

Mobilising European law

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Abstract

The literature on European legal mobilization asks why individuals, groups and companies go to court and explores the impact of litigation on policy, institutions and the balance of power

among actors. Surveying the literature we find that legal mobilization efforts vary across policy areas and jurisdictions. This article introduces a three-level theoretical framework that organises research on the causes of these variations: macro-level systemic factors that originate in Europe, meso-level factors that vary nationally, and micro-level factors that characterise the actors engaged in (or disengaged from) litigation. We argue that until we understand more about how and why different parties mobilise law, it is difficult to respond to normative questions about whether European legal mobilization is a positive or negative development for democracy and rights.

Key words: European Convention on Human Rights; European Union; law and politics; legal mobilization.

Introduction

A growing literature explores how individuals, groups, and companies use European law to pursue their interests. The process of European integration generated a new opportunity structure for legal mobilization that expanded over several decades. Postwar commitments to peace and prosperity, as well as democracy and human rights, inspired the original ‘European Union’ (EU) treaties and European Convention on Human Rights (Convention), both of which constitute sources of European law. Functional imperatives to realise the Single Market led the Court of Justice of the EU (CJEU) to issue judgments – in cooperation with national courts – that ‘constitutionalised’ the EU into an unprecedented supranational polity, vesting EU citizens with substantive rights and procedural guarantees. Meanwhile, the development of universal individual access to the European Court of Human Rights (ECtHR) offered another means to claim rights (Shelton 2003). Private litigants mobilising these two

sets of rights have made these European courts the world's busiest international tribunals (Alter 2013).

Normatively, the consequences of this mobilization are contested. Disagreement about the extent to which the growing emphasis on rights threatens (Dehousse 2000) or enhances (Cichowski 2006) democratic accountability in Europe parallels broader debates about the democratizing or elitist consequences of postwar 'rights revolutions' and 'juristocracies' within national democracies (Epp 1998; Hirschl 2004). Some see a challenge to social democracy, where court-propelled negative integration liberalises markets and outpaces the positive integration that could ameliorate the weakening of national social policies (Höpner and Schäfer 2010, Martinsen 2015; Scharpf 2010). Others uncover judicial efforts to expand European social rights by extending national benefits to migrating EU citizens and third-country family members (Caporaso and Tarrow 2009; Conant 2006; Wind 2009). Such generosity fuels backlash against 'welfare migration' (Blauberger and Schmidt 2014; Martinsen 2015), which resulted in judicial retrenchment (Larsson and Naurin 2016) and threats to the legitimacy of the EU and Convention. Arguments about EU immigrants exploiting national welfare systems and 'meddling courts' contributed to the victorious 'Brexit' campaign of the United Kingdom's (UK) referendum on EU membership. Similarly, litigation that foils efforts to deport foreign terrorist suspects and criminal convicts (Conant 2016) features prominently in frustration with the ECtHR and the constraints its interpretation of the Convention imposes (Conservatives 2015). Far from an obscure domain, legal mobilization has become politically salient.

Empirically, disagreements persist about factors underlying these developments. Daniel Kelemen (2011) argues that formal law, lawyers, and litigation play a growing role in EU policymaking in contrast to traditional regulatory styles that featured more informal, cooperative, or technocratic relations among participants in West European states. Tracing

the origins of this change to economic liberalization within a fragmented EU political structure, Kelemen sees a diffusion of US ‘adversarial legalism’ theorised by Robert Kagan (2001). By contrast, Kagan (2008) expects that entrenched national cultural and legal institutions impede adversarial legalism in Europe. Comparative accounts uncover the uneven extent to which European legal mobilization affects policy and democratic governance (Blauberger and Kelemen 2017; Cichowski 2007; Conant 2002). We need to learn more about the sources of these variations.

We propose to organise research on the causes of variations into three levels of analysis: macro-level systemic factors that originate in Europe, meso-level factors that vary nationally, and micro-level factors that characterise the actors engaged in (or disengaged from) litigation. The following sections outline contributions within each emphasis, which span a variety of literatures including comparative law and politics, international law and politics, and socio-legal studies. While we are aware that broader conceptions exist (Vanhala 2011a), our discussion focuses on European legal mobilization in the narrow sense of private litigants engaging in court proceedings based on a European source of law, be it EU law or the Convention. Until we understand more about how and why different parties mobilise law, and how national and European institutions mediate the impact of this activity, it is difficult to respond to normative questions about whether European legal mobilization is a positive or negative development for democracy and rights.

