

ARTICLES

Legal Mobilization in the Field of Asylum Law: a Revival of Political Opportunity Structures?*

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1 Legal Mobilization in Asylum Law: Who and Why?

On 14 June 2022, a legal challenge to the deportation of asylum seekers from the United Kingdom (UK) to Rwanda at the European Court of Human Rights (ECtHR) proved successful.¹ The plane did not leave a UK runway, after a series of ‘legal battles’ fought by human rights lawyers.² This development can be placed within a broader context of legal challenges, also known as legal mobilization or strategic litigation, within the field of asylum law.³ Legal mobilization refers to the invocation of “legal norms, discourse, or symbols to influence policy, culture, or behavior”.⁴ In its narrow application, this refers to litigation strategies (strategic litigation) only.⁵ Strategic litigation can be defined as legal action through a judicial mechanism as a means to create change (legal, political, social) beyond the individual case/interest.⁶ This article will use these terms (legal mobilization/strategic litigation) interchangeably, in reference to the same phenomenon.⁷ A rich body of literature has attempted to explain the use of litigation to achieve social and/or policy change and, in doing so, has come up with a variety of relevant factors. However, this research has neglected a field in which legal mobilization has increased exponentially over the last few years: asylum law. Moreover, while other studies have focused mainly on finding why organizations would or would not turn to litigation as their strategy of choice, fewer studies have looked at different organizations that all pursue legal mobilization strategies but that have different levels of mobilization and different parallel strategies.⁸ This article attempts to initiate filling this lacuna.

* The author would like to thank all the interviewees for participating in the research and discussing their work extensively. Moreover, the discussion following an oral presentation of the present research during the conference ‘Courts as an Arena for Societal Change’, organized by the research group on Institutions for Conflict Resolution in 2022 at Leiden University, has helped shape this article further.

1 See <https://www.nytimes.com/2022/06/14/world/europe/britain-asylum-seekers-rwanda.html?smid=tw-share>; ECtHR 14 June 2022, *K.N. v. the United Kingdom*.

2 See <https://www.politico.eu/article/uk-rwanda-flight-grounded-european-court-uk-asylum-seekers/>.
3 Walsh 2017.

4 Vanhala 2021.

5 As used in research such as Passalacqua 2021; Vanhala, Lambe & Knowles 2018.

6 Van der Pas 2021.

7 The author recognizes, nonetheless, that legal mobilization strategies can be broader than litigation only.

8 Similar to Lejeune & Ringelheim 2022.

To some extent litigation strategies by civil society in the field of asylum law are 'hidden': by representing individual clients and not litigating directly, the strategy behind the litigation procedure is not always evident.⁹ Nevertheless, even though it is not always immediately apparent, several collective actors are actively involved in numerous legal mobilization efforts on asylum matters. Examples of these actors can be found throughout Europe. For quite some time now, the UK-based AIRE Centre has been a notable user of legal mobilization to protect fundamental rights.¹⁰ An example of a high-profile litigation case in asylum law in which the Centre was involved is *N.S. & M.E.* before the Court of Justice of the European Union (CJEU). Another prominent actor is the European Center for Constitutional and Human Rights (ECCHR), a German-based NGO involved in (for example) the case of *ND and NT v. Spain* before the ECtHR.¹¹ The non-governmental organizations (NGOs) mentioned are active at the European level, but numerous organizations pursue legal mobilization strategies at the national level as well. Examples of these NGOs include the Dutch Council for Refugees (DCR)¹² and the *Associazione per gli Studi Giuridici sull'Immigrazione* (ASGI).¹³ The rise of litigation strategies by collective actors in the field of asylum law, as opposed to other strategies such as lobbying and protesting, prompt the following two questions: why are these NGOs mobilizing the law to attain their objectives? And, secondly, how do NGOs make the trade-off between litigation and other strategies?

Numerous studies have attempted to answer the first question (or a similar question) in the field of political science and socio-legal research. Roughly, a distinction can be made between two different types of explanations: relevant factors that are external to the organization (or social movement) and factors that are internal to the organization.¹⁴ As to the external factors, two types have come up. The first focuses on Political Opportunity Structures (POS), entailing political access and receptiveness, to explain strategy choice by social movements.¹⁵ Flowing from this research, authors have coined the political disadvantage theory to explain why some organizations turn to the courts and others do not.¹⁶ The second type focuses on Legal Opportunity Structures (LOS), entailing (among others) access to justice and judicial receptiveness, to explain why the law is mobilized.¹⁷ As part of LOS, the availability of rights is also of relevance.¹⁸ The second type of factors, internal organizational factors, provide a different set of explanations. These include resources, organizational identity and external relations of organizations.¹⁹

