

**WHEN NGOs TURN TO STRATEGIC LITIGATION: EUROPEAN  
SUPRANATIONAL COURTS AS VENUES TO INFLUENCE EU ASYLUM  
POLICY AND THE DUBLIN REGULATIONS**

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## **Abstract**

In the European Union, there is an increasing scholarly interest in legal mobilization as more NGOs rely upon strategic litigation before the European courts as a political tool to seek national and transnational influence. This thesis is inspired by the socio-legal literature, a growing body of cross-disciplinary studies focusing on the legal-mobilization of interest groups and raises the question of why NGOs turn to courts and under which conditions legal mobilization is likely to take place as a political strategy to seek political and legal influence. Most of the studies of strategic litigation have focused on the compliance aspect of litigation and extensively relied on structural (macro) level explanations for scrutinizes strategic litigation. This thesis takes a different approach for explaining strategic litigation by introducing the lens of ‘prior effective experience with the European court system’ as an explanatory variable. Using a combination of quantitative and qualitative research, this thesis attempts to understand the relationship between prior legal action experience with European court system and the choice of strategic litigation before the European supranational court system. Furthermore, it focuses on European NGO’s legal mobilization battle at the European Court of Human Rights and European Court of Justice for transformation of European Asylum policy and The Dublin Regulations.

This thesis suggests two significant empirical observations (1) There is a significant relationship between the organizations' prior legal experience with European supranational court system and choice of strategic litigation for seeking influence on European Asylum policy. (2) European Courts expanding interest in Asylum field boosts NGOs choice of strategic litigation for seeking influence on European Asylum policy which in return also expands European courts’ power on the policy area.

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I dedicate this work to Academics for Peace movement in Turkey, whom have been accused of terrorism for asking peace.

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## **List of Abbreviations**

|              |   |
|--------------|---|
| <b>AI</b>    | Amnesty International                         |
| <b>AC</b>    | Asylum Case Law                               |
| <b>CJEU</b>  | Court of Justice of the European Union        |
| <b>CES</b>   | Council of European Studies                   |
| <b>CEAS</b>  | Common European Asylum System                 |
| <b>EDAL</b>  | European Database of Asylum Law               |
| <b>ECRE</b>  | European Council on Refugees and Exiles       |
| <b>ECtHR</b> | European Court of Human Rights                |
| <b>ECHR</b>  | European Convention on Human Rights           |
| <b>EC</b>    | European Commission                           |
| <b>HHC</b>   | Hungarian Helsinki Committee                  |
| <b>TEU</b>   | Treaty on the European Union                  |
| <b>UNHCR</b> | United Nations High Commissioner for Refugees |
| <b>ICJ</b>   | International Commission of Jurists           |

## Introduction

In the early days of the Schuman Plan, the idea of the European Union (EU) amounted to an international economic cooperation agreement between member states.<sup>1</sup> No non-governmental organizations (NGOs) were included in its formation, and no public interests were on the agenda.<sup>2</sup> Today, six decades after the Rome Treaty was signed, non-governmental organizations, European Union organizations such as the Court of Justice of the European Union (CJEU), non-EU institutions, and organs of the Council of Europe such as the European Court of Human Rights (ECtHR) have emerged as crucial players in policy development and law-making in the EU.<sup>3</sup> The European supranational court system played a vital role in the 1980s, fostering the transformation of the Treaty of Rome into an international treaty that governs economic cooperation and integrates the European member states.<sup>4</sup> The Rome Treaty also acts as a ‘supranational constitution’ granting rights to individual citizens.<sup>5</sup>

The emergence of the European supranational court system and the process of European integration generated expanding legal opportunities<sup>6</sup> over several decades.<sup>7</sup> Both national and transnational non-governmental actors now increasingly exploit the European

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<sup>1</sup> Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2007), 1.

<sup>2</sup> Ibid

<sup>3</sup> Anne-Marie Slaughter, *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context*. (Oxford: Hart, 2003.) ; Also see Cichowski, *The European Court and Civil Society*, 3-6.

<sup>4</sup> Cichowski, *The European Court and Civil Society*, 3-6.

<sup>5</sup> Cichowski, 3-6.

<sup>6</sup> Cichowski, *The European Court and Civil Society*, 6.