Macro-level factors: European legal opportunities

An important source of variation in legal mobilization includes the impulses that derive from European law. What are the macro level factors that encourage and discourage litigation? How have the shifting legal norms and institutional arrangements of the EU and the Convention shaped the rules of the game for potential litigants? While we have only begun to

explore some of these questions empirically, it is clear that ‘integration through law’ (Cappelletti et al. 1986) has been uneven.

Historically, integration gave preference to some actors and policy areas, leading to a process of ‘co-evolution’ (Baumgartner et al. 2003). With its original emphasis on economic rights, EU law primarily offered opportunities to companies and workers who could benefit from regional market liberalization. Companies have been adept at challenging national product standards and labour and tax laws that they interpreted as restrictions to their free movement rights (Genschel and Jachtenfuchs 2011, Seikel 2015). The EU legislator is moreover actively fostering a framework for private litigation in issues of competition and public procurement (Eliantonio and Muir 2015). Market-correcting policies such as consumer and environmental law developed later, but now increasingly offer an opportunity for interest group litigation. Individual claims were long limited to contesting how nationality or gender discrimination affected employment and related welfare entitlements (Cichowski 2007; Conant 2004; Hofmann 2013). The growth of new groups and individual claims concerning broader fundamental rights paralleled the expanding activities of the EU’s courts and legislature (Fligstein and Stone Sweet 2002). Broadly applicable anti-discrimination measures were not available until a 1999 EU Treaty change, which subsequently led to the passing of the Race Equality Directive (Evans Case and Givens 2010). The CJEU was long prevented from fully reviewing topics involving the EU’s area of ‘freedom, security and justice’, such as migration and asylum. It only more recently became the focal point of legal mobilization efforts by migrants and their supporters in contrast to the more prominent position of the ECtHR in this area (Psychogiopolou 2014). EU law proper - overseen by the CJEU - did not contain a single, written catalogue of individual rights until the 2000 Charter of Fundamental Rights became legally binding with the Lisbon Treaty in 2009. While the CJEU has begun to issue more human rights rulings, its human rights caseload does not

compare to that of the ECtHR. The ECtHR is more directly accessible to societal actors, but the presence of a competing quasi-constitutional framework in Europe illustrates what polls have consistently shown - European citizens are confused about or unaware of their European rights. Even experts continue to debate the relationship of the Charter and the Convention to other aspects of EU and national law, underlining the complexity that societal actors wanting to mobilise European law must navigate. This context helps explain why many social movements have long shown a relatively low degree of Europeanization, as EU law offered little to them and requires adaptation to its complexities. Most grass root organizations limit their activities to the national or local level (Monforte 2014). It remains unclear whether the trajectory of European legal mobilization will eventually encompass the broader ‘rights revolutions’ seen within national democracies (Epp 1998).

Institutionally, the EU is a distinctive multi-level system of governance whose structure shapes the presence and preferences of political actors and favours some players over others (Scharpf 2010). The quantity of players involved in decision-making frequently creates gridlock. As a result, actors ‘shopping’ for the right venue to maximise their interests (Baumgartner and Jones 2009) will often end up before courts, whose incremental and case-specific decision-making leads to surprising and uneven demands for policy changes (Schmidt 2012). When controversy strikes, the CJEU has proven well insulated against any ‘court curbing’ measures (Kelemen 2012 but see Larsson and Naurin 2016). Yet Brexit and the recent surge in europhobia across the continent suggest we need to be more attentive to risks that insulated legal arenas pose if their exclusive access and focus inspire mass backlash.

Meso-level factors: national legal opportunities

The mobilization of European law is also dependent on the legal channels available to potential litigants who face distinct opportunities and obstacles across legal systems. Such

‘legal opportunity structures’ (Evans Case and Givens, 2010; Hilson, 2002) filter the way that European law impacts national policies. The national judiciary’s operations are only partially regulated by the Convention, EU law and case law. Among the most litigated Convention provisions, Article 6 violations of the right to a fair trial identify systemic problems with the length of proceedings in many states (Cichowski 2006). Meanwhile, the CJEU has repeatedly stated that national legal procedures must constitute an effective means of enforcing EU rights, and that it must not be more difficult to enforce EU rights than it is to enforce national rights. EU legislation increasingly includes procedural provisions, but harmonization is limited by the principle of procedural autonomy (Elia Antonio and Muir 2015).