9 Tsourdi 2017.

10 See <https://www.airecentre.org/the-aire-centre>.

11 See <https://www.ecchr.eu/en/case/nd-and-nt-v-spain/>.

12 See <https://www.vluchtelingenwerk.nl/nl/wat-hebben-we-nog-meer-bereikt-met-strategisch-procederen>.

13 See <https://www.asgi.it/chi-siamo/english-version/>.

14 See also Hilson 2002.

15 Kitschelt 1986.

16 Cortner 1968; Coglianese 1996.

17 Andersen 2006.

18 De Fazio 2012.

19 See for example: Edwards & McCarthy 2004; Rhode 2008, p. 2042; Morag-Levine 2003, p. 460; Lejeune 2020.

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By looking at NGOs that have all mobilized the law, though to a different extent, the current research allows for a cross-case comparison across the different possible relevant factors. The type of litigation that the NGOs conduct is also different: some show more engagement with international judicial bodies, for example. The answer to the questions posed in the present article can tell us something about the relevance of the different national contexts in which the NGOs operate, as well as the overarching European context. Moreover, the importance of the different types of organizations and how they are set up can be highlighted by researching the legal mobilization turn in asylum law in Europe.

The research mentioned previously has not delved into the question of why NGOs in Europe use legal mobilization in the field of asylum law. Therefore, the present article looks at four different NGOs from two European states that are actively involved in litigation strategies to explain why the law is mobilized in this field. Additionally, by comparing NGOs with different levels of legal mobilization and different parallel strategies, the factors provided in the theoretical framework can be assessed in more detail. The selection of two NGOs per state allows for a within-state comparison, while the selection of two European states allows for a cross-state comparison as well. As case studies, the aforementioned NGOs DCR and ASGI have been selected, complemented by the Dutch Public Interest Litigation Project from the Dutch section of the International Commission of Jurists (PILP-NJCM)²⁰ and the Italian *Associazione Ricreativa e Culturale Italiana* (ARCI).²¹ The first two NGOs are active in the field of migration and asylum law, while the latter two pursue litigation on multiple human rights-related fields. Next to that, two NGOs (one from Italy and the other from the Netherlands) are more engaged in strategies such as lobbying than the other two. In order to research selected organizations' reasons for mobilizing the law, interviews have been held with multiple members of each NGO. This interview data has been supplemented with other data and, specifically, information from the NGOs themselves (that is publicly available) to generate an overall perspective on the reasons for legal mobilization. With the approach taken, the present study adopts a bottom-up perspective, looking at the litigants and the explanatory factors in their decision to mobilize the law, as opposed to taking a court-centric, top-down perspective. This allows for insight into how (potentially) important cases end up before courts, as opposed to assuming that cases merely end up there of their own accord.²²

2 Theorizations on Legal Mobilization

2.1 A Chronological Tale of Theory

As stated previously, research on legal mobilization has offered multiple explanations over time as to why the law is mobilized, which are addressed here in (somewhat) chronological order. A clear starting point is research by political scientists on strategy choice by social movements that focuses on the

20 See <https://pilpnjcm.nl/en/>.

21 See <https://www.arci.it/>.

22 Passalacqua 2021, p. 753.

aforementioned Political Opportunity Structures.²³ POS theory generally distinguishes between more ‘open’ structures and more ‘closed’ structures. If POS are open, this offers political access to social movements and organizations, which would allegedly lead to the use of ‘inside’ strategies such as lobbying or other legislative strategies.²⁴ If POS are closed, access is limited, and other strategies, such as legal mobilization or protesting, are resorted to.²⁵ Two different dimensions can be distinguished in literature on Political Opportunity Structures. The first entails access to the political system/political institutions, while the second entails the receptiveness of these institutions to the claims made by a social movement.²⁶ With regard to the first dimension, different aspects have been identified as relevant in establishing whether a political system has open access or not. Examples are the degree of centralization, the party system, the resources, internal coordination and professionalization of public administration, and, lastly, whether a state has a neo-corporatist model of governance.²⁷ The second dimension, the receptiveness of political institutions, entails whether political institutions are open to these claims.²⁸ This builds on the previous dimension of access, as access is rendered useless if the claims of the social movement are not taken into account by the political institutions. Most significantly for legal mobilization research, political disadvantage theory has been coined in relation to POS literature.²⁹ This theory assumes that ‘insider’ groups, meaning groups with political strength, do not turn to the courts to attain their goals. ‘Outsider’ groups, on the contrary, do resort to litigation as they do not have a seat at the policy-making table. It is noteworthy that these theories have not come up in recent research on legal mobilization.³⁰ Before academic research focused on Legal Opportunity Structures, the law and the judiciary were subsumed by authors into aspects of political opportunities.³¹ This was until Hilson coined the term ‘legal opportunity’ in 2002, after which numerous authors have focused on LOS as explanatory factors behind mobilization of the law.³² Several aspects have been ascribed to LOS. For the purpose of the current study, two main dimensions have been distilled from the literature that mirror the dimensions of POS. The first is access to justice. This entails, for example, rules on standing and thus access to courts. If these rules are restrictive, this closes up LOS and would lead to less litigation strategies. Moreover, as part of access to justice, the availability of rights (or legal ‘stock’/framework) can be looked at.³³ It is argued here that the legal framework is part of access to justice (as opposed to a separate dimension), as this determines the rights that can be brought to court.

