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Stemming the tide of illiberalism? Legal mobilization and adversarial legalism in Central and Eastern Europe

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ABSTRACT

This paper explores the rise of rights-based regulation through litigation as a distinctive feature of legal culture in Central and Eastern Europe post-1989. This type of adversarial legalism was born at the intersection of post-communist, European integration, and neoliberal discourses, and is characterized by legal mobilization at national and supra-national levels, selective adaptation of adversarial mechanisms, and the growth of rights consciousness. The paper distinguishes Eastern European developments from both American and Western European types of adversarial legalism, assesses the first quarter century of post-communism and represents a first step towards constructing a genealogy of the region's legal culture post-1989.

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1. Introduction

A populist billionaire with authoritarian tendencies is the incoming prime minister of the Czech Republic, Poland's Law and Justice Party has been steadily chipping away at the rule of law and human rights since 2015, and Hungary has become the poster child of illiberal democracy under Prime Minister Viktor Orbán. In both Poland and Hungary, the ruling parties have targeted the judiciary at all levels. In Poland, the battle over controlling the membership, internal functioning, and powers of the Constitutional Tribunal has been ongoing since 2015 ([Human Rights Watch, 2017](#)), while in Hungary the government essentially gutted the Constitutional Court's powers with the 2012 Constitution and the 2013 amendment. Both Poland and Hungary have also attacked civil society and human rights, and have refused to comply with the EU requests to restore the rule of law. Both countries stand now as warnings of emerging global authoritarianisms.

And yet not all is lost. I argue in this paper that the groundwork for countering authoritarianism has been laid out since 1989 and the outcomes, specifically a growth in legal mobilization and adversarial legalism, have been valuable for fighting current rule of law and human rights battles. The explosion of litigation in Central and Eastern Europe (CEE) post-1989 is a clear indicator and striking development, even when considering the low 1989 baseline. Since its establishment in 1959, for example, more than half of the judgments delivered by the European Court of Human Rights (ECtHR) concerned only six states: Turkey, Italy, the Russian Federation, Romania, Poland, and Ukraine, four of them from Eastern Europe ([European Court of Human Rights Overview 1959-2016, 2017](#)). Their litigiousness stands out even more considering that they became members of the European Convention on Human Rights (ECHR) only after the fall of the Berlin Wall. The Court, in return, has

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both opened its doors more widely to claimants (in 1994) and has become increasingly more involved in policy-making for these countries and the region at large,¹ most recently through the creation of pilot judgments (addressing repetitive cases arising from structural problems at the national level). Across the board, we see citizens who are willing to defend their rights and challenge their states, and courts, whether domestic (national) or supranational (at the European level), eager and willing to take on the challenge.

This litigiousness is indicative of broader trends in the legal culture(s) of the newest members of the European Union, one that is distinctive compared to Western European trends and European legal mobilization (Conant et al., 2017). This rise in litigation is also visible at national levels and contributes to a significantly more adversarial legal culture compared to pre-1989. Courts and litigation have become central to policy-making in CEE countries in ways that are reminiscent of Kagan's argument about adversarial legalism—regulation through law and litigation in the US (Kagan, 2001). Nonetheless, CEE trends are distinct from both the US and Western European countries.

If American adversarial legalism is driven by commerce, individualism, egalitarianism and anti-statism (Kagan, 2001), and Western European developments are driven endogenously by political fragmentation and neoliberal deregulation and re-regulation (Kelemen, 2011), the adversarial legal culture in CEE is fueled by the massive expansion of its legal mobilization infrastructure over the past twenty-five years in a post-communist neoliberal context. The result is a specific type of adversarial legal culture and regulation through litigation characterized by active and politicized courts (in particular constitutional courts), mobilization of supranational courts (such as the ECtHR), selective adaptation of adversarial mechanisms (such as public interest law litigation), and the growth of litigation and rights consciousness at domestic levels. These key features have risen in a discursive terrain dominated by neoliberal, post-communist, and European integration discourses, which partially converge (primarily in a rights-based discourse), as well as backlash to them, evident most recently in post-recession illiberal developments in Poland and Hungary.

I focus here primarily on CEE countries that are also EU members, as well as signatories of the ECHR: Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, Slovenia and Slovakia. I chose countries that belong to different accession waves, from the earliest—Hungary, Poland, Czech Republic, Slovakia, Slovenia in 2004—to the latest—Romania, Bulgaria in 2007, and Croatia in 201. There are significant differences among CEE countries both pre-1989 and since then, but for the purposes of this paper I consider the commonalities are stronger than the differences. The paper takes 1989 as its starting point. I do not aim to compare specific countries here, but rather to identify and explore common patterns at a regional level (individual countries therefore serve here as illustrations of broader developments).

The paper uses a legal mobilization framework to introduce the emerging adversarial legal culture in the region and the factors that contributed to it. The next section presents some key indicators and causes of this adversarial legalism, while the third section discusses building the legal mobilization infrastructure over the past quarter century, focusing on discourses, resources, institutions, expertise, and public interest litigation. The last two sections explore some consequences, primarily the rise of rights-based regulation through litigation at the national and supranational levels. I conclude by touching upon the recent anti-judicial and anti-democratic backlash in some of the CEE countries.

2. Legal mobilization in Central and Eastern Europe

Almost two decades ago, Charles Epp (University of Kansas), focusing on common law countries, argued that their recent “rights revolutions” were less a matter of judicial activism and more of broadened access to justice and increasing legal mobilization, in particular highlighting the role and importance of material support and resources. Legal mobilization refers to the process by which individuals claim their rights and pursue those claims in court (Epp, 1998). Since then, legal mobilization theory, drawing from law and society, political science, and sociology, has both de-emphasized litigation and underscored the importance of other factors, such as material, legal, and political resources, promises of rights and rights consciousness, support networks, and broader politics and opportunities for mobilizing law through litigation and otherwise, towards eventually achieving social change (McCann, 1994; Cichowski, 2016; Vanhala, 2012).

From this broadly defined legal mobilization perspective, the legal opportunity structure (LOS) approach emphasizes the extent to which legal systems are open and accessible for both individual and collective actors along various dimensions, such as procedural variables (for example, standing, costs, time limits), material resources, legal resources and existing legal stock, judicial receptivity, cultural frames, presence of allies or counter-mobilizing forces (Vanhala, 2012). Obstacles include in particular: obstacles to access to justice (for example, funding) – what can be litigated, by whom, where, when, and how.

The legal mobilization theory and legal opportunity structure approach help frame CEE developments, in particular by identifying key factors that contribute to its specific adversarial legal culture. There are four factors that essentially shape the legal opportunity structure in the region studied: political and ideological changes, resources and expertise, a new institutional landscape, and a litigation-friendly environment. Political and ideological changes include four distinct types and phases: the fall of communism, the European Union accession process, the EU integration (positives and disenchantment), and the post-recession fragmentation of the region and shifts to illiberalism. Second, the creation of a new institutional landscape includes not only the establishment of constitutional courts, but also of other types of institutions that play a role in

¹ “Region” refers to countries of Central and Eastern Europe.

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