s.

The liberalization of public transport services resulted at first in a completely decentralized system of collective bargaining. The market is dominated by a monopoly exercised by Deutsche Bahn AG, a former state enterprise in which industrial relations have traditionally been regulated by firm-level agreements (*Haustarifvertrag*). After liberalization, the unions aimed to establish a collective agreement at the industrial level (*Flächentarifvertrag*) in order to regulate the newly emerging market. But the new competitors refused to support this endeavor. The ability to enforce lower labor standards than those of Deutsche Bahn AG was potentially their only major competitive advantage against the quasi-monopoly of the former state enterprise. Therefore, in this sector wage agreements are now typically negotiated at firm level (Brandt & Schulten 2008, pp. 76–88).

Interest group pluralism has always been high, as three different unions organize railway workers in Germany (Streeck *et al.* 1981). Until the 1990s, their relationship was

characterized not by competition but by a functional division of labor. The biggest union, Transnet (formerly known as the Gewerkschaft der Eisenbahner Deutschlands), is an industrial union organizing all kinds of railway worker. A second union, Gewerkschaft Deutscher Bundesbahnbeamter und Anwaerter (GDBA), provides representation for a specific type of status, namely, the civil servant (*Beamte*). As already mentioned, according to a German tradition people performing essential functions on behalf of the state are regarded not as employees but as state agents. This involves a particular status: the *Beamte* have lifetime security of tenure but they do not have the right to strike. Many important functions in the railway sector are performed by *Beamte* who are organized by GDBA. There is only one major exception: although the locomotive engine drivers could be employed as *Beamte* too, the majority of them (80%) have always been organized in a craft union, Gewerkschaft Deutscher Lokomotivfuehrer (GDL). GDL is a union with a long historical tradition, as it was founded in 1867 (Schroeder & Greef 2008, pp. 342–343).

Traditionally, the interaction of the three unions was marked by a very high level of cooperation and coordination, especially in collective bargaining. Hence, despite their organizational diversity, the unions provided the workers with a high level of equality in terms of working conditions. Pluralism did not necessarily result in competition. But this situation has changed since the 1990s. With Deutsche Bahn AG now a private enterprise, the *Beamte* are slowly disappearing, which also means that newly hired engine drivers are no longer employed as *Beamte* but as regular white collar employees. As a result, rivalry has emerged between the industrial union Transnet and the craft union GDL. The functional division of labor between the unions has blurred. Traditional patterns of cooperation have eroded; cooperative pluralism has turned into competition. Competition is also sharpened by the fact that both unions, Transnet and GDL, seek to organize the drivers of other companies in the newly emerging market.

GDL has tried to gain an advantage from its acquired role as a white collar workers' union. For those engine drivers who are regular employees, striking is not prohibited. Therefore, the bargaining power of GDL has increased dramatically (and will further increase in the future as the decline in the number of *Beamte* continues unabated), to the extent that, in the course of the 1990s, the craft union decided to end its collaboration with the other unions.

GDL's decision to leave the bargaining community was due not only to its increased power but also to resistance to the policy of the dominant industrial union. As far as it was concerned, Transnet no longer served the train drivers' interests. In the context of the privatization process, more than 50% of jobs were lost at Deutsche Bahn AG. Transnet's aim of securing employment meant that it had accepted more and more concessions over the past 15 years in pursuit of this goal. This strategy was sharply criticized by GDL, which argued in favor of adopting a more adversarial approach to the employers' side (Schroeder & Greef 2008). East German workers were more affected by job losses than West Germans (Kirchner 2008, p. 155). And as GDL was more deeply rooted in East Germany than the other unions, the Transnet strategy posed a major challenge to it.

Moreover, GDL perceived the market-based restructuring of rail transportation as a one-way street. While the workforce had to suffer from market mechanisms in terms of job losses, the company passed up the opportunity to establish a market-based wage scheme. To the present day, hardly any kind of flexible pay scheme exists linking wages to the performance of the workforce or the company. The engine drivers' union, GDL,

claimed that, once market-based governance was declared to be the dominant management strategy, a performance-based wage plan should be established in all areas of governance, so that the workforce would have a chance to benefit from it. Hence, the engine drivers' union was more willing than the other unions to accept American-style business unionism (Hoffmann & Schmidt 2008). It demanded a wage policy based on justice instead of equality.