23 Kitschelt 1986; Kriesi et al. 1995; Tarrow 1994; Kriesi 2004.

24 Coglianese 1996, p. 738.

25 Ibid.

26 Compare Hilson 2002.

27 Kriesi 2004, pp. 70-71; McAdam & Tarrow 2019, p. 21; Soenneken 2008, p. 35; Vanhala 2016.

28 Hilson 2002, p. 242.

29 Cortner 1968; Coglianese 1996; Vanhala 2011; Vanhala 2016; Olson 1990; Lejeune & Ringelheim 2022. See also Morag-Levine 2003, pp. 502-503.

30 An exception is Lejeune & Ringelheim 2022.

31 Vanhala 2011, p. 11.

32 Hilson 2002, p. 242; Andersen 2006; De Fazio 2012; Vanhala 2012.

33 De Fazio regards this as a separate dimension; see De Fazio 2012.

The second dimension is judicial receptiveness. This entails that judges need to be receptive to the claims made in litigation by NGOs; otherwise, they might feel deterred from using this type of strategy.³⁴

Political and legal opportunities are presumed to exist at the national level. However, Conant et al. argue that the development of the European Union (EU) has created an extra 'level' of factors that cater into strategy choice by NGOs.³⁵ For example, looking at the legal framework as part of LOS, EU law has created a new catalogue of rights that can be relied on in national litigation, while the CJEU is a new legal avenue to pursue litigation at.³⁶ All in all, legal mobilization research shifted from POS and the political disadvantage theory to LOS as factors that can explain strategy choice by NGOs, while the EU has created a new layer of possible explanatory factors.

Moving further along the timeline, the most recent literature has moved from LOS to more internal, organizational factors to explain the use of legal mobilization. These include organizational identity and framing.³⁷ Attention to one specific organizational factor was already present in earlier studies, namely resources.³⁸ Human resources, such as legal staff, are relevant in this regard, but the focus has also been placed on financial resources. Litigation is regarded as a relatively expensive strategy, and funding is therefore vital to pursue goals via this route.³⁹ Thus, it has been theorized that NGOs with more financial means are more likely to mobilize the law. Human resources, on the other hand, are closely linked to organizational identity and what Vanhala refers to as 'strategy entrepreneurs'.⁴⁰ All of these factors refer to a similar organizational aspect: the type of employees that work at an NGO. If these employees are legal staff, presumably the use of litigation as a strategy will come much more naturally to them than the use of a different strategy, such as protesting. Additionally, if an NGO has as a main goal strengthening rights (of a specific group of people), this could lead to the pursuit of legal mobilization as well, since the objective of the organization is linked to the law (i.e. 'rights'). This ties into 'framing processes' that happen within an organization, as described by Vanhala.⁴¹ Already in 1998, Epp combined these factors and referred to this as the existence of a 'legal support structure': organizations that are dedicated to establishing rights, with committed and able lawyers, and sources of funding.⁴² A different organizational factor arising from the literature is the existence of relations with other organizations.⁴³ Such relations can be a reason to start litigation collectively, as resources and expertise are shared.

34 De Fazio 2012; Cummings & Rhode 2009, pp. 606, 614.

35 Conant et al 2018.

36 See also the work of Passalacqua 2021; van der Pas 2023.

37 Vanhala 2018.

38 Edwards & McCarthy 2004; Edwards, McCarthy & Mataic 2019.

39 Hilson 2002, pp. 240-241; Rhode 2008, p. 2056.

40 Vanhala 2018.

41 Vanhala 2009; Vanhala 2016.

42 Epp 1998.

43 Lejeune 2020.

In sum, the legal mobilization literature offers a mixed picture of potential relevant factors. This raises the question of what factors can be awarded more importance in the field of law under scrutiny in the present study. Most studies focus on confirming or debunking an existing theory, or trying to come up with new explanatory factors. By looking at specific case studies (NGOs) with different levels of legal mobilization and parallel strategies in the current research, it is aimed to provide insight into the different relevant factors collectively for mobilization of the law in the field of asylum law in Europe but also to draw conclusions about legal mobilization literature more broadly.

2.2 *Asylum Law, the Selected States and the Selection of NGOs*⁴⁴

The field of asylum law in Europe offers an interesting topic of study on legal mobilization for several reasons. First, as described previously, there has been a rise in the use of litigation strategies by NGOs in this field of law. Secondly, with the creation of the Common European Asylum System (CEAS) and the EU Charter of Fundamental Rights (binding since the 2009 Lisbon Treaty), the field of asylum law has gained an extensive catalogue of European legal 'stock' relevant for NGOs as part of LOS.⁴⁵ In addition, the CJEU has been referred to as a potential extra 'asylum court', opening up LOS even more.⁴⁶ Possibly, this has led to an increase in the use of legal mobilization: owing to more open (EU) LOS in the field of asylum law, NGOs have started making increased use of litigation. On the other hand, accessing the CJEU is not easy. In the most commonly used procedure, the preliminary reference, litigants are dependent on the national judge to pose a question.⁴⁷ This partially closes EU LOS.

