

# **Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organisations in the United Kingdom, France, Finland and Italy**

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What explains the likelihood that an NGO will turn to the courts to pursue their policy goals?

This article explores the factors that influence the mobilization of law by environmental NGOs in four Western European countries. It finds that explanations focused on legal opportunity structures are unable to account for the patterns of within-country variation in legal mobilization behaviour. The research also shows that bird protection NGOs as well as home-grown national environmental NGOs are generally more likely to turn to law than transnational environmental groups. While resources and legal opportunities clearly matter to some extent, the author suggests - drawing on sociological institutionalist theory - that explanations of NGO legal mobilization should a) incorporate an understanding of how groups frame and interpret the idea of “the law” and b) explore the role of “strategy entrepreneurs” who promote the use of particular tactics within an organization.

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## 1. INTRODUCTION

Nongovernmental organizations (NGOs) around the world are increasingly relying on legal tools to influence and enforce public policies across a wide range of fields (Tate & Vallinder, 1995). Yet it is not always clear why one NGO will turn to the courts and another NGO - which works in the same country, on similar issues, in similar ways - will not (Dalton et al. 2003). Even less is known about why groups which are situated in different legal systems and which face different incentives and constraints in terms of mobilizing the law might behave in remarkably similar ways in terms of their use of litigation. What then explains the likelihood that an NGO will turn to their national courts to pursue their policy goals?

Addressing this question will help to shed light on debates about whether Europe is seeing a rise in levels of adversarial legalism (Kagan, 2007; Kelemen, 2011). Daniel Kelemen argues that with the advent of the European Union (EU) there has been a shift in regulatory styles in Western Europe; away from consensus politics and opaque networks of bureaucrats who develop and implement policy towards “American-style” regulation through litigation which relies on lawyers, courts and private enforcement. Much of the debate on whether Europe is undergoing this shift has focused on top-down, structural explanations. What has been neglected in this debate is the role of micro-level agents, who according to the Eurolegalism argument, are the ones pursuing litigation. While some NGOs have embedded legal mobilization into their activities, others have not. Kelemen’s work demonstrates the breadth of the Eurolegalism phenomenon but does not account for variation across member states (Kelemen, 2011: 243). In order to make broader claims about the degree to which “Eurolegalism” has spread and shaped behaviour it is crucial to understand how the agents at the centre of this argument behave vis-à-vis use of the law (Israël, 2013).

Answering this question will also matter to scholars of NGO politics. Use of the law can have profound implications in terms of an NGOs ability to influence policy change and

promote effective enforcement of existing legislation. One branch of previous research has argued that the use of legal tools can shift the balance of political power in society and can transform marginalized or weak groups into political players capable of challenging policy makers and shaping policy outcomes (Alter & Vargas, 2000; Barnes & Burke, 2015; Cichowski, 2006; Conant, 2006; Doherty & Hayes, 2014; Epp, 2009; Sellers, 1995; Wilson & Rodriguez Cordero, 2006). However, other research has found that the opening up of new legal opportunities can have a paradoxical effect: the empowerment of the already powerful (Conant, 2002; Galanter, 1974). Tanja Börzel (2006) found that law enforcement mechanisms in the EU can increase opportunities for participation by groups, but only if they possess domestic court access and sufficient resources to use it.

These studies have tended to focus on one or two countries and some concentrate disproportionately on groups that regularly turn to the courts. As Börzel points out “...research on litigation and participation ... tends to suffer from a selection bias on the dependent variable. Cases in which citizens and groups fail to bring claims ... are hardly considered” (Börzel, 2006, p. 129). There has been remarkably little systematic research on why NGOs situated in the same policy fields and same jurisdictions vary so greatly in terms of their reliance on legal tactics. And there have been only a few studies that examine the propensity to “turn to law” by similar organizations in different countries (see Epp, 1998; Kagan & Axelrad, 2000; Kitschelt, 1986; Morag-Levine, 2003; Sellers 1995). This is in part because comparing the effects of law and legal systems is a difficult endeavour: causally linking particular features of legislation, legal systems or the characteristics of organisations with particular behaviour in terms of legal mobilization is challenging. For example, if standing – the right to sue – is limited, if the potential costs of litigation are high and if a group has limited financial resources, it is difficult to know which reason (or a combination of all of them) exerts a chilling effect on an NGOs’ propensity to litigate. The problem of

accounting for the negative result on the dependant variable – choosing not to mobilize the law - becomes central in this type of research.

This article addresses this problem by adopting a multiple country, cross-NGO comparative research design which allows for some disentangling of the effects. I analyze the legal mobilization behaviour of the key environmental groups in four Western European countries: Finland, France, Italy and the United Kingdom. Drawing on the theoretical literature on legal opportunity structure (LOS) I derive a series of expectations for which jurisdiction we might expect to find more groups that regularly turn to the courts. This body of work has shown how the creation of new legal opportunities, the types of rules that structure who is allowed to access the court and the rules on legal costs can influence whether NGOs decide to mobilize the law (Andersen, 2006; Hilson, 2002; Wilson & Rodriguez Cordero, 2006; Vanhala, 2012). Within each country this research examines whether the use of litigation is embedded within the activities of the national branches of transnational organizations, Greenpeace, Friends of the Earth and WWF, as well as nationally home-grown environmental protection associations.

The research finds that there is enormous variation in how groups respond to legal opportunities. It finds, first, that organizations operating in the continental European countries examined here that are involved in the protection of birds and their habitats are among the most likely in their jurisdictions to rely on legal challenges to pursue their goals. In France, Italy and Finland the bird protection organizations and national environmental NGOs were identified as regular users of administrative legal processes and saw litigation as a part of their normal activities. This is not the case for the Royal Society for the Protection of Birds (RSPB) in the UK which is among the least litigious of the environmental NGOs in that jurisdiction. Second, the research here finds that the national branches of WWF are consistently non-users or low-users of litigation across all four countries. In each of the

jurisdictions studied they were identified as one of the groups least likely to turn to the law. The pattern among the other groups is more variable. Greenpeace, while generally characterized as a non-violent direct action group, has also used legal tactics to some extent in some, but not all, jurisdictions. A similarly mixed pattern exists for Friends of the Earth with regular use of the courts by the British and French branches and a total eschewing of the courts by the Finnish and Italian branches.