Which attributes of a legal system contribute to a legal opportunity structure that is conducive to legal mobilization? Studies on the national reception of European law have often grouped countries according to their legal family or tradition, emphasising the distinction between civil law and common law countries, but it is doubtful that this distinction describes meaningful differences in the use of courts and the practical effects of litigation (Alter 2009). Important variation even within these families include the degree of judicial independence, the possibility for judicial review of legislation or administrative acts, the incorporation of the Convention with constitutional or statutory status and the ability of courts to control their docket (Alter 2009; Epp, 1998; Keller and Stone Sweet 2008, Soennecken 2016). These characteristics vary nationally. In addition, opportunities for litigation are structured along national rules governing ‘access to justice’, a key concept in litigation research, which includes rights of standing and costs (Evans Case and Givens 2010; Hilson 2002). Such rights vary both cross-nationally and between subject matters. Some systematic comparisons exist, in particular for the areas of non-discrimination (European Union Agency for Fundamental Rights 2011) and the environment (Darpö 2013). Standing rules vary particularly regarding the possibility to bring cases on behalf of somebody else or

in the public interest (Evans Case and Givens 2010), with, e.g., fairly liberal rules in the UK and restrictive rules in Germany, where showing individual concern is a general requirement. Conversely, the lack of individual opportunity to bring constitutional challenges in, e.g., the UK in contrast to Germany and Spain, creates incentives to mobilise the ECtHR. The costs of bringing a dispute to court also vary in important aspects (European Union Agency for Fundamental Rights 2011). Some countries, such as the UK, require a fee to bring a case to court, which increases upon appeal. All EU member states offer legal aid that alleviates litigation costs for persons of limited means, but differences exist concerning the extent of such aid, in particular whether it is available to interest groups or covers representation by a lawyer. Some countries require representation by a lawyer in certain kinds of cases (e.g., Germany), whereas no such requirement exists in others (e.g., Sweden). Lawyer fees are capped in some countries (e.g., Germany), but not others (e.g., the UK). ‘Loser pays’ arrangements, where the losing party has to cover the legal costs of the winner, can make engaging in legal proceedings a risky exercise (Vanhala 2012). Other sources of variation in opportunity structures for litigation are factors such as the length of legal proceedings, time limits on bringing claims to court, and the availability of legal insurance or alternative dispute settlement mechanisms (European Union Agency for Fundamental Rights 2011). National differences persist despite increasing efforts by EU institutions to improve access to justice across the EU, both through specific access to justice initiatives and the inclusion of procedural standards in substantive legislation, a development that has been termed an ‘incidental proceduralisation’ of EU law (Elia Antonio and Muir 2015).

Focusing on *legal* opportunity structures misses another factor: the availability of alternative political opportunities for influence (Bouwen and McCown 2007; Hilson 2002). It is in this aspect that research on legal mobilization should interact more closely with research on lobbying and interest group politics (Beyers et al. 2008, Klüver et al. 2015, Saurugger and

Terpan 2017, Hofmann forthcoming). The degree of a political system's openness to interest representation structures the incentives of individuals, groups and companies to turn to European law and the courts. Chris Hilson points out that such incentives are not only dependent on *structural* access to political institutions, but also their more contingent receptiveness to certain political arguments. Ideological congruence between political decision-makers and individuals, groups or companies seeking influence increases the latter's political opportunity. Similarly, legal opportunity goes beyond structural access to courts and includes the receptiveness of national judges and other officials to certain legal arguments such as those based in European law (von Staden forthcoming; Hilson 2002). Attitudes can be shown to vary in important and systematic ways. For example, Marlene Wind (2010) has argued that a preference for majoritarian democracy and the lack of a tradition of judicial review explains the reluctance of Scandinavian judges to fully endorse European law. Legal culture, or culturally shared values and attitudes towards law and legal procedures (Nelken 2004), is not just shared among the judiciary, but also among the wider public. Based on survey data, James Gibson and Gregory Caldeira (1996) find significant cross-national differences regarding the valuation of individual liberty, support for the rule of law, and perceptions of the neutrality of law. The authors expect such differences to play a central role in how European law impacts national policies, but there are few empirical tests of this proposition.