At the national, EU member state level, there are many differences in terms of POS and LOS. As a result of the neglect of POS theory in legal mobilization research over recent years, LOS theory is used here in case selection. As it is impossible to research all NGOs throughout the EU, a selection has been made here for four NGOs in two different EU member states, based on a difference in LOS at the national level. Furthermore, a selection is made based on the difference in levels of mobilization, with each NGO having mobilized the law at least once, and a difference in parallel strategies. For LOS, it has been established whether direct litigation and acting as a third party (*amicus curiae*) is possible in different EU member states, as these factors open up access to the courts as part of LOS. Italy and the Netherlands, in this regard, are two states where these aspects differ considerably, as Table 1 shows.

44 The selection of states and NGOs described in this paragraph is also based on the differing levels of EU legal mobilization for a different article; see van der Pas 2023.

45 The CEAS includes several EU directives and regulations, binding on the EU member states. The EU Charter is not specific to the field of asylum, but frequently used in asylum cases.

46 Tsourdi 2017.

47 Art. 267 Treaty on the Functioning of the European Union.

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Table 1 *Legal Opportunity Structures*

	Italy	The Netherlands
<i>LOS: Direct litigation NGOs</i>	No (except for consumer cases and non-discrimination cases) ^a	Yes (if NGO is mandated to protect public interest) ^b
<i>LOS: Amicus curiae</i>	No, only if the third-party can show own interest in the case ^c	Yes, before the highest civil court ^d and highest administrative courts ^e

^a European Parliament 2012; Barbera & Guariso 2018.

^b See art. 3:305a Dutch Civil Code.

^c European Parliament 2012, pp. 389, 402.

^d See art. 393 Dutch Code of Civil Procedure.

^e Barkhuysen & Jak 2020; De Rond 2017; Hermans 2021.

With regard to LOS, the Netherlands is more open than Italy when looking at the rules on standing (access to courts), as NGOs are able to litigate directly in the Dutch legal system. Besides, *amicus* briefs (or third-party interventions)⁴⁸ can be sent to the highest courts, while that is only possible under strict conditions in the Italian system. Thus, if LOS are decisive for the NGOs to pursue legal mobilization strategies, their specific influence can be assessed within two ‘most-different’ contexts. Two NGOs for each state have been selected, to allow for a within-state comparison next to a cross-state comparison. In order to do so, a search of several networks and search engines has been conducted to make a list of NGOs pursuing legal mobilization in Italy and the Netherlands, respectively.⁴⁹ Four NGOs have been selected accordingly, where a choice has been made to include different types of organizations: those that pursue strategic litigation (mostly) only and those that pursue a multitude of strategies. As a result, DCR and PILP-NJCM for the Netherlands and ARCI and ASGI for Italy have been selected.

DCR is a Dutch NGO that tries to advance the rights of asylum seekers and refugees through a multitude of strategies.⁵⁰ One of these strategies is strategic litigation, while another is lobbying.⁵¹ The NGO has a specific Committee Strategic Litigation, involved in national and European litigation procedures on asylum law. Thus, DCR is a frequent user of strategic litigation but uses many other strategies as well. ARCI is an Italian fundamental rights NGO, which conducts a range of activities on different topics. Specifically on migration, the association provides “legal assistance, job placement, services, Italian language courses, post school programs, lobbying activities directed at European, national and local authorities; awareness raising campaigns; migrants’ empowerment, support of migrants self-organization”.⁵² Among others, the NGO is involved in legal mobilization but only to a very limited

48 The terms refer to the (relatively) same practice; see van den Eynde 2013; Cichowski 2016; Wiik 2018.

49 These networks include the European Council on Refugees and Exiles (ECRE, <https://ecre.org/members/>), the European Implementation Network (EIN, <https://www.einnetwork.org/members-partners>) and the network Liberties (<https://www.liberties.eu/en/about/our-network>).

50 See <https://www.vluchtelingenwerk.nl/nl/wat-wij-doen>.

51 See <https://www.vluchtelingenwerk.nl/nl/lobby>; <https://www.vluchtelingenwerk.nl/nl/wat-hebben-we-nog-meer-bereikt-met-strategisch-procederen>.

52 See <https://www.arci.it/documento/arci-association/>.

extent.⁵³ Based on the political disadvantage theory, it can be assumed that DCR and ARCI are ‘insider’ groups, as they use lobbying as one of their strategies. Both ASGI and PILP-NJCM, the other two NGOs, have strategic litigation as their primary tool. ASGI is an Italian NGO working on migration-related matters, and PILP-NJCM works on a broader range of topics. Both NGOs have a strong legal focus, with PILP-NJCM using strategic litigation most exclusively.⁵⁴ These NGOs can be assumed to be more politically disadvantaged than the other two.