<sup>7</sup> Lisa Conant et al., “Mobilizing European law,” *Journal of European Public Policy*, (2017): 1-14, DOI: 10.1080/13501763.2017.1329846.

court system to assert social influence and pressure to policy and lawmakers in European Union.<sup>8</sup>

Supranational litigation opportunity offers disadvantaged interest groups new participation rights and a voice at the national and EU levels.<sup>9</sup> Disadvantaged groups experience more obstacles in accessing to political opportunities in order to make their voices heard in the EU and national legislative fora and/or limited legal opportunities within domestic level structures.<sup>10</sup> Thus, supranational judicial decisions can be influential and can be used by NGOs as a leverage to ‘expand the scope of rights’<sup>11</sup> or ‘transform the interpretation of the Treaty provisions’<sup>12</sup> as well as rules that are ‘otherwise immune to transformation.’<sup>13</sup> In effect, the use of the European supranational court system by NGOs can shape policy development as well as expand the boundaries of EU politics.<sup>14</sup> Kohler-Koch also notes that by using the European institutions and European court system NGOs ‘are gaining a prominent place in the programmatic re-orientation of the EU integration.’<sup>15</sup>

This study will not argue that strategic litigation challenges the significance of formal legislative policy-making and executive law-making. Instead, strategic litigation in a way

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<sup>8</sup> Cichowski, *The European Court and Civil Society*, 8-12; Conant et al., “Mobilizing European Law,” 8.

<sup>9</sup> See i.e. Chris Hilson, “New social movements: the role of legal opportunity,” *Journal of European Public Policy*, (2011) 238-255; Conant et al., “Mobilizing European Law,” 8-12.

<sup>10</sup> Gesine Fuchs, “Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries,” *Canadian Journal of Law and Society / Revue Canadienne Droit Et Société* 28 (2) (2013): 189-208.

<sup>11</sup> Cichowski, *The European Court and Civil Society*; Hilson, “New social movements,”; Fuchs, “Strategic Litigation for Gender Equality”.

<sup>12</sup> Cichowski, *The European Court and Civil Society*

<sup>13</sup> Cichowski, *The European Court and Civil Society*, 11.

<sup>14</sup> Ibid

<sup>15</sup> Cited in, Emek M Uçarer, “Tempering the EU? NGO advocacy in the Area of Freedom, Security, and Justice,” *Cambridge Review of International Affairs* (2014): 146.  
<https://doi.org/10.1080/09557571.2013.840559>.



complements and sometimes ‘enhances the essential modes of democratic governance’.<sup>16</sup> More importantly, strategic litigation arms NGOs with the ability to influence policy and law-making at the national and EU levels, especially in areas that are resistant to changes via other modes of political participation methods.<sup>17</sup>

Relying on resource mobilization and legal opportunity theories, this thesis raises the question of why and when NGOs turn to courts and under which conditions legal mobilization is likely to take place as a political strategy to seek political and legal influence in the European Union. It investigates how European NGOs are utilizing the European supranational court system to push for policy changes at the EU level, with a focus on the areas of European Asylum Policy and The Dublin Regulations. In short, using a combination of quantitative and qualitative methods, this thesis attempts to understand the relationship between prior legal action experience with the European supranational court system and the choice of strategic litigation for seeking policy transformation influence.

This thesis first introduces relevant socio-legal scholarship and theoretical background on the emerging role of international organizations in the European courts and international relations. Then, relying on existing theories and findings, it addresses why a different approach and scope is needed to understand better the dynamic between NGOs and the European supranational court system. In chapter two, I present the Dublin system, and NGOs’ struggle against the mentioned framework. In chapter three, by using newly

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<sup>16</sup> Cichowski, *The European Court and Civil Society*, 6.

<sup>17</sup> Cichowski, *The European Court and Civil Society*, 7.

introduced large-N quantitative data derived from Cichowski & E. Chrun<sup>18</sup> on the European Court of Human Rights Database, I will explore interplay dynamics between European interest groups and the utilization of strategic choice at European Legal structure. The multi-linear regression model is used to track the quantitative trends at the European Court of Human Rights as well as to test our hypothesis. Then in chapter four, using interviews conducted by the author, quantitative findings will be confronted with empirical findings from refugee/asylum NGO's in the European Union. In the last section of this thesis, empirical findings are presented with the limitations and the grounds for the future research.