This empirical picture presents a puzzle in terms of existing theory. Accounts that focus on opportunities, incentives and constraints that lie at the level of the legal and political system offer an important starting point for explaining who mobilizes the law but they are unable to fully account for the variation in terms of who turns to litigation. In order to further develop theoretical explanations of legal mobilization, this paper develops a set of hypotheses and undertakes further analysis to explore the analytical leverage of a sociological institutionalist approach – that focuses on collective action framing processes and the role of legal professionals – to address the diverging patterns of NGO litigation behaviour.

The remainder of the article is structured as follow. The next section presents the LOS theoretical approach which focuses on the existence of relevant legal stock, on the degree to which standing rules are liberalized and on a legal system's cost rules. Section three presents the research design and discusses case selection and methods. Section four draws on extensive qualitative data, including more than 60 semi-structured interviews, to explore the landscape of environmental legal mobilization in Europe by focusing on cross-organizational variation in legal mobilization activity. The findings suggest that while LOS theory offers an important starting point, legal mobilization theory should be further developed. Section five then turns to sociological institutionalism and derives a series of hypotheses. The plausibility of the sociological institutionalist approach is then examined through a qualitative analysis.

The paper concludes with an interpretation of the main findings and suggestions for future research.

## **2. LEGAL OPPORTUNITY STRUCTURES**

Drawing on social movement theory, scholars have developed the concept of LOS to explain how the scope of access to justice in a particular jurisdiction impacts on the likelihood of groups mobilizing the law (Andersen, 2006; Hilson, 2002; Vanhala, 2012). The focus is on the institutional-level constraints and incentives that determine an organization's ability to sue. While different scholars include different variables in their conceptualisations of the LOS there is some consensus that the available legal stock, the rules determining legal standing and the rules on legal costs all matter (see Andersen, 2006; Evans Case & Givens, 2010; Hilson, 2002; Vanhala, 2012).

Legal stock refers to the body of laws that exist in a particular field – from European law, to Constitutional law to statutes and regulations. As Andersen notes, “...laws shape the *kinds* of legal claims that can be made as well as the *persuasiveness* of those claims” (Andersen, 2006, p. 12). A major difference between common law countries (such as the UK) and civil code countries (such as France) is the role of precedent in judicial decision-making. In common law jurisdictions new judicial decisions are constrained by previous ones which means that case law makes up a large proportion of the legal stock. Changes in legal stock can create or limit opportunities for NGOs to frame their legal claims persuasively.

Scholars also agree that the regulations that determine who can access the courts – the standing rules – also play a crucial role in determining who mobilizes the law and who does not (Börzel, 2006; Evans Case & Givens, 2010; Wilson & Rodriguez Cordero, 2006). Rachel Cichowski and Alec Stone Sweet (2003) identified a global liberalization of standing rules which has influenced the ability of environmental groups in particular to access justice. This approach argues that groups that operate in a jurisdiction where the standing rules are

liberalized are more likely to mobilize the law than groups that operate in jurisdictions where standing is restricted.

Finally, there is a long-standing literature showing that the ways in which legal costs are determined can have an important influence on whether collective actors are willing to go to court (Hylton, 1993; Kritzer, 1992). In the US, each party is responsible for paying their own attorney's fees. This system is also in place in several European countries. In the English legal system, by contrast, the losing party is responsible for paying the other party's legal fees. This loser-pays system has been shown to have a chilling effect on litigation because of the potential of incurring enormous costs (Vanhala, 2012).

It is important to note that most formulations of LOS theory do not make deterministic claims about what NGOs will do in terms of mobilizing the law; instead they outline the parameters of what is institutionally possible. LOS theory can offer predictions of the following type: when all other things are equal, and where structural constraints and incentives in a country favour a particular strategy, that strategy may become more prevalent among groups. While some socio-legal scholarship has found that strict restrictions on standing or severe cost rules can effectively shut down this avenue of NGO action (Kritzer 1992), most examples of the application of LOS theory to empirical cases in democratic countries explore the nuanced relationship between opportunity structures and NGO action (Andersen, 2006; Vanhala, 2011).

### **3. CASE SELECTION AND METHODS**

This article undertakes a four country study of legal mobilization in Western European countries, with a particular focus on within-country variation. The four countries were selected because they offer consistency in terms of the legal stock - as members of the EU a large proportion (up to 80 per cent according to some analyses) of their environmental laws emanate from the supranational level (Halpern, 2011). They also offer variation in terms of:

whether they operate under a common law legal system (the UK) or follow a civil code system (the other three); whether they are generally understood to be leaders (Finland) in terms of compliance with EU environmental law, whether they are in the middle of the pack in terms of compliance (the UK and France) or whether they are laggards (Italy) (see Börzel et al., 2010).

Variation in terms of levels of access to justice on environmental matters is also key in the research design. In 1998 the four countries studied here signed (and later ratified) the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (known as “the Aarhus Convention”). This international treaty has served as a mechanism to encourage improved access to justice on environmental issues across Europe. A systematic study conducted in 2007 on access to environmental justice across the then-25 EU member states highlighted the similarities and differences between these countries in terms of standing rules – who has the right to sue - and cost rules. The findings of this and two other comprehensive studies suggest that these four countries offer significant variation in terms of their LOS (Darpö 2013; de Sadeleer et al. 2005; Milieu 2007).

France can be described as having a very open LOS for environmental groups. In France any environmental association possesses legal standing, as soon as a decision of the public administration has a direct link with its field of activities, and corresponds to its geographical scope. In addition, certain associations that are officially licensed by the Ministry of the Environment are presumed to have legal standing against any administrative decision that is directly related to their objectives. Licensed NGOs can act as a plaintiff in instances in which there has been direct or indirect harm to collective interests and a violation of any environmental law that these groups have the objective of defending. A unique feature of French environmental law is the fusing of civil and criminal processes whereby if a

criminal case is being prosecuted a recognized association can join the case as a plaintiff (Papadopoulou 2009). In terms of costs there are not only no fees to bring cases but often the awarding of damages in a successful case can be financially rewarding for an organization. In this way access to justice for NGOs is quite broad.