Both of the other unions, Transnet and GDBA, as well as the management of Deutsche Bahn AG tried to prevent the engine drivers' union from bargaining independently. The employer simply refused to talk to the engine drivers. In 2004, GDL went on strike for the first time, in support of an independent collective agreement. The union appealed to the labor court several times for its right to collective bargaining to be recognized. The conflict was transferred to the courtroom in order to achieve a better result. The labor court decided that GDL was allowed to claim union status and therefore allowed to make use of collective bargaining rights. Nevertheless, the other unions as well as the management of Deutsche Bahn AG still refused to accept GDL as an independent bargaining party. As a result, GDL refused to acknowledge just about every collective agreement negotiated by the other unions on behalf of the whole workforce. The craft union filed several lawsuits on this issue.

In 2007 the conflict culminated in the train drivers deciding to enforce an independent collective agreement. Moreover, they demanded a wage increase of up to 30%. To put pressure on the management, the union announced a series of strikes. Again, the management appealed to several labor courts in three different states to prohibit them. The courts ruled that GDL was permitted to target local and regional trains with its strike activities, but it was not permitted to target long-distance trains or goods traffic. The judges argued that the damage would be too great and "disproportionate."

This ruling prompted several other German industrial unions to intervene, as they were afraid that the court decision might affect their own bargaining rights. Although all of them would have liked to support Transnet, they felt obliged to argue in favor of the train drivers' autonomy in their own self-interest. Together with several other actors, such as the Federal Ministry of Labor and Social Affairs, they urged the bargaining parties to renegotiate and search for a political solution. A mediation process was initiated. The result was a joint declaration with a very ambiguous message. On the one hand, the management conceded that GDL should have the right to an independent collective agreement; on the other hand, the bargaining results should not come into conflict with those agreements negotiated by the other unions. Not surprisingly, interpretations differed markedly: while GDL emphasized its autonomy, the management of Deutsche Bahn AG insisted on the union's obligation to collaborate with the other unions, and continued to refuse to offer better working conditions.

Once again the craft union announced strikes, which prompted the employers once again to seek redress in the labor courts. This time, the court ruled that GDL was permitted to strike without any restriction. This ruling presented GDL with the opportunity to target long-distance trains and goods traffic. For the management of Deutsche Bahn AG, the court ruling was a major defeat. Therefore, the CEO of the company appealed to political actors for help. The Chancellor as well as the Ministry of Labor, he claimed, should intervene and legislate to restrict the craft union's room to maneuver. But both refused to lend their support, citing the legal autonomy of the collective bargaining parties, which also included the freedom to strike. Thereafter, Germany witnessed the

biggest railway strike in the history of the sector. As a consequence, the management of Deutsche Bahn AG was forced back to the bargaining table, and finally, in January 2008, a collective agreement was negotiated.

This case study displays significant elements of adversarial legalism. Due to the processes of liberalization and privatization, the railway sector has witnessed a dramatic change in market conditions and a sharp increase in political fragmentation. At the same time, the capacity of the actors to cooperate with one other and among themselves has diminished. The mode of interaction between the parties has become more and more adversarial and legalistic, as the political process has been constantly interrupted by court interventions. Political decisionmaking has been blocked because, time and again, one of the parties has switched from the political arena to the legal arena to achieve a better result. And the labor courts are the parties that have made the most important decisions. If the judges had not acknowledged GDL's unrestricted freedom to strike, the craft union would have lost the battle.

What role have lawyers played in this conflict? Both bargaining parties, Deutsche Bahn AG and GDL, have relied heavily on lawyer support. In particular, GDL's lawyer has made use of legal techniques that are associated with US law firms. The final court procedure, for instance, lasted 12 hours because he constantly interrupted the work of the judges. He accused the presiding judge of being biased toward the employer's side. His pleadings lasted hours because he started to recite poetry about railway workers. And he alleged that many procedural errors had been made. But, interestingly, his law office is a very small firm located in Frankfurt with no international ambitions at all. Hence, multinational firms are not a necessary condition for the emergence of adversarial legalism. Economic liberalization and its interaction with a largely endogenously induced breakdown of political authority and cooperative capacity seem to be much more important variables.