### **Research question**

The role of NGOs in governance and policy-making, in the EU has received substantive scholarly attention and has been well documented over the last three decades.<sup>19</sup> Until recently, much of this work has taken an account of particular policy areas and specific organizations. Integration scholars have traditionally studied the transformation of European law and policy in the EU via different levels of political processes.<sup>20</sup> Past scholarly work on legal studies, which have focused on intergovernmental treaty negotiations, EU parliamentary policy agenda setting<sup>21</sup> or the policy development powers of the European Commission.<sup>22</sup> The participation of non-governmental organizations in European law and policy-making has also been increasingly approached by a different set

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<sup>18</sup> Rachel A. Cichowski and Chrun, Elizabeth, "European Court of Human Rights Database," European Court of Human Rights Database, accessed April 28, 2018,

<sup>19</sup> See the Cichowski, *The European Court and Civil Society*; Uçarer, "Tempering the EU?".

<sup>20</sup> Uçarer, "Tempering the EU?", 2014

<sup>21</sup> Cichowski, *The European Court and Civil Society*, 3.

<sup>22</sup> Ibid

of disciplines, often focusing on access to political structures, such as European law and policy-making bodies (Commission, Council, and the Parliament).<sup>23</sup>

Moving beyond these various forms of studies concentrate on political opportunity, legal mobilization a dynamic in which transformation of law and ‘institutional change can occur [also] from below.’<sup>24</sup> In other words, interest groups who are disadvantaged or unsuccessful in utilizing those political opportunities or, are unable to exhaust the conventional political structures can ‘weaponize and instrumentalize the law’<sup>25</sup> as a strategic tool and provoke transformations of law or policy reforms from below.<sup>26</sup>

When and why interest groups turn to legal opportunities have been also a fruitful area of research for socio-legal scholars. The focal point of much of the literature has concentrated on explanatory variables by employing organizational level (micro) analysis and structural (macro) analysis.<sup>27</sup> The organizational or agent-level analysis relies extensively on resource mobilization and organizational identity-based explanations.<sup>28</sup> For the scholars who adopt the latter, structural or condition derived explanations often drive on both legal and political opportunity structures such as access to procedures or executive rule making bodies.<sup>29</sup>

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<sup>23</sup> Uçarer Emek M, 2014,

<sup>24</sup> Cichowski, 2007, 6

<sup>25</sup> Sophie Jacquot & Tommaso Vitale ‘Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level’, (Journal of European Public Policy, 2014) 587-604,

<sup>26</sup> Ibid

<sup>27</sup> Lisa Conant et al., “Mobilizing European law,” Journal of European Public Policy, (2017): 1-14, DOI: 10.1080/13501763.2017.1329846

<sup>28</sup> Conant et al., “Mobilizing European law,” 6-9.

<sup>29</sup> Ibid

Notably, most of the scholars of the socio-legal studies look into the structure and cost-benefit analysis as the key definers of the strategic choice.<sup>30</sup> Vanhala<sup>31</sup> and Conant<sup>32</sup> suggest that the study of NGO behaviour for strategic litigation has accommodated more accounts of structural analysis while paying less attention to organizational level dynamics. In other words, socio-legal scholars have favoured macro-level analyses (i.e., access to procedures) of political and legal opportunity structures and cost-benefit calculations at the organizational level, as the research centered on micro-level elements (i.e., organizations legal capacity or prior legal mobilization experience) are considerably understudied. The oversight on engagement dynamics of interest groups with the courts is eye-catching. This thesis determines the gaps in the socio-legal literature on strategic choices and develops an explanatory approach to these issues.

Firstly, the opportunity-based and access-based explanations generalize and oversimplify the instrumentalisation of the courts.<sup>33</sup> While political-legal opportunity and cost-benefit analysis are extensively used to explain the strategic choice of litigation, there are only few studies that distinguish legal opportunity as a resource to secure compliance or legal opportunity as a tool to transform law and policy. Yet, most of the explanations explicitly or implicitly focus on litigation strategy as an enforcement tool. For instance, Cichowski<sup>34</sup> attributes the success of engagement of European NGOs with ECtHR and

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<sup>30</sup> Conant et al., "Mobilizing European Law," 7.