Under the Finnish Environmental Protection Act (2000) registered associations or foundations whose purpose is to promote environmental, health or nature are generally granted access to the courts. In terms of costs the court hearing the case decides who is liable for the procedure's costs and this is based on the assumption that a private party is both procedurally and financially at a disadvantage compared to its public counterpart. Generally a private party is not held liable for the expenses of a public authority (Milieu 2007).

In Italy, associations that are officially recognised by Ministerial decree have access to the courts. Case law has also increased the possibility for environmental NGOs to challenge public authorities' acts in the name of the protection of "collective interests". In addition, citizens and groups can also participate in the prosecution for offences of environmental damage, as an "offended party". As such they can submit complaints as part of the proceedings and make claims for damages. Like in France this has the effect of transforming a civil action into a criminal proceeding and the NGO has the right to fully participate in the criminal procedure. In terms of costs a loser-pays system is in operation but it is common practice in the regional administrative courts for each party to be ordered to bear its own costs.

Finally, the UK is among the least hospitable places in Europe for environmental NGOs to access the courts (Darpö, 2013). While standing for NGOs has become more commonplace, the loser-pays fee system is a major deterrent for most groups. However, after a decade of domestic and international judicial scrutiny there have been a number of slow improvements in the rules on costs through the introduction of various cost-capping

mechanisms. The Government introduced bespoke costs rules in 2013 for environmental cases in order to comply with EU and international law. The costs still remain high, however, particularly when compared to the costs faced by NGOs in other European countries.

Given this comparative landscape, groups in France will find it institutionally easier to mobilize the law given the broad access to justice they possess and the financial incentives they face in terms of low costs and potential financial rewards. At the other end of the spectrum it would be reasonable to expect groups in the UK to be more reluctant to turn to the courts because of the huge potential cost liabilities inherent in taking cases in that jurisdiction. In the middle are groups situated in Finland, which makes litigation fairly easy for NGOs, and Italy where access to justice is broad but the risk of the loser-pays system makes it unlikely for groups concerned with resources to take on many cases.

This article explores the degree to which litigation is embedded in the activities of the major environmental NGOs in each country. This involved looking at the national branches of the major transnational environmental NGOs (Greenpeace, Friends of the Earth and WWF) as well as the main birds protection organisation in each country (Birdlife Finland, Royal Society for the Protection of Birds (RSPB) in the UK, *Ligue pour la Protection des Oiseaux* (LPO) in France and *Lega Italiana Protezione Uccelli* (LIPU) in Italy).<sup>1</sup> If the state had another large, important nationally-based environmental protection NGO this was also included in the analysis. This resulted in the inclusion of *France Nature Environnement* (FNE) in France, *Suomen Luonnonsuojeluliitto* also known as the Finnish Association for Nature Conservation (FANC) in Finland, *Legambiente* in Italy and ClientEarth in the UK. These organisations were identified through a review of the secondary literature on the

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<sup>1</sup> It is important to note that during the course of research interviews in Italy in autumn 2014 the federation of Friends of the Earth International voted to discontinue the membership of Friends of the Earth Italy (*Amici della Terra*).

environmental movement and NGOs in each country (e.g. Diani & Donati 1999; Konttinen et al., 1999; McCauley, 2007; Rootes, 2003; Nicolino, 2011).

Focusing on the largest groups in each jurisdiction allows for some control of one of the important variables explaining why some groups might rely on legal mobilization more than others: resources. Total organizational income for the year 2010 was collected for each group from organizational documents or from interviewees where the documents were not available. Consistent data on financial resources is difficult to find in terms of cross-organizational and cross-national analysis so a one-year snapshot of resources is all that is shown here. Table 1 presents the data (in euros).

*[Insert table 1 about here]*

A resource mobilization approach claims that organizations must be able to mobilize resources successfully in order to pursue collective action (McCarthy & Zald, 1977). The extension of this to research on legal mobilization is that financial resources are a necessary (but not sufficient condition) for mobilizing the law. In his seminal research Marc Galanter (1974) found that the “haves” tend to come out ahead in litigation efforts because of their ability to be “repeat players” in the courtroom. Charles Epp found that across common law jurisdictions “Combining rights consciousness with a bill of rights and a willing and able judiciary improves the outlook for a rights revolution, but material support for sustained pursuit of rights is still crucial” (Epp, 1998, p. 17). Epp found that a “support structure” – consisting of organizations committed to establishing rights and access to legal and financial resources – is a necessary condition for a rights revolution. There is now a broad consensus that support structures are central to sustaining legal mobilization efforts (Alter and Vargas 1998; Cichowski 2007; Conant 2002, 2006, 2016). Choosing the largest and best-funded

environmental NGOs in each jurisdiction allows the research design to control for this factor.<sup>2</sup>

The main source of data was 60 semi-structured interviews conducted by the author and a research assistant across the four countries. Interviewees included executive directors, policy and campaign directors for the groups, policy officers, campaigners, volunteer coordinators, in-house lawyers, volunteer lawyers and external counsel that worked with these organisations.<sup>3</sup> Interviews probed the strategies and tactics groups used to pursue their goals and asked questions concerning the organization itself, including the degree to which it relied on various legal strategies, its relationship with other NGOs both nationally and internationally, relationships with government actors and with lawyers. Interviews were conducted in English, Finnish, French and Italian and translated to English by the author and a research assistant. Data about each organisation's litigation activity comes directly from the interviews and was supplemented by information from the organisation's newsletters and annual reports and secondary literature where these were available. Interviews were coded qualitatively by the author.<sup>4</sup>

There are two clear limitations with the data used here. First, comparing levels of legal mobilization across countries is an almost impossible endeavour. Comparing and measuring the number of times groups undertake the process of moving from environmental grievance to legal claim to legal case to legal outcome is complex in any single country and exponentially so when looking across countries. For this reason the focus of analysis here is

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<sup>2</sup> The use of overall budget figures is an imperfect proxy for exploring resource mobilization explanations of legal mobilization dynamics. This data is used simply to highlight that these groups are relatively well-resourced in general terms.

<sup>3</sup> This included interviews with 19 informants in Finland in 2011, interviews with 13 informants in France in 2011 and 2012, 25 interviews in the UK in 2010, 2011 and 2015 and interviews with 8 informants in Italy in 2014.