As stated previously, several members of each NGO have been interviewed to establish the reasons for pursuing legal mobilization strategies. All members interviewed were senior-level staff, such as lawyers, litigation directors and heads of departments. The interview data is attributed to the NGO as a whole, to allow for a cross-case comparison between NGOs, as the research does not focus on the individuals within the NGOs. At least three members per NGO were interviewed. The interviewees were approached through my own network and that of colleagues. All NGOs approached agreed to participate in the research. The interview data has been analyzed using the software Atlas.ti. This interview data has been supplemented by other publicly available data (such as NGO websites) to establish the ‘why’ of legal mobilization for the organizations involved.

3 Why Is the Law Mobilized?

3.1 *A (Surprising) Common Aspect: Political Opportunity Structures*

As explained in the preceding section, legal mobilization literature has moved away from focusing on POS as explanatory factors in recent years and has shifted to political disadvantage theory. Nevertheless, during the interviews with NGO representatives for the present study, general political aspects came up rather prominently when questions were asked on the reasons for pursuing legal mobilization strategies. Litigation, in this regard, was commonly contrasted with lobbying. The following statement expresses this sentiment clearly:

Strategic litigation is not necessarily an ultimum remedium, you can also use it earlier on, but if there is one topic on which politically there is nothing to get done, because of the political constellation at the moment, it is on non-white Dutch citizens. And asylum seekers are part of that group. There are so many political parties who feel that if they only minimally positively support refugees or asylum seekers, they will lose votes and that is why everything is suspended.⁵⁵

For all NGOs interviewed, strategic litigation in the field of asylum was not a ‘last resort’, to be used only in instances where no other strategy worked. Nevertheless, the link made in a previous statement to political strategies not working was also

53 One of the few litigation procedures in which they were involved was a collaborative effort; see: <https://www.glanlaw.org/single-post/2018/05/08/legal-action-against-italy-over-its-coordination-of-libyan-coast-guard-pull-backs-resulti>.

54 See <https://www.asgi.it/chi-siamo/english-version/>; <https://pilpnjcm.nl/en/>.

55 Interview litigation director PILP-NJCM.

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made by all. This is noteworthy, especially since there seems to be no difference for the NGOs in relation to the different positions as political ‘insiders’ or ‘outsiders’ and different parallel strategies.

The strongest link in this regard was made by PILP-NJCM. From the interviews with the NGO members, most explicitly an or/or-approach came forward: either lobbying can be pursued as a strategy or strategic litigation. As stated before, this NGO pursues mostly litigation strategies (and is more of a political ‘outsider’). The other three NGOs pursued both legislative and litigation strategies at the same time, as is reflected in the following statement:

If I think about reasons why not to do strategic litigation, when you want to complain about a policy or you want to stop specific behaviour from the government, it is very important that you first try other ways.... [S]ometimes NGOs have tables of discussion and different ways of conversation with the ministries or etcetera. So maybe it can be more helpful for your strategic goal to act in a different way, maybe by putting political pressure [on the government], or raising awareness..., public mobilization for example, a public campaign, I mean maybe you can find other tools.⁵⁶

What is emphasized here is the use of other tools, mostly political strategies, to attain a certain goal. Here, the contrast between litigation and other strategies is emphasized once again: political pressure, raising awareness, a public campaign are all other tools that can be used instead of litigation. The fact that this Italian NGO (as well as the other one) makes use of political strategies as well as litigation strategies seems to indicate that POS are relevant but not definitive in determining strategy choice.

Implicitly, looking at strategies other than litigation first would entail that if such strategies do not work, strategic litigation is then used. The following makes this more explicit:

It’s more that, as DCR, we do advocacy with politicians, so the classic lobby, and we do strategic litigation on topics where we think that politicians don’t get the message, or there is no room to do something about it via the classical lobbying-way. So we take the political situation into account, to what extent is it feasible to achieve something through lobbying or campaigning, then we do that.⁵⁷

Lobbying is here referred to as a ‘classic’ strategy, equalled with a strategy like campaigning as more preferred tools when politicians are receptive to the claims made. If politicians are not, then litigation is resorted to. As lobbying is at times used according to the NGOs, this seems to indicate that there is access to political actors. However, these actors are not always willing to listen to the claims of the NGO, which could then lead to a turn to the courts. Linking back to the two

⁵⁶ Interview externalization project officer ARCI.