<sup>31</sup> Lisa Vanhala, "Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics," *Journal of European Public Policy* (2009): 740-745.

<sup>32</sup> Conant et al., "Mobilizing European Law," 8-12,

<sup>33</sup> Vanhala, "Anti-discrimination policy actors and their use of litigation strategies",

<sup>34</sup> Rachel A. Cichowski, "Legal Mobilization, Transnational Activism and Gender Equality in the EU," *Canadian Journal of Law and Society* 28, no. 2 (2013): 209-227.

CJEU, on their power of enforcement of their decisions. Shelton<sup>35</sup> observes that civil society organizations have ‘surprisingly’ influenced inter alia practices in criminal law, the administration of justice, asylum law, and property law in member states by using the ECtHR. Also, Fuchs<sup>36</sup>, Vanhala<sup>37</sup>, and Cichowski<sup>38</sup> have noted on the compliance element of litigation. Fuchs and Cichowski demonstrate that EU law has been instrumental in making progress on issues of gender equality and equal pay in the member states.<sup>39</sup> In the case of non-compliance, NGOs invoked the articles either indirectly through the ECJ (CJEU) or through direct engagement with the ECtHR. NGOs have taken up the role of an enforcer of rights.<sup>40</sup>

Secondly, a significant share of the literature in socio-legal analysis does not distinguish between different types of litigation before the court. While litigation before the ECtHR varies from being a victim (direct party), representing an applicant, third-party intervention, and submitting briefs (*amicus curiae*), studies tend to interpret the litigation process in singularity, ignoring the other modes of participation. Harlow and Rawlings<sup>41</sup> made a useful distinction between proactive litigation strategies and reactive litigation strategies. While some organizations use proactive litigation, meaning that they seek to promote institutional or policy change through the courts<sup>42</sup>, other organizations are geared toward reactive litigation, often in situations of discriminatory practices of law<sup>43</sup>. Reactive

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<sup>35</sup>Dinah Shelton, “The Boundaries of Human Rights Jurisdiction in Europe,” *13 Duke Journal of Comparative & International Law* (2003): 147,

<sup>36</sup> Fuchs, “Strategic Litigation for Gender Equality”, 2013

<sup>37</sup> Vanhala, “Anti-discrimination policy actors and their use of litigation strategies”,

<sup>38</sup> Cichowski, "Legal Mobilization, Transnational Activism and Gender Equality in the EU", 2013

<sup>39</sup> Treaty on the Functioning of the European Union, 9.5.2008/ Article 157 TFEU

<sup>40</sup> Cichowski, 2013, 210-213

<sup>41</sup> Cited in Vanhala, “Anti-discrimination policy actors and their use of litigation strategies,” 741.

<sup>42</sup> Cited in Vanhala, 741.

<sup>43</sup> Ibid

organizations challenge the law as or on behalf of direct victims and seek acknowledgement by judges to demand greater levels of compliance.<sup>44</sup>

Thirdly, the socio-legal literature tends to ‘black box’ organizations.<sup>45</sup> Organizations are depicted with fixed characteristics or as homogeneous entities, which lead to trivial accounts of analysis.<sup>46</sup> In other words, interest groups are treated as static and clones of one another; NGO’s interest type (i.e. LGBTI+ organizations versus Environmental organizations), status (i.e. ECOSOC membership, registration etc.) and social movement dynamics (i.e., organization’s strategy, preferences, resources etc.) remain understudied. These dynamics come forth when comparing environmental groups with women’s rights organizations where the former seek creation of EU level legislation the latter seek domestic level compliance with the pre-existing legislation. Also, refugee/asylum rights organizations enjoy a longer history of legal mobilization and have more expertise and develop the legal capabilities to influence the policy cycles. Newcomers of the third-party sector such as digital-rights organizations, which have shorter prior experience in the EU may lack these resources when mobilizing the European law.

Finally, most of the socio-legal literature studying the interest groups participation at ECtHR and CJEU often focused on qualitative research design and particular case studies (often comparing particular interest groups). There are only a handful studies that sustain quantitative or mixed methods as a research design. Therefore, the literature lacks

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<sup>44</sup> Ibid

<sup>45</sup> Vanhala, “Anti-discrimination policy actors and their use of litigation strategies,” 738-754.

<sup>46</sup> Ibid

quantitative studies that may provide broader – generalizable results as well as large-N analysis.