7. Summary and conclusions

This article has argued that a German way of adversarial legalism has emerged in the field of industrial relations. Processes of decisionmaking, interest intermediation, and conflict resolution have to some extent shifted away from the corporatist tradition. In the case of Deutsche Bahn AG, they have become more "adversarial" as the collective bargaining parties have turned to the courts as a forum for conflict resolution. Moreover, the political process has become more "legalistic" because it is constantly interrupted by interventions from the courts. Kagan's approach can explain why this has happened. Decisionmaking power is fragmented and "hyperpluralism" has emerged due to intensified international competition. Distrust between capital and labor as well as between different unions has generated adversarialism. In this constellation, the common law nature of labor law provides the opportunity structure for the emergence of a more legalistic style of conflict resolution. Unions and employers' associations have lost a major part of their regulatory capacity because they are struggling with each other and among themselves over the future development of collective bargaining. The case study of the conflict at Deutsche Bahn AG illustrates this very well.

One could argue that Deutsche Bahn AG is a very special case that is not representative of the German industrial relations system. And surely there is some truth in this point. More adversarial legalism certainly does not necessarily mean that other methods

of governance are wholly displaced. Moreover, it is unlikely that this new governance mode will accelerate and become predominant within the next two or three years. Nevertheless, the case under study is unlikely to be unique, for several reasons.

First, as already mentioned, Germany is witnessing a revival of craft unions. GDL might be regarded as having pursued a particularly aggressive strategy but it is not the only aggressive craft union. In 2006 hospital doctors successfully fought for an independent wage agreement. The same occurred with pilots and traffic air controllers. Hence, the fragmentation of political authority continues.

Second, over the past several years, the unions have begun to explore revitalization strategies. And some German unions, especially the big service sector union *ver.di*, have been trying to learn from American organizations how to target employers (and how to address workers) more effectively (Greven 2006). For American unions, adversarial legalism is a core strategy. Hence, in the context of cross-border learning processes, adversarial legalism might be imported at the union level too. In the field of industrial relations the key actor in the diffusion of adversarial legalism is unlikely to be law firms but unions.

Third, similar developments are observable in other policy areas. After the election of 2002, the German government, which had previously tried to find a corporatist way of reforming (and retrenching) the welfare state, abandoned its cooperation with the unions and enforced the retrenchment of the welfare state by the so-called *Hartz-reforms*. In response, many union groups at the local level, along with many left-wing Social Democrats, started to provide affected citizens with legal support to litigate against the reforms. As a result, the social courts have encountered an enormous increase in lawsuits. Additional judges have had to be hired in many courts at the regional level. The Federal Social Court has even had to establish an additional senate adjudicating on nothing but *Hartz* cases. Hence, there is a direct link between the erosion of corporatist interest intermediation and interest group politics in the courtroom.

Nevertheless, the German system of industrial relations is far from converging on the "American way of law." Instead, a specific German path and style of adversarial legalism seems to be unfolding. The first major difference to the US is the minor role played by law firms and their material interests. Damages claims for millions of dollars, which can drive companies into bankruptcy, do not play any role in Germany (and probably will not in the near future, at least in the areas of labor and social law). A second difference is that collective legal action in Germany is legally restricted to particular interest groups and policy fields. Moreover, in Germany the possibility of collective legal action is clearly a resource for interest groups, whereas in the US organized interests are always subject to the possibility of class action lawsuits without interest group participation. The asbestos-related case studies have shown that legal action is able to replace political collective action, which can block political reform. When US workers decide to file a lawsuit, this might further weaken the already weak unions unless they are asked to join the endeavor. In Germany, a group of workers can sue their employer as a group only if they ask their union to support them. Otherwise, they have to stand alone before the court. In future, this – if nothing else – might strengthen the organizational capacity of the German unions.

Whether adversarial legalism spreads into many other policy fields remains to be seen. Given that we can observe the fragmentation of political authority in many areas, it is unclear whether this style of policymaking will remain restricted to particular niches.

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