⁵⁷ Interview head of the DCR Committee Strategic Litigation.

dimensions of POS (access and receptiveness), the receptiveness of political actors here seems to be much more relevant than theoretical access in determining strategy choice, at least in the Dutch context. For the Italian political system, the same appears to be the case:

ASGI also does advocacy, for example, we are part of some consultative groups within the law-making process, we have some friendly MPs [members of parliament] to whom we can send proposals, if we know that a law is in the making or reforms are in the making and we want amendments.... But sometimes the government is unresponsive, sometimes they, you know, they approve legal reforms which are counter-reforms, and they negate people's rights, sometimes they refuse to do things that you want them to do and the only language they understand is lawsuits.⁵⁸

Once more, the relevance of the receptiveness dimension of POS comes to the fore here. An explicit link is made between listening to claims and litigation, by stating that if the government is 'unresponsive', only lawsuits work. Thus, the access is there (participation in the law-making process, proposing legal amendments through politicians), but on certain topics there is a lack of desired responses by political actors. This is seemingly similar in the Dutch and Italian context and then leads to mobilization of the law. The political disadvantage theory does not seem to play a role in this regard: the NGOs who can be presumed to be 'insiders', because they use lobbying in parallel to strategic litigation, also link their strategy choice to political receptiveness and how asylum matters are regarded by politicians and the government.

3.2 *The Role of Organizational Identity and Resources*

Section 3.1 shows a revival of a theory that has not come up in much legal mobilization literature over the past few years and, more specifically, it shows the relevance of the receptiveness dimension of POS. In determining a relevant theory, one could stop there: the statements indicate POS as being of importance in deciding the strategy choice. However, the NGOs researched are involved in lobbying parallel to litigation. This warrants a closer look.

Other statements by the interviewees nuance the strong point of departure of POS theory: often, lobbying and litigation are not used separately but at the same time. The following statements are examples of this:

We encountered the limits of lobbying, we did not get any further with international advocacy, also politically there was not much to get, dependent on the composition of the government,.... So we did these procedures, strategic litigation.... We could achieve something, something we cannot achieve in the national lobby. At least, you need to try both.⁵⁹

58 Interview ASGI lawyer from Turin.

59 Interview part-time legal officer DCR and academic, member of the DCR Committee Strategic Litigation.

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H: In Rome there are lobby activities as well, so we work with MPs of course, we are inside a working group, there are national guides and platforms, a national platform about asylum and immigration.

L: ARCI acts as the major player at the NGO level, in order to put pressure on the parliament and the government for a new law to be adopted, for amendments, so the connection with the parliament is there.

...

P: I mean, strategic litigation in our field, it's one of the tools that we use to strengthen the other activities that we do.⁶⁰

In the first statement, the last sentence is telling: it indicates a simultaneous use that does not contrast lobbying and litigation as opposing strategies as such. Rather, the NGOs indicate that they use the strategies in parallel. NGO members of ARCI (last statement) express this most clearly, with litigation being an activity to support other activities. Thus, while the previous section indicates a relevance of POS and the receptiveness of political actors, the preceding statements nuance the decisive influence of POS, as lobbying is used as well despite 'closed' Political Opportunity Structures.

The question, then, is what other external and/or internal factors influence the strategy choice of the NGOs researched. Other remarks by the interviewees indicate the relevance of more internal, organizational factors:

KP: And why was strategic litigation your tool, and not only raising awareness, or only reaching out to other NGOs? Why strategic litigation?

M/T: I think because we are lawyers. Mainly, I don't know.

T: We just think in this way.

M/T: Yes.

T: With a case to bring change.⁶¹

The 'turn to the courts' of the Italian NGO ASGI is explained by the interviewees as linked to the persons working for the NGO: ASGI is a network of (among others) lawyers and legal academics. The NGO is engaged in lobbying but in large part pursues litigation strategies. This is seen as a logical development in the preceding statement as this strategy is the expertise of many of the members. Such a factor shifts the relevance of an external factor (such as POS) to an internal one, namely the identity of the organization and the (human) resources of the NGO. For one other NGO, this link between the organizational identity and the use of legal mobilization was made explicitly as well:

The combination of direct provision of services, so working one-on-one with refugees and asylum seekers and knowing what is going on, and advocacy, that combined with our in-house knowledge, because we are experts in the area of

60 Interview head immigration & asylum department ARCI (H), legal consultant ARCI (L) and project officer working on the externalization project of ARCI (P).

61 Interview ASGI lawyers from Milan/Tuscany (M/T) and Triest (T).

asylum law, then it is very logical that we do strategic litigation, because you need legal knowledge, and knowledge of what happens in practice and what the bottlenecks are, and you need to represent these interests. And you do that via strategic litigation, which is of course advocacy via the judge.⁶²

The interviewee from DCR links the use of strategic litigation by the NGO to the structure of the organization: the NGO has a ‘helpdesk’, providing information and legal aid to asylum seekers, refugees and their lawyers, while at the same time it is an advocacy organization representing the interests of refugees and asylum seekers. Strategic litigation is a combination of the two: ‘advocacy via the judge’. Again, an internal factor here seems to play a role in determining strategy choice, namely the identity and structure of the NGO. Although a factor like this was not always explicitly mentioned, it can be assumed that this applies to the other NGOs as well. For example, the staff of PILP-NJCM consists of employees with a legal background only. In terms of deciding on an appropriate strategy, it is thinkable that these NGO members are therefore more inclined to think of litigation. Overall, this section shows a nuanced picture of the influence of POS. The NGOs in different national contexts all conduct lobbying strategies, and thus a hard distinction between closed or open POS does not seem to matter as much. Moreover, the empirical data points to a relevance of internal factors as well: the identity and resources of an organization.