In this sense, this thesis adopts an innovative approach to study the choice of litigation strategy based on the aforementioned issues. By focusing on the transformative dimension of litigation and organizations' effective experience with legal mobilization, this thesis aims to understand why- and when – non-governmental organizations utilize litigation to transform/change the European law and policy. In short, to understand the NGOs choice of litigation better, this study unpacks the effective litigation experience with European court system as a resource type.

## Hypothesis

This thesis proposes an alternative approach to socio-legal analysis. Instead of examining legal and political opportunity structures, this study focuses on agent-level analysis by delving into organization's resource and litigation dynamics with the European Supranational court system. Resource mobilization theory suggests that interest groups turns to the strategic litigation depending on their available resources. Following Lisa Conant's suggestion that resource based explanations needs to unpack resources and focus on specific resources, this study takes organizations' legal experience with the European legal system as a specific resource type to explain their choice of litigation to pursue the organization's goals.

My central hypothesis is that non-governmental organizations with prior effective experience of litigating at European court system are more likely to use the European court system to seek influence on policy and law-making at the EU level. I define the 'effective legal experience' with two explanatory variables. First, organization's prior experience filling lawsuits with the Court. Second, organization's prior achievements using the strategic litigation.



## Research Design and scope

This thesis adopts both qualitative and quantitative methods. The quantitative part of the study seeks to understand the relationship between NGOs legal mobilization experience with ECtHR and their choice of intervention before the ECtHR for seeking influence on European asylum policy and law. The multi-linear regression model is adopted in order to explore the NGOs litigation dynamic at ECtHR relying on the ECHRD dataset.<sup>47</sup> The qualitative research element analyses the views of the legal practitioner's on the dynamics of legal mobilization through European court system and legal system. The analysis is using process tracing method for understanding the legal struggle of NGOs in the European Union against the Dublin regulations. I use four semi-structured elite interviews conducted between 23rd April and 27<sup>th</sup> April 2018, in Budapest, Hungary and Brussels, Belgium. The legal practitioners' views will be confronted with quantitative findings for triangulation purposes.

In the quantitative part of the study, I employ the multi-linear regression model with a continuous dependent variable. Quantitative section attempts to explore interest (sectoral) based trends in using the strategic litigation before the ECtHR and also presents the effect of the prior legal action on the organizations choice of the litigation. In the regression model, I define the prior effective experience with 'past litigation experience' and 'important court judgements'. I also utilize the interest type variable as an independent variable to explain different interest groups legal influence on the European case law based

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<sup>47</sup> In this study I adopt the multi-linear regression model with a dummy variable. The model will attempt to assess the relationship between two independent variables (one dummy variable) and a single continuous explanatory dependent variable.

on their prior legal experience. In short, the quantitative part focuses on NGOs engagement dynamic with the ECtHR using the Large-N analyses.

After shedding light on interest groups litigation dynamic with ECtHR in the fourth chapter, this study moves to the qualitative findings from selected NGOs that use or are interested in litigation before the CJEU and ECtHR. By using the empirical evidences collected through semi-structured interviews from NGOs, this thesis attempts to justify the quantitative findings and the hypothesis. Besides the interviews, relevant judgement and rulings from the ECtHR and CJEU on Dublin regulations are explored in this section.

The study primarily focuses on the Dublin regulations because the Dublin regulations have been deeply debated among legal scholars, European NGOs, and activists. It received substantive criticism from both integration and human rights scholars as well as NGOs, since the increased salience of refugee and immigration issues in political debates across the European Union.

The Dublin presents an exciting area since all member states are a signatory of Geneva Convention on 1951 and EU Charter of Fundamental Rights and there are severe criticisms by lawyers and scholars that Dublin regulations are in contradiction with the Geneva Convention and relevant European directives under the EU Charter of Fundamental Rights. Therefore, NGOs, lawyers and activists across Europe are mobilizing to challenge and reform the Dublin regulations.<sup>48</sup> However, although there have been strong academic and NGOs' criticism and protests across the European Union, there has hardly been any

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48 "No to this Dublin IV Regulation!" Pro Asyl, accessed May 17, 2018, [https://www.proasyl.de/wp-content/uploads/2015/12/No-to-this-Dublin-Regulation\\_German-NGO-Policy-Paper\\_Dec-2016.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/No-to-this-Dublin-Regulation_German-NGO-Policy-Paper_Dec-2016.pdf)

changes in the Dublin regulations over the last several years. Most recently with the new allocation schema, and the new European CEAS system which is primarily developed in relation with the Dublin system, the new Dublin system(IV) discussed at the stake and NGOs are eager to influence the new Dublin system.