Methodologically, empirical research on the varying mobilization of EU law across national legal systems has largely been based on data relating to national judges' use of the preliminary reference procedure (Mayoral 2016). These procedures, however, cover the slimmest portion of cases concerning EU law (Bobek 2016; Kelemen and Pavone 2016). There is little evidence to establish whether reference rates to the CJEU are a valid proxy for the litigation of EU law in national courts. The much higher rate of registered applications to

the ECtHR than references to the CJEU suggests that references are poor reflections of ‘demand’ for European redress (Conant 2016). Comparing reference rates may therefore tell us too little about cross-national opportunities and obstacles for EU law litigation. A better baseline to assess legal opportunities would be litigation rates more broadly. National legal systems vary in the amount of cases they generate. Systematic comparative data is rare (Wollschläger 1998), but the newly introduced ‘EU Justice scoreboard’ may prove a valuable data-source. There is now also research on subnational variation in the use of courts (Kelemen and Pavone 2016), which suggests that any comparative analysis of legal mobilization should justify its unit of analysis.

Micro-level factors: agent characteristics

A critique of approaches that focus on the macro- and meso-level alone is that they tend to treat litigants as if they were black boxes. In doing so, they ignore agent-level characteristics that influence whether individuals, groups or companies will turn to the courts (Vanhala 2011b). Therefore, a third prong of the analytical framework presented here lies at the micro-level and focuses on the potential litigants themselves and their relationships with each other and with state institutions. This section presents four factors that have been identified in the existing literature as agent-level explanatory variables in accounting for variance in propensities to mobilise the law.

First, the perceptions of potential litigants need to be accounted for. Individuals, groups and companies need to perceive the legal opportunities available to them in order to mobilise the law (Cichowski and Stone Sweet 2003). This requires at least minimal levels of a European ‘legal consciousness’ – that is, understandings and meanings of law circulating among social relations (Silbey 2005) – among an organization’s leadership and/or membership. Marc Hertogh (2004) has argued that there is a European understanding of legal consciousness that is distinctive from its American counterpart. The latter, he argues, is

concerned with how people experience (official) law whereas the European variant is concerned with addressing the question: what do people experience as ‘law’? One treats law as the independent variable and the other as the dependent variable. Hertogh recommends unifying these approaches, and future research could apply these understandings to unpack how legal consciousness matters differently across various national settings, communities and policy areas.

Second, existing research has shown how pivotal resources can be in explaining the mobilization of European law. Findings on European legal mobilization have tended to fall in line with the idea that ‘the haves come out ahead’ (Galanter 1974). For example, Tanja Börzel (2006) found that decentralised EU law enforcement mechanisms increase opportunities for participation of environmental NGOs, but only if they possess domestic court access and sufficient resources to use it. ‘Resources’ have been defined in different ways in existing literature: from relatively narrow understandings that focus on financial resources to broader interpretations that include in-house lawyers and/or access to networks of *pro bono* legal advice (Cichowski 2016; Conant 2016; Epp 1998; Vanhala 2016). To date there has been little research that unpacks this. Does differentiating among types of resources offer better explanations of the role of resources in explaining variations in legal mobilization activity (e.g. material versus legal resources)? The literature on the role of cause lawyers has expanded to include European case studies. For example, Israël (2014) challenges conventional accounts of the rise of rights-consciousness in France, arguing that practicing lawyers and movement activists have been more important than European courts. More systematic theorising and comparative case studies could help elucidate the role that legal staff play in European legal mobilization dynamics.

A third body of work shows how identity politics influences the likelihood that law is mobilised. This work focuses primarily on interest groups as the unit of analysis but these

findings may be relevant for corporations and individual litigants as well. While the identity of an organization is interlinked with perceptions a group holds, it refers here to static or slowly-changing features of group culture. Ideological approaches may become sources of conflict or consensus within a group and may steer the group towards the use of particular tactics and strategies. For example, research reveals that groups that define themselves according to a human rights-based approach to their policy work are more inclined to rely on litigation because the courts are understood as the appropriate venue to pursue rights claims (Doherty and Hayes 2014; Jacquot and Vitale 2014; Vanhala 2009). Recent research also shows that groups, for example some trade unions, prefer to find collective national solutions to labour relations issues even when opportunities may exist in EU law (Guillaume 2015). Potential litigants' identity and culture matters yet we have little understanding about the extent it matters across contexts and how these factors interact with meso-level factors (but see Hilson 2002).