3.3 *What About Other Factors?*

The question that remains in relation to the theoretical framework is the role of the other factors that have come up in prior research. One of the main theories in legal mobilization research is on LOS, that when ‘open’, would theoretically lead to more use of litigation. Moreover, in the field of asylum law, specifically, there is a higher availability of rights with EU law. As theorized in Section 2.2, the Netherlands has more open LOS in the access dimension. Nevertheless, all NGOs, also the ones in the (in theory) more closed Italian system, pursue legal mobilization. Where does that leave theory on LOS? In some of the interviews, legal aspects were referred to as being only of slight relevance to the choice to pursue strategic litigation:

I think that there has to be a legal ‘hook’. We get a lot of requests about things that are unfair, the way the [Dutch] tax system is, or complicated technical health insurance constructions and those are topics that we find important, but they are issues on which it is difficult to start judicial procedures, as the state has a lot of discretion in the way in which they want to organize these things. In these areas, it is difficult to find a legal ‘hook’, so strategic litigation is probably not the best means.⁶³

It is clear from this statement that claims that legally speaking have no chances of success are not brought to court by PILP-NJCM. Similar aspects were mentioned

62 Interview head of the DCR Committee Strategic Litigation.

63 Interview legal officer PILP-NJCM.

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by other NGOs, all relating to the legal framework around asylum, which determines the feasibility of certain claims. This legal framework has come up in prior research as part of access to justice and LOS. It was mentioned in the course of this research by one interviewee, for example, that EU law has brought an additional layer to the existing legal framework, which opens up more possibilities for claims in strategic litigation. Thus, this dimension of LOS is, although not solely, relevant in determining strategy choice, but perhaps more on an individual case basis or in determining the exact claim and argumentation put forward in strategic litigation procedures. The other dimension of LOS described in the theoretical framework, the receptiveness of judges, came up as well:

I think that, what makes it [strategic litigation] promising is that there are a few courts in the Netherlands open to this, so the goal is eventually to get clarity about certain lines of case law or policy. And then especially the European judge, so that is our goal and of course the idea is that it improves and not deteriorates the legal position of asylum seekers and refugees.⁶⁴

[W]e realized that it's much easier to change our legislation through strategic litigation and starting from the judges, because we have a very responsive magistratura, a very responsive judiciary.⁶⁵

These two statements come from one NGO in the Netherlands and another in Italy, both referring to the same aspect, namely judicial receptiveness. Although not presented as decisive in the interviews, both LOS dimensions do influence decisions to pursue litigation strategies, as opposed to other strategies. A certain extent of LOS 'openness' is thus required. Nevertheless, Sections 3.1 and 3.2 show a much clearer relevance of other factors. Moreover, the theoretical difference in access to court between the Netherlands and Italy (see Section 2.2) does not come up as significantly important.

With regard to the other factors described in Section 2.1, most have come up in relation to at least one of the NGOs. For example, one NGO discussed the origins of financial resources (the donors of the NGO) as an aspect they take into account when deciding on strategy choice. Another NGO has many relations with other organizations, grass-roots movements, and external law firms, which can influence the decision to pursue strategic litigation for them as well. All in all, the different theorizations have come up to some extent for most of the NGO members interviewed, but not as decisive factors. A final aspect that has not been extensively described in Section 2.1 but that has come up and that has particular relevance in this field of law is the lack of access to justice for asylum seekers and refugees:

64 Interview academic, member of the DCR Committee Strategic Litigation.

65 Interview ASGI lawyer from Milan.

I think it's also very much linked, our strategic litigation, because we think that for example asylum seekers or immigrants, they cannot actually access their rights. So we decided to do litigation for these kinds of reasons.⁶⁶

This links back to what Passalacqua (2021, p. 764) has described as 'altruism': individuals or groups that mobilize on behalf of migrants. She identifies this as a crucial factor for legal mobilization, which appears to be the same for the NGOs researched here. The lack of political and legal rights for asylum seekers and refugees are an explicit reason for some to pursue the strategies they do.