Also, this study adopts a policy and sector-specific approach and therefore zooms onto Europe-based NGOs that are working in the refugee/asylum rights advancement in Europe. In the qualitative part of the study, primary attention is concentrated on the European Council on Refugees and Exiles (ECRE) and member organizations. ECRE is one of the oldest European umbrella organization working in the advancement and protection of the asylum/Refugee rights across Europe.

ECRE's work mainly focuses on providing legal support, conducting strategic litigation, and advocacy<sup>49</sup> in the EU and member states level. Studying ECRE and its member organizations deserve scholarly attention in studying the legal mobilization in the European Union because ECRE has been one of the most active and largest Refugee/Asylum rights umbrella organization across Europe. Moreover, it proactively seeks to use and promote strategic litigation in line with advocacy work to influence European case law and European level policymaking. Furthermore, ECRE has been deeply engaged with Dublin regulations. Sub-networks of the ECRE, namely the EDAL<sup>50</sup> and ELENA<sup>51</sup> projects have been placed strategy to serve as a bridge at promoting the strategic litigation at ECtHR and CJEU for NGOs, individuals and the lawyers across Europe.

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<sup>49</sup> See the ECRE's mission on <https://www.ecre.org/mission-statement/>

<sup>50</sup> European Database of Asylum Law, EDAL

<sup>51</sup> The European Legal Network on Asylum, ELENA

The purpose of this research is to examine NGOs' use of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) as a tool to achieve policy and legal change at the EU level. The conclusion chapter discusses the empirical findings and attempts to answer the question when and why NGOs turn to the international litigation in the European Union to seek policy and law-making influence.

Findings of this research may contribute to the debate on integration literature providing empirical evidences, on what extent the EU policy process remains controlled by member state governments and what is the role of CJEU and ECtHR shaping those policy cycles through NGO's legal mobilization. What degree of European integration on Asylum law can take shape through NGOs participation at the European court system? After concluding remarks, this study ends with the limitation and future research section.

### **Data selection and reliability**

This study adopts a mixed research design by including quantitative and qualitative methods design. The quantitative element of the study relies heavily on the European Court of Human Rights Dataset, released on 2017 and developed by Rachel Cichowski and Elizabeth Chrun<sup>52</sup> The database includes variables lay out judicial decisions<sup>53</sup> and organizations participation modes as well as importance of the court judgements<sup>54</sup> between the 1960 and 2014. It is an open dataset, available online.<sup>55</sup> Original dataset consists of two

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<sup>52</sup> Cichowski and Chrun, "European Court of Human Rights Database."

<sup>53</sup> Trends such as subject (i.e. violated articles) violation rate (frequency of the violation) defendant country.

<sup>54</sup> Effects are including organization identification number, participation rates (frequency calculated by summary), and types of participation, amicus impact, and domestic legal change

<sup>55</sup> See the website of ECHR on <http://depts.washington.edu/echrdb/>

main branches: *a judgement based dataset* and *participation based dataset*. I mainly use the *Judgement database* which includes patterns in ECtHR judgements and general trends of NGOs litigating before ECtHR.<sup>56</sup>

The original dataset includes 15,136 judgements from the ECtHR.<sup>57</sup> The datasets are coded and maintained by authors of the dataset and derived from HUDOC database.<sup>58</sup> Furthermore, as a subsidiary database, the European Database of Asylum Law has been used to crosscheck the reliability of the ECHRD datasets. Qualitative data has been collected through four semi-structured interviews.<sup>59</sup> The interviews are constructed with the thematic framework but are kept very flexible to allow interviewed legal practitioners to address other problems/findings, which were not observed out by this research. The organizations were selected based on their membership to ECRE and their accessibility.<sup>60</sup>

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<sup>56</sup> Cichowski and Chron, “European Court of Human Rights Database.”