<sup>4</sup> Interviews were coded according to a coding frame developed on the basis of the theoretical explanations explored in this article. This was then followed by an analysis using a constant comparison method which involved refining categories as the research progressed. This method has the benefit of allowing inductive insights from the data to emerge.

whether the use of litigation or legal challenges is embedded in the activities of an NGO, whether it is incidental in their activities or whether it is completely absent. “Embedded” means that the organization regularly uses litigation or legal challenges as a part of their activities, has experience of doing so, takes a proactive approach in terms of using the law and understands it as a normal part of what an NGO does. “Incidental” means that the organization may have used litigation but it is not a regular part of their activities or strategic work, their use of law may have been reactive and in describing what they do, use of the law does not feature prominently or at all. This classification still poses difficulties in terms of comparative analysis. For example, when legal mobilization is embedded in a Finnish NGO, where administrative courts are accessed without a lawyer, where the costs of taking a legal case are low and where often there is no hearing, this is very different from a group in the UK describing litigation as embedded in their activities where the bureaucratic hurdles and potential cost liabilities of lodging a case are much higher.

What then can we learn, if anything, from the cross-national nature of this study? Some lessons can be gleaned that are helpful in developing theory on when and why NGOs might mobilize the law. A cross-national comparison offers some insights into *the degree* of analytical leverage a LOS explanation offers. This research design is not striving to offer a definitive test of the theory but rather seeks to offer some insights regarding the boundaries of a LOS approach. If in a country, such as France, where groups are offered opportunities and strong incentives to mobilize the law, and they choose not to this suggests that other factors are playing a very important role. Similarly if in a country like the UK, where the LOS is fairly inhospitable, groups are regularly pursuing cases this also tells us that something else is going on. Certain types of within-country variation thus can ultimately offer clues about the extent to which other factors may be playing a role in shaping legal mobilization propensities. This research does not offer a definitive rejection of the theory; the aim is to begin to outline

the conditions under which a LOS may be more or less relevant in explaining legal mobilization dynamics.

A second reason this research design is analytically useful lies in the ability to compare the legal mobilization behaviour of different national branches of the same transnational organization. The three transnational NGOs examined here, Greenpeace, Friends of the Earth and WWF, vary in terms of their international cohesion (with Greenpeace acting as a single global organization, FoE as more of a loose federation and WWF as a network) and patterns in the legal mobilization behaviour of different branches might help to inform theory development in terms of how and why NGOs chose the tactics they do.

A second limitation concerns the reliance on self-reporting regarding the legal activity of groups. This is obviously an imperfect measure of legal mobilization propensities. Any individual informant may not be aware of all of the activity of the organization or may not be aware of historic legal activity. This possibility was explored in the interviews and other informants were identified if there were doubts about the extent of knowledge a particular informant may have had. A second gauge was asking other organizations within the same country which organisations were likely to turn to the courts and which were unlikely to do so. This offered at least some informal reputational auditing with which to cross-check the self-reported data. Finally, secondary literature on all of these countries was examined to validate the findings presented here (e.g. Diani & Donati 1999; McCauley, 2007; Rootes, 2003; Konttinen et al., 1999; Nicolino, 2011; Vanhala 2012; Vanhala 2016).

#### **4. LEGAL MOBILIZATION DYNAMICS ACROSS WESTERN EUROPE**

Table 2 presents whether the use of litigation is embedded within an organization's activities, whether it is incidental to them or whether they completely avoid litigation. It categorizes groups according to how they reported their involvement in litigation in interviews. The data

shows that within each country there is variation in terms of whether litigation as a strategy is a regular part of the activity of NGOs. In Finland and Italy there were more groups that reported having taken no cases or only a small number of cases but in each jurisdiction there was at least one group that did rely on litigation as one of their main tools. In France and the UK there was significant variation in terms of whether groups used legal tools. Some, like *FNE* and *LPO* in France, regularly take legal cases to the administrative courts whereas WWF had only taken a small number of cases in that country. In the UK Friends of the Earth and Greenpeace were identified as regular litigants and WWF and RSPB were identified as relatively litigation-averse.

*[Insert table 1 about here]*

What the data shows is that there are more similarities among groups situated in different countries in terms of their legal mobilization behaviour than among different groups situated within the same legal-political environment. For example, in each jurisdiction WWF was identified as extremely litigation averse. Greenpeace tended to use some litigation but not very much in each jurisdiction. All of the home grown national environmental protection NGOs had used litigation as a normal part of their activities.

These findings raise the possibility that perhaps it is organizational *perceptions* or *knowledge* of the LOS that drove the differences. This was probed in interviews and the results generally suggested that groups across jurisdictions have high levels of awareness of European environmental law and of their right to access courts, particularly since the adoption of the Aarhus Convention.

In terms of legal stock there was a high-level of awareness about the national and supranational legislation relevant to the areas within which these NGOs operate. There was consensus among all groups (including the litigation-averse) across all countries that EU

environmental legislation was a powerful tool. For example, the Executive Director of the Finnish Association for Nature Conservation said:

[Litigation] is something that has been used more often in the past 15 years because it has been so powerful.... and nowadays even better as a result of EU membership ... I'm pretty sure that the majority of Finns thought that we would be best in class in environmental policies [when Finland joined the EU] but it didn't turn out that way, there were many things that had to be modified. And actually nowadays EU legislation represents a formidable instrument for our work because we can always go back to existing EU legislation if we notice something isn't being complied with. But I think they have learned their lessons nowadays. The Finnish ministries are pretty good about complying... (Interview, FANC, September 9, 2011).

One interviewee from *France Nature Environnement* noted the extent to which they rely on EU environmental law:

Often, I think that in at least half of our cases we note that something does not respect European Community law.... We really have mastered European environmental law because we know very well that everything flows from that.” (Interview, FNE, June 13, 2012).

An interviewee at WWF Italy expressed similar sentiments but also noted what was generally understood to be a significant flaw of the system in Italy: an ability to circumvent.

The EU has incredibly advanced environmental laws, so the Italian system has had to adhere to these. The problem in Italy is the implementation of the law. There is of course a growing attention to environmental issues, but also a growing attention towards ways to get around legal norms (Interview, WWF Italy, November 14, 2014).