4 Implications for Theory and Future Research

Section 3 paints a mixed picture in terms of the different factors that influence the choice to mobilize the law in the field of asylum for the selected NGOs. This has several consequences when answering the main research questions: why NGOs are mobilizing the law to attain their objectives and how they make a trade-off between litigation and other strategies. First, in relation to legal mobilization in the field of asylum law by the four NGOs researched in the Netherlands and Italy, the theory of Political Opportunity Structures has much relevance. Despite being neglected in the legal mobilization literature over the last few years, the respondents in this study point to the influence of receptiveness of politicians to their claims when it comes to strategy choice. Given such receptiveness, lobbying or other legislative strategies are viable options. This political receptiveness is lacking in the field of asylum both at the Dutch and at the Italian national levels, according to the NGOs. Broadening this finding to a more general level, it can be concluded that to some extent POS, and especially receptiveness, can matter when it comes to deciding on strategy choice.

Secondly, although important, the influence of POS is not decisive in the 'turn to the courts' for the selected NGOs. Rather, other aspects that play a role are internal, organizational factors. Most clearly, the identity of an organization and its staff can determine the choice of strategy. For example, most interviewees have a legal background, which can make litigation a logical choice of strategy, as this is what is most familiar to them. Therefore, there seems to be an interplay between the external political receptiveness and the internal organizational identity. This identity relates to multiple aspects described in the theoretical framework, such as the structure of an organization and the human resources. They all boil down to the same organizational aspect, namely the people who work for the organization, or, as Epp stated, the legal support structure.⁶⁷ The interplay between the external and internal factors is a finding that could be useful in other fields of law as well, as it prevents studies from focusing on one type of factor only.

Thirdly, and lastly, the other factors that have come up during the interviews show that there are a variety of factors from the theory that caters to the choice to pursue

66 Interview head immigration & asylum department ARCI.

67 Epp 1998.

Kris van der Pas

legal mobilization and that therefore no single theory can be identified as definitive or decisive. Legal Opportunity Structures, for example, can play a role to some extent as EU and national law can determine on a case-by-case basis whether a strategic litigation case is initiated, as flows from the current research. Nevertheless, the rules on access to courts which differ for Italy and the Netherlands have not been found to be relevant in this specific study. Financial resources, on the other hand, were found to be of relevance to one specific NGO. The question is where this leaves the different theorizations on legal mobilization in general. I propose here to take into account the (European and) national context in terms of political and legal aspects when researching why NGOs pursue strategic litigation, as this context first creates the playing field for NGOs that could mobilize the law. Furthermore, the organizations themselves and their internal aspects are to be described in legal mobilization research as well. The background of the staff working for the organization, the way in which the organization is set up, and how it is financed are aspects that can all influence the decision to pursue litigation strategies. This overall picture and accumulation of factors can bring to the fore why the law is mobilized, as opposed to focusing on a single theoretical explanation for an NGO's choice of strategy.

In sum, this article has attempted to provide an answer to the question of why NGOs in the field of asylum law in Europe have increasingly turned to the courts to achieve their goals. To this end, research has been conducted on the different contexts within which the NGOs operate as well as the organizational-level aspects that potentially explain the pursuit of legal mobilization. The reasons that have been mentioned during the interviews show aspects of relevance, especially at the national and organizational levels. It can be concluded from this that many theorizations on the topic can both be supported and contradicted. In order to provide an overall picture to explain why strategic litigation is pursued by specific actors as opposed to other strategies in a specific field of law in future research, the following three aspects would need to be described:

- 1 What is the political context on a certain issue? Are the claims made by actors heard at the political level, and is their perspective taken into account?

This is not determined by an objective, national-level factor. One organization could have more access to political actors than the other, or feel that they are more heard than the other. These questions are related to the theory of Political Opportunity Structures and the political disadvantage theory.

- 2 What is the legal context on a certain issue? What legal framework is there (both substantive and procedural)? Does the actor feel that judges are receptive to their claims?

This context does not necessarily shape the choice to pursue litigation, but it can influence the way in which litigation takes place. The (perceived) receptiveness of the judiciary can be an important element: if you do not feel heard, you will not go

to court. These questions are posed in connection with (EU) Legal Opportunity Structures theory.

- 3 What is the organizational-level context? Who works in the organization? How many financial means do they have, and where do these come from? How does the organization present itself to the outside world? What relations does the organization have with other organizations?

This context can determine the ways in which an organization operates. If only lawyers work at a certain organization, litigation will definitely be one of the options that are considered. This can be even more important than the political and legal contexts. Nevertheless, the latter contexts remain important because they shape the system, and the organizations have to work within the system.

For further research, several aspects that have not come up in the present research could be taken into account as well. The first is the relevance of trends: as described in the introduction, strategic litigation has become more popular in the last few years. A perceived success of this strategy could lead to other organizations using the same tool. This perspective has not come up as relevant here but could be taken into account in following research projects. A second aspect is the importance of individuals who work within these organizations. Some individual members of the Italian and Dutch NGOs researched seem to play an important role, but it has been beyond the scope of this project to look into this further. Future research could focus on this aspect. Lastly, in order to assign more weight to the different theorizations and factors, it could be interesting to research the decision not to mobilize, i.e., research organizations that do not pursue strategic litigation at all. The factors relevant to this decision could provide further clarity on why the law is or is not mobilized.

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