<sup>57</sup> Ibid

<sup>58</sup> HUDOC is an online database includes judgement and case summaries.  
<https://hudoc.echr.coe.int/>

<sup>59</sup> See the EDAL database, <http://www.asylumlawdatabase.eu/en>

<sup>60</sup> Throughout the research total of 16 organizations are contacted through e-mail. The selected organizations details can be found in in appendix-2.

## Chapter 1) Theoretical background and existing literature

The power and increasing role of the non-state actors is now widely accepted as an integral part of international relations.<sup>61</sup> Nonetheless, it is only very recently that international relations scholars and legal scholarship showed an increased interest in theorizing the role of non-governmental organizations in the international sphere.<sup>62</sup> This chapter introduces the existing literature and theoretical background on the emerging role of NGOs in international courts and international relations. The first section of the first chapter introduces the relevant theories on the role of international organizations through legal mobilization of transnational interest groups.

The second section offers an overview of the development of the European supranational court system and its implications for non-state actors. The third section, relying on socio-legal analysis, presents and discusses existing explanations and conceptualizations for legal mobilization of interest groups, how they engage and utilize the supranational court system in the European Union. In this chapter, I concentrate on the European Union and interest groups within the European Union, working in the refugee/asylum field. In short, this chapter prepares the analytical ground for the discussion in the third and fourth chapters.

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<sup>61</sup> Peter J. Spiro, “Nongovernmental Organizations in International Relations (Theory),” in *Interdisciplinary Perspectives on International Law and International Relations: (The State of the Art)*, ed. Jeffrey L. Dunoff and Mark A. Pollack (2012), 223.

<sup>62</sup> Ibid

### 1.1) Transnational legal mobilization: ‘Law as weapons of the weak?’<sup>63</sup>

The role of international law (and its power), legal actors, and legal institutions are integral to the discipline of international relations. Socio-legal literature emerged as a cross-disciplinary field, influencing and feeding the core theories of political science, international relations and sociology. One of the most notable early definitions in the literature suggested that law is utilized as a resource and mobilized through courts ‘when a desire or want is translated into demand as an assertion of rights’.<sup>64</sup>

In this sense, strategic litigation can be defined as seeking influence through litigating in a case at court, which may create in return an influence beyond the court, possibly serving as a ground for social, political, and legal change.<sup>65</sup> In a broader definition, Lisa Vanhala defines legal mobilization as ‘individual or collective interest groups invoke legal norms or discourse to influence policy or behaviour’<sup>66</sup> Early literature on legal mobilization widely accepted and focused on state actors’ legal mobilization and state litigation efforts for policy and social change.<sup>67</sup> Whereas litigation by non-state actors and/or individuals was mostly represented as a domestic struggle in national courts where their capability of influence was assumed to be limited to national boundaries.<sup>68</sup>

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<sup>63</sup> Jacquot and Vitale, “Law as weapon of the weak?,” 596-604.

<sup>64</sup> Zemans, Frances, "Legal Mobilization: The Neglected Role of the Law in the Political System," *The American Political Science Review* 77 no. 3 (Sep 1983): , 700

<sup>65</sup> Mónica Roa & Barbara Klugman, “Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia,” *Reproductive Health Matters* (2014): 31

<sup>66</sup> Christine Rothmayr Allison and Lisa Vanhala, “Legal Mobilisation: Europe in Comparative Perspective,” p.1. Accessed on May 9, 2018, <https://ecpr.eu/Filestore/WorkshopOutline/34.pdf>

<sup>67</sup> Conant et al., „Mobilizing European Law,“ 7-12.

<sup>68</sup> Ibid

In the last decade, this view has dramatically changed by newly acknowledged trends. For instance, Anne-Marie Slaughter argues that some of the state roles and power have pervasively transmitted to non-state actors in an increasingly globalized world that is characterized by the massive trans-mobility of individuals, groups, and most importantly ideas.<sup>69</sup> Similarly, very recently some of the legal scholars have defined the ‘new world order is based on a complex web of trans-governmental networks, where power is often diffused to non-state groups’<sup>70</sup>. Relatively, NGOs became an inevitable part of this newly emerging global system through their increasing presence in international courts, international and multilateral institutions.<sup>71</sup>

In other words, the emergence of the international courts systems and processes of global legalization are increasingly shaping supranational and international governance<sup>72</sup> and weak groups of international relations the NGOs and transnational activists are increasingly presented and actively seeking a role in this governance model.<sup>73</sup> Thus, as suggested by Vanhala ‘Litigation as a political strategy and courts as venues to influence public policy’<sup>74</sup> is an emerging concept and litigation efforts of transnational interest groups deserve more interest than ever before.