This was echoed by an interviewee at Friends of the Earth Italy:

Everyone is ready to praise new developments of environmental law. What remains to be established is their coherence, effectiveness and efficacy... Then at times laws are applied, yes, but only formally. So there is a new directive, then four more years go by before it is implemented and the directive before that one hasn't even been implemented yet. Italy does this continuously (Interview, Friends of the Earth Italy, October 15, 2014).

There was some variation both across groups and across countries in whether groups perceived themselves to be welcome in the courtrooms. Some interviewees from French NGOs noted the ease with which they can turn to the courts:

Normally in law you have to show that you suffered a harm, a direct and personal harm, which is very restraining. But in France for associations, especially environmental protection associations but also consumer associations, for years and years we have been able to just say that every environmental infraction, if we are an environmental protection organization, causes us indirect harm. And that gives us very, very wide access to the judge...but we know we are lucky compared to other countries... (Interview, FNE, June 13, 2012).

Several interviewees in the UK noted that judges have become more favourable to the idea of NGOs in the courtroom over the last fifteen years. For example, one lawyer from Friends of the Earth noted:

Judges are more receptive to the importance of having NGOs using the court process...whereas before they would think that NGOs had no place in the court process... (Interview, Friends of the Earth EWNI, April 13, 2010).

Similarly, in Finland, organizations such as Birdlife Finland and FANC were aware of the provisions of the Aarhus Convention that enhanced access to justice for associations. One interviewee noted

To access the law is quite new so this legislation [on access to justice] has been improving quite fast ... But I would say this was a very good thing and positive thing... because when the government has cut money and staff from environmental departments it often seems that the public interest is taken care of by civil society organisations. And also, the number of cases which are nature conservation cases have increased a lot. I would say that the societies that have been in the court have had good success. They don't go there easily. They don't complain about everything. They go to complain about the issues that they think are wrong and against the law. They have developed nature conservation practice a lot. Now when the other parties know that we have access to law it should prevent projects and decisions that are against the law. When we have access to law, we have more power (Interview, Birdlife Finland, September 9, 2011).

Italian interviewees were more likely to note the problem of slow timescales of court processes than interviewees in other countries. Interviewees noting this problem included those from groups that only use litigation irregularly and those that are more often in the courts. For example, an interviewee from Greenpeace Italy said:

We work with legal actions. We present legal complaints to administrative tribunals, to the Council of State, to the Presidency. Historically, I must say these have been some of our most effective weapons, for a very simple reason: beyond the merit of the legal questions we raised, beyond whether our complaints have been accepted or rejected, very often we have succeeded. The problem is that our

justice system, our civil law system, is rather chaotic, so it causes controversies to go on for many years (Interview, Greenpeace Italy, October 7, 2014).

An interviewee from *Legambiente* also noted:

In Italy, I think also compared to the rest of Europe, the world of justice is slow, extremely bureaucratized. We do initiate actions with so much energy and enthusiasm... (Interview, Legambiente, October 7, 2014).

The empirical evidence suggests that it is not the LOS nor vastly varying perceptions or knowledge of legal opportunities that drive the differences in organizational behaviour.

## **5. EXPLAINING VARIATIONS IN ENVIRONMENTAL LEGAL**

### **MOBILIZATION: A SOCIOLOGICAL INSTITUTIONALIST APPROACH**

I argue here that accounting for intra-country variation demands further theorization. Recent literature has begun to pay more attention to social movement characteristics beyond material resources in explaining the choices NGO make in terms of strategic action and tactics. There is widespread disagreement, however, about which characteristics matter the most. For example, legal mobilization has been explained by: the need for elites to please the rank-and-file membership (Hansford, 2004; Solberg & Waltenburg, 2006); internal, intergenerational divisions over attitudes toward cooperation and conflict with state institutions (Morag-Levine, 2003); the impact of opposing strategies from adversaries in particular venues (Holyoke, 2003); and relations of cooperation and competition within a field of action (Vanhala, 2011). All of these approaches could be categorized under the broad umbrella of sociological theories of institutions that seek to account for why and when some groups are more likely than others to embed legal mobilization in their tactical repertoire.

In this section I suggest that the literature on sociological institutionalism may be useful in addressing the puzzle of why some organizations that have the opportunity to use

legal action do not, and why others seem to inherently value legal mobilization as a strategy even when faced with significant material and procedural hurdles.

Sociological institutionalism, one of the three varieties of “new institutionalism” (along with rational and historical counterparts), emerged from organizational theory (Hall and Taylor 1996). Sociological institutionalist scholars understand institutions as “systems of meaning” based on formal and informal norms, rules, routines, understandings and frames of meaning that define “appropriate” behaviour for groups and the individuals within them (March and Olsen 1989; Powell and DiMaggio 1991). From a sociological institutionalist perspective, organizational “ways of doing” and “ways of knowing” are slow to change because they are maintained by actors who “embody and enact” norms and scripts (Lowndes and Roberts 2013; McAdam and Scott 2005; Powell and Dimaggio 1991). While there are emerging differences within the school of sociological institutionalism regarding the relationship between institutions and individual action there is a general consensus that institutions influence action through cognitive scripts, categories and models.

This article narrows the focus on to two sets of factors internal to organizations that may exert pressures that steer an organization’s approach to legal: framing processes and the role of epistemic professionals. Although these two factors are undoubtedly related they will be separated in the theoretical discussion below for analytical clarity.

### **5.1 Framing processes**

Curiously, while political scientists wanting to explain legal mobilization have adopted much from social movement theory, they have tended to neglect an important branch of work in the field on normative values and framing processes which have come to be considered key components in understanding the character and course of social movement organizations (Benford and Snow, 2000).

Organizational identity and the way in which organizations perceive the world creates internal pressures that define the parameters within which decisions about forms of collective action are made (Benford & Snow, 2000). For James March and Johan Olsen (1989), institutions are interrelated rules and routines that define appropriate actions in terms of relations between roles and situations. March and Olsen (1989) use the term “logic of appropriateness” to capture the essence of this mechanism based on normative influence: organizational norms are “followed because they are seen as natural, rightful, expected and legitimate” (March & Olsen 2004: 3).