A fourth theoretical approach focuses on relational issues. This can include the relationships individuals, groups and companies have (1) with various branches of government and/or (2) with each other. This approach stems back to research that argued that those who are 'politically disadvantaged' or 'outsiders' in the legislative or executive branches are more likely to turn to the judicial arena to pursue their political objectives than 'insiders' (Cortner 1968; Vanhala 2009). This can be influenced by generational changes within an organization and attitudes towards conflict with state institutions (Morag-Levine 2003) or by structural features of state institutions. For example, socio-legal research on neo-corporatism has found that under some circumstances civil society-state partnerships have a chilling effect on legal mobilization and encourage groups to utilise other venues (Soennecken 2008), whereas under other conditions they facilitate litigation (Vanhala 2016). The relationships among individuals, groups and companies have also been shown to shape

the propensity to mobilise law (Alter and Vargas 2000). What remains to be explored is the conditions under which cooperative, competitive and conflictual dynamics are most likely to influence choice of tactics, including legal mobilization. Literature on interest group politics offers a promising place to start, and comparative research, of both the small-n and large-n variety, could help to elucidate patterns.

Conclusions

In this contribution we introduce a three-level framework for explaining EU legal mobilization. We believe it delineates the range of explanatory factors that scholars have examined in an unsystematic fashion in accounting for legal mobilization. This framework elucidates a number of research puzzles and gaps and offers a theoretical way forward.

First, we highlight that the mobilization of European law is something that happens primarily at the national level. Much attention focuses on the few cases that reach European courts but the bulk of relevant cases never make it this far. More emphasis needs to be placed on national courts, and national courts of first instance in particular. Very little data is currently available on how European law is used at these lower levels of national legal systems. Developing more systematic insights would highlight patterns against which individual case studies could be contrasted. While we have focused on litigation, legal mobilization in the broader sense of an ‘assertion of rights’ (Zemans 1983) also occurs outside the courtroom. Future research could adopt this de-centered view to identify the role of actors who are overlooked by litigation-focused approaches.

Second, this analytical framework uncovers the uneven nature of legal mobilization across Europe. Future theorising can draw on this synthetic framework to account for variation more systematically. While our framework focuses on Europe, the same three-level distinction applies to other situations where international law fosters local legal mobilization, and opens the possibility for cross-regional comparison (Alter and Helfer 2009).

Methodologically scholars should specify which source of variation they are investigating and design their research to hold factors at other levels of analysis constant. In the absence of such strategic research design, we risk studies that are overdetermined, creating theoretical explanations that do not travel across countries or policy areas, and overlooking negative outcomes on the dependent variable.

Third, sources of variation in legal mobilization differ depending on the type of participating actors. Much of the literature has focused on interest groups, while less research focuses on individuals and companies as litigants. This is unfortunate. The question of how citizens claim rights lies at the core of the normative argument about the effects of legal mobilization on democratic politics. Litigation by comparatively resourceful companies on the other hand underlies the argument that EU law contributes to a liberal transformation of social market economies. At the same time, little is known about why some companies litigate and others do not. While we believe that private litigants are the main drivers, litigation by public authorities also contributes to changes in Europe. In the EU, the Commission has used litigation against national governments to pursue its policy objectives (Schmidt 2000, Hofmann 2013), and national governments also engage in litigation against the Commission (Adam et al. 2016).

Finally, our limited understanding about the causes of variance in legal mobilization across Europe also implies that we should be careful about the normative conclusions we draw. Greater empirical insight into how individuals and interest groups use courts will allow us to discern whether European law can be a weapon of the weak or remains a ‘hollow hope’ (Rosenberg 1991). Better data on who litigates can reveal the degree of bias in EU law, an investigation that bears similarities to the theoretical discussion on an unbiased interest group system in Europe and offers opportunities to combine these agendas (Lowery et al. 2015).

The growing normative debate about macro consequences is currently missing micro foundations.

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