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<sup>69</sup> Anne-Marie Slaughter, *A new World Order* (Oxford; Princeton University Press, 2004) cited in Ulrike Brandl; *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, Edited by Guy S. Goodwin-Gill, All Souls College, Oxford, Hélène Lambert, University of Westminster *International Journal of Refugee Law*, Volume 23, Issue 2, 1 (July 2011) Pages 428–431,

<sup>70</sup> Slaughter, *A new world order*, 4-12.

<sup>71</sup> *Ibid*

<sup>72</sup> Slaughter, 20-21; Cichowski, *The European Court and Civil Society*;

<sup>73</sup> *Ibid*

<sup>74</sup> Vanhala, “Anti-discrimination policy actors and their use of litigation strategies,” 740-742.



## 1.2) NGOs role in international sphere and policymaking

By the nature of international law, non-state actors of the international relations lack international legal personality.<sup>75</sup> Therefore, traditionally, the role of Non-governmental Organizations (NGOs) has been boiled down to being domestic players within the legal system of a particular state. However, this view drastically altered<sup>76</sup> in the last decades with the significant increase of transnational groups participating in different levels of international governance, seeking influence or sometimes only transferring goods and services.<sup>77</sup> The NGO literature mainly evaluate groups ‘participation based on their policy and lawmaking desires.’<sup>78</sup>

While groups like Oxfam International or Amnesty International focus on the law development and enforcement, some others emerge with delivering services with limited political activities.<sup>79</sup> However, it has been widely accepted by the recent studies that much like other political actors, ‘NGOs are self-interested entities engaged in advancing their own agendas’.<sup>80</sup> In addition, some scholars distinguish between transnational and national interest groups.<sup>81</sup> However, as suggested by Spiro, since national NGOs are also widely participating in international relations through different transnational channels (such as

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<sup>75</sup> Spiro, “Nongovernmental Organizations in International Relations (Theory),” pp. 223., 223

<sup>76</sup> See also, Slaughter, *The European Court and National Courts*, 18

<sup>77</sup> Spiro, “Nongovernmental Organizations in International Relations (Theory),” 224

<sup>78</sup> Ibid

<sup>79</sup> Ibid

<sup>80</sup> Spiro, “Nongovernmental Organizations in International Relations (Theory),” 225

<sup>81</sup> Spiro, “Nongovernmental Organizations in International Relations (Theory),”

international governance bodies, international courts, Transnational networks, etc.), it is difficult to make such distinction between national and transnational organizations.<sup>82</sup>

It may be argued that national NGOs have less institutional access than transnational NGOs but this does not change their ability to enter in transnational activities, seeking interest and influence through international courts and multilateral institutions.<sup>83</sup> Spiro on NGOs participation in international relations observes that new global decision-making processes are ought to include more NGO entities than old formal political systems.<sup>84</sup> Furthermore Spiro also breaks down NGOs participation in international decision making in three phases: (a) the ‘before’ phase,<sup>85</sup> which consists of agenda-setting power, NGO’s ability or ambition of bringing particular interest into the policy-making phases (b) the ‘during’ phase.<sup>86</sup>

In which transnational organizations participate in formal bargaining and negotiations (i.e NGOs’ consultation sessions at the European Commission) and (c) the ‘after’<sup>87</sup> phase where organizations’ take a role in implementation and enforcement of released decisions.<sup>88</sup> This distinction is important to conceptualize NGO’s participation in international relations and their ability to seek influence through different stages of the international or European policymaking. Furthermore Newman and Zarring<sup>89</sup> demonstrate

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<sup>82</sup> Ibid

<sup>83</sup> Spiro, “Nongovernmental Organizations in International Relations (Theory),” 225

<sup>84</sup> Spiro, “Nongovernmental Organizations in International Relations (Theory),” 225-226

<sup>85</sup> Ibid

<sup>86</sup> Ibid

<sup>87</sup> Ibid

<sup>88</sup> Ibid

<sup>89</sup> Abraham Newman and David