To understand why some groups might pursue strategies, such as legal mobilization, even in the face of procedural and material hurdles, I apply this notion of the influence of “logics of appropriateness” on tactical repertoires by exploring the potential power of meaning frames on decisions to engage with the law. Building on Erving Goffman’s concept of a frame as a “schemata of interpretation”, David Snow and Scott Byrd argue that the framing perspective views actors not merely as promoters of existing ideas and meanings but as “signifying agents actively engaged in producing and maintaining meaning for constituents, antagonists and bystanders” (Snow & Byrd, 2007, p. 123). Framing processes shape which issues are seen as problems, which are discussed, which are taken up for action and, important for this research, which forms of action are seen as most appropriate (Smith, 1998; Vanhala, 2011). A collective actor’s framing processes may have an influence on the type of strategy they will choose in trying to shape politics and achieve change. The tools of frame analysis allow us to capture the process of the attribution of meaning that individuals give to symbols, events, behaviour and discourse (Goffman 1974).

If this argument is theoretically sound we would expect to see that groups are more likely to rely on legal mobilization when their identity and framing processes define “law” as an efficient and morally acceptable target of action and when they see the courts as an

appropriate venue within which to pursue their policy goals. Conversely, if an organization's hegemonic ideational frames do not conceptualize the "law" or courts as legitimate targets or venues it seems unlikely that they will be regular and active participants within judicial venues.

*Hypothesis 1: Groups that frame the problems they seek to address and/or the constituencies they serve through a legal lens will be more likely to rely on litigation. Groups that are sceptical of law and/or do not understand the constituencies they advocate for primarily as rights holders will be less likely to have litigation embedded in their tactical repertoire.*

Evidence about organizational framings of law can be found in groups' public documents and in the private statements of organizational insiders. If framing matters then groups which see a strong legal framework as an important part of addressing environmental problems will be the ones more likely to turn to the courts. Frame analysis can be used to probe how campaigners and lawyers have understood and then acted upon their organization's conception of the law and what the environmental legal framework offers.

## **5.2 Strategy Entrepreneurs**

Sociological institutionalist explanations have recently been accused of devoting too much attention to the ways in which the institutional ideational environment influences the behaviour of individuals. By placing so much emphasis on the role of cultural conventions, norms and cognitive frames, sociological institutionalism has been criticized for removing human agency too completely from the process (Peters 2005). A recent turn in new institutionalism focuses on the role individuals can play in shaping organizational structures and meaning frames. For example, some recent work by sociological institutionalists has focused on mimesis; the idea that in a context of uncertainty and limited rationality, institutions have a tendency to imitate one another (Peters 2005). This is thought to occur

mostly through the migration of professionals from one organization to another (Saurugger 2013). Individuals are able to form and reform organizations: particular categories of individuals can shape organizations and their tactical repertoires.

Different sub-disciplines in the social sciences have conceptualised the role of these types of micro-level agents in a variety of ways. For example, international relations scholars who study the diffusion of human rights tend to talk about “norm entrepreneurs” - those agents who advocate for different behaviour with the hope of playing a catalytic role in norm emergence or norm change (Finnemore and Sikkink 1998). Others, particularly those who study international environmental politics, have emphasized the role that knowledge-based experts – epistemic communities – play in diffusing ideas, framing issues for debate and proposing specific policies or strategies. Peter Haas defines an epistemic community as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area” (Haas, 1992, p. 3). In the field of socio-legal studies, scholars have pointed to the role of “cause lawyers” in social movements to account for the turn to legal mobilization: the existence of in-house lawyers or relationships with *pro bono* legal counsel may help to explain a group’s propensity to litigate or may influence the meaning frames of a group and increase the likelihood of a group framing problems through a legal lens (Edelman et al. 2010; Epp, 1998; Israël 2014; Lejeune 2011).

Bridging these three bodies of work on norm entrepreneurs, epistemic communities and cause lawyers, I introduce the term “strategy entrepreneurs” here to describe those agents who may play a role in introducing new tactics into an organization’s repertoire and promoting the use of particular strategies, such as legal mobilization. It is hypothesized that those organizations with relationships with lawyers will be more likely to use legal tools.

*Hypothesis 2: Groups that have relationships with lawyers will be more likely to mobilize the law than those without connections to legal counsel.*

If the role of strategy entrepreneurs matters in explaining legal mobilization we should be able to assess this by tracing the relationships organizations have with lawyers and the nature of those relationships. This can include in-house lawyers and/or close relationships with external lawyers and/or the existence of volunteer networks of lawyers.

In their empirical work, sociological institutionalists tend to undertake in-depth case studies of specific organizations and use interpretive methodologies to produce “thick” descriptions of subtle and dynamic processes by which institutionalized norms influence repertoires of action over extended temporal scales (Lowndes and Roberts, 2013; Morag-Levine, 2003; Vanhala, 2011). Covering a number of organizations across four countries means this paper cannot offer the type of in-depth analysis that has been characteristic of previous approaches in a single article. However, the breadth of coverage in this paper is an important contribution in terms of understanding the analytical leverage of a sociological-institutionalist approach across multiple cases.

## **6. EVIDENCE**

This section uses the theoretical framework developed above to explore the empirical evidence.

### **6.1 Framing processes**

Hypothesis 1 suggests that a group’s framing processes will influence the likelihood that they will use litigation: if a group views the problems they seek to address as legal ones we would expect them to be more likely to turn to the courts than groups that might be skeptical about law. The cross-national/cross-organizational pattern does suggest that framing processes matters to some extent in explaining the propensity to mobilize the law.

Across all four countries two consistencies across organizations emerged. WWF was seen in all of these jurisdictions, both internally and externally, as a group that is litigation-averse because of its culture which is perceived as conservative and oriented towards corporations. Said one participant from the organization in France: “WWF is not an organization that wants to undertake a lot of litigation. For at least the last ten years the object has been to undertake nature protection programs” (Interview, WWF France, June 7, 2012). According to one lawyer that had interacted with the group in France, the organization at one point considered increasing its use of proactive litigation:

So, WWF recently, in about 2003... asked themselves “would it not be in our interest to use the law proactively?” So they began to do it slowly and now I can say they have stopped completely. This policy of using law was stopped almost as soon as it had started... It’s not their culture in fact... (Interview, environmental lawyer, June 14, 2012).

Interviewees in Finland tended to characterise WWF in remarkably similar terms.

WWF is more... close to decision-makers and policy-makers... they want to be more approved... They don’t want to argue and they don’t want to be openly disagreeing.... So when other groups are cutting off cooperation [with government or corporate actors] WWF are still trying to find some compromise (Interview, Birdlife Finland, September 9, 2011).

A second cross-organizational pattern emerged from the interviews. Greenpeace’s framing of the law was also fairly consistent across the four states studied here. The organization can be described as having a sceptical orientation towards the law and what can be achieved by relying on the legal framework (though this was not totally consistent across states). It differs from the other organizations discussed here in that it is often engaged in criminal law processes after non-violent direct action protests. Greenpeace’s reluctance to use

the law pro-actively has been attributed by several research participants to the culture of action within the organization and the time scales of justice. For example, one participant in France noted that in Greenpeace: “There is a mistrust of judges. In general the justice of men is too slow: it’s not adapted to the climate emergency, to the ecological emergency” (Interview, environmental lawyer, June 14, 2012).

An interviewee in Italy echoed these sentiments:

Let’s say that it isn’t part of the rhetoric of Greenpeace that of inviting people to respect the law. It’s not our method.....I would say that environmental law at times is only a fig leaf covering dirt. For example, when we denounced harmful emissions by the coal plant in Vado Ligure, the company defended itself saying it had always respected legal emission limits. So obviously there is a problem with those limits, which caused damages to health and environment. Environmental law is something that at times is best to be suspicious of... (Interview, Greenpeace Italy, October 7, 2014).

Thus the hypothesized relationship seems to be stronger for some organizations than others. However, an inductive insight that emerged from the data was the framing of the relationship between civil society and government and how this shaped attitudes towards legal action. This was particularly prevalent in two of the jurisdictions. Interestingly, interviewees in both Italy and Finland highlighted the fact that a perceived inability to participate in policy-making pushed them to the courts. In Finland the problem was identified as a long history of consensual politics

[Use of the law] is something that has been used more often in the past 15 years because it has been so powerful. In a country like Finland where most of the decisions are based on consensus, a civil society organization like ours would

have no role whatsoever if we couldn't threaten decision-makers and the people in power with legislative instruments (Interview, FANC, September 9, 2011). Nowadays the Court seems to be our only friend. I'm very happy that in the courts there is still a place for objective rulings (Interview, Birdlife Finland, September 9, 2011).

In Italy it was the lack of participatory mechanisms that was seen as a reason to turn to the courts.

[In response to the question do you take legal actions?] Yes, very often. Very often. It is an activity that, unfortunately, in Italy is overused. This goes back to the fact that when politics are not as transparent as they should be, when its relations are not as participative as they should be, action through courts often becomes necessary (Interview, LIPU Italy, October 24, 2014).

Finally, interviewees from Greenpeace in several countries described what they saw as the occupation of civil society by the state or political organizations:

The thing is that in Italy there is no well-defined line between civil society and politics. Historically, here political institutions have worked to occupy civil society ... This means that there have never been really independent organisations. We [Greenpeace] - because we are a non-Italian reality, as in we were born and raised in a global network and shaped by the Anglo-Saxon culture - have limits, boundaries that are very strict when it comes to our independence. We are a non-party organisation. We really are. This is our strength and our weakness (Interview, Greenpeace Italy, October 7, 2014).

This was also noted by an interviewee at Greenpeace Finland who argued that "Civil society is an extension of the state" (Interview, Greenpeace Finland, September 9, 2014).

What the interview data suggest however is that perceived exclusion from political decision-making can be a prompt for groups to turn to courts. Interestingly, it does not seem to matter whether this exclusion exists in a very transparent political system (such as Finland) or because of the lack of transparency and access to legislators (such as in Italy). In both of these countries groups have framed their decision to turn to the courts within a broader rhetoric of exclusion from decision-making.

Another aspect that differentiated organisations was how they saw the use of litigation fitting in with democratic processes. For some, there was a strong framing of “access to justice” as a key tenet of democracy. For example, in their promotional material Friends of the Earth (across countries) and some of the national organizations rely on this framing when communicating with their memberships and the broader public.

Going to court to defend the environment where a law has been breached is a form of participation which citizens should be encouraged to undertake, albeit as a last resort... The benefit of more open access to the courts comes from improved decision making by public authorities, who know that their decisions can be challenged. (Friends of the Earth Scotland, 2011, 6).

To deal with the ecological crisis and against harm to the environment, we are deploying all the tools of democracy, from consultations to legal action. Each year, France Nature Environnement defends the interests of the environment in more than a hundred legal cases (FNE Website, 2016).

For a small minority of interviewees there was much greater skepticism about what democratic ideals mean in terms of mobilizing the law. For example, one interviewee in Italy noted:

I do get that at times some issues can only be solved through court action, but we would like to avoid that, both because the Italian justice system is in a pitiful state

and because it is a careless way to do politics (Interview, Friends of the Earth Italy, October 15 2014).

In short, framing theory is useful in accounting for the behaviour of two of the transnational groups examined here but cannot account for the overall picture. The identity of WWF as an organization that does not use law in an adversarial way was consistent across countries. Interviewees from within and outside the organization regularly pointed to it as a group whose culture jarred with the use of litigation. Similarly, there was a relatively consistent framing among interviewees in Greenpeace's various branches that the law was not an effective tool and the organization, based on this interview data, can be described as being sceptical about the extent to which a legal framework alone can offer effective protection of the environment. In contrast with this, interviewees in the home-grown national environmental protection organizations and the various branches of Friends of the Earth were much more likely to express (implicitly or explicitly) faith in what the legal framework can offer in terms of environmental protection.

## **6.2 Strategy entrepreneurs**

This research finds limited support for hypothesis 2 that suggests that groups that have relationships with lawyers will be more likely to mobilize the law. Table 3 summarizes the access each organization has to legal expertise. There was a good degree of variation in terms of the amount of legal staff in-house within each country and some patterns across countries. NGOs in the UK had more lawyers in-house than any of the other countries. One UK research participant noted:

A decade ago, very few NGOs had in-house lawyers – now most of the large NGOs do. This may have improved the quality of legal advice received – or at least have secured improved access to legal advice! (Personal Communication, WWF UK, April 12, 2011).

At the other end of the spectrum are the Finnish NGOs which do not have any in-house lawyers.

We are the organization that does that [take legal challenges]. But we don't have our own lawyer unfortunately. It's something that we really miss at this stage. Fortunately in some bigger issues we have been able to find partners that have been able to help us with that. So both at the national level and at the EU level we have been active. In raising complaints, taking complaints and going all the way to the court (Interview, FANC, September 9, 2011).

The more effective work is done through the Courts. We have to go to the Courts more often because nothing happens without it. So I think environmental societies should have more lawyers (Interview, Birdlife Finland, September 9, 2011).

*[Insert table 3 about here]*

Across countries Greenpeace did not have an in-house lawyer in any of the countries studied but all of the interviewees from the organization pointed to a long-standing institutionalized relationship with a lawyer or several lawyers within their jurisdiction. Often the cost of in-house legal staff was seen as prohibitive. For example, a Greenpeace interviewee in Italy noted:

It's a problem of costs. Having a limited budget, we need to verify whether it's more convenient to have an internal lawyer as part of our staff, or if from time to time we consult lawyers who are already familiar with our work....Usually, when we face administrative appeal, there is already a lawyer involved, who's probably from the place in which the administrative proceedings take place, who knows the issue and is specialised in that issue. We have a couple of lawyers we know who do that (Interview, Greenpeace Italy, September 30, 2014).

A former Friends of the Earth lawyer in England made a similar point.

Different campaigners had different ideas about how law could help...I also acted quite proactively, gave them information... The big issue was cost...the downside of losing a case is that you lose money and you have to think whether the money could have been spent better elsewhere (Interview, former Friends of the Earth EWNI lawyer, April 22, 2010).

Though in some jurisdictions this was changing. Greenpeace France, for example, argued that perceptions about when to use the law were changing.

Greenpeace has evolved a lot in the last ten years: previously legal action was perceived as supporting direct action protests. A lawyer intervened only when activists were arrested and prosecuted. Today legal action is seen as an advantageous campaign tool in achieving concrete results (Greenpeace Magazine, 2006, 14)

Finally, the lawyers that were interviewed across organizations tended to see themselves as having to be proactive and “reach into” campaigns rather than sit and wait for campaigners to come to them.

I find that we [the lawyers] really play a driving role on use of the law. For example, there is legislation and we know that concretely it's not being enforced... So we say, “ok here is a priority, we're going to enforce the legislation. It's not necessarily going to be someone from one of our thematic campaigns that calls on us to do it. It's up to us to have our own ideas (Interview, FNE, June 13, 2012).

It all depends on the character of the individuals and organisations.....it all depends on the campaigners...if they can see how their objectives can benefit from litigation... (Interview, former Friends of the Earth EWNI lawyer, April 22, 2010)

ClientEarth, in the United Kingdom, was the only group examined that is made up mainly of lawyers. They saw this as differentiating themselves from other UK groups in a fundamental way.

Because law has not been used a lot by the other groups...and hence it comes last in the thought process...I am exaggerating here...but the other groups always start with politics... and then bring in law later on...We look at problems in the world and think of the best way to deal with these problems using law... This is a major difference between us and other organisations...And this is the idea...to develop tremendous in-depth expertise and to be able to work on the whole cycle of the law...from its inception to working in Parliament...to implementation and enforcement...the latter stages are really not focussed on by other groups...they focus more on getting law enacted...and for lawyers enactment is just part of the process...for us implementation and enforcement are equally important (Interview, ClientEarth, April 22, 2010).

The findings here are inconclusive in terms of whether having in-house legal staff, an institutionalized relationship with an external lawyer or a large network of volunteer lawyers makes a group more likely to mobilize the law. What this data does suggest is that groups have found a number of ways to access legal advice, even when their financial resources are limited. Future research could develop this approach by exploring the nature of the relationships more closely and by exploring whether having a legal professional in leadership roles within organizations might be influential in increasing an organization's propensity to litigate.

## **CONCLUSION**

How can we explain why some NGOs turn to the courts as a part of their political campaigning whereas others eschew the use of this tactic? According to existing literature the

likelihood of mobilizing the law is influenced, but not determined, by the rules that shape who is allowed to go to the courts, the existence of relevant law, the financial incentives and constraints to going to court and the availability of resources to do so. The research presented here offers a complementary picture.

In each of these jurisdictions there were organizations that regularly use legal tools to challenge policy decisions. This may not be surprising for a case like France, where the incentives clearly encourage groups to go to the courts. However it is surprising that many of the groups in the UK, where there are significant cost hurdles to mobilizing the law, regularly turn to the courts. The interview data also showed that variation in legal mobilization behaviour was not driven by differences in knowledge or perceptions of the legal opportunity structure. The large majority of the groups interviewed here had high levels of awareness of EU environmental law and of the improving opportunities to turn to law.

The findings here suggest that a sociological institutionalist perspective is a helpful complement to existing legal mobilization theoretical approaches but alone it also fails to account for the patterns observed. The frame analysis suggests that for WWF and Greenpeace there is at least some relationship between these organizations' worldview and culture vis-à-vis "the law" and their tendency to avoid the use of this tactic. Surprisingly, the existence of different forms of relationships with lawyers did not seem to have a direct impact on levels of legal mobilization activity. In some cases, groups without in-house legal counsel were the most litigious in their jurisdiction, in other cases groups with in-house lawyers, such as WWF, were very unlikely to go to court. In France and Italy the national environmental NGOs, *FNE* and *Legambiente* respectively, possess extensive decentralized networks of lawyers which may help to explain why the use of legal action is embedded in their tactical repertoires. In short, the findings here suggest there is no straightforward relationship

between the role of legal professionals within an organization and their likelihood of mobilizing the law.

All of this suggests that there is not one overarching theoretical branch that can account for legal mobilization dynamics both across and within countries. This research has played an important role in expanding the spatial horizons of legal mobilization research; future research should strive to also expand temporal horizons (see e.g. Morag-Levine, 2003). This would help us understand how, for example, the historical record of litigation success and failure might influence legal mobilization dynamics within an organization. Scholars could also move towards developing a synthetic theoretical framework that takes both contextual factors and agent-level characteristics seriously and explores the interaction between them to account for legal mobilization behaviour across countries, across groups and over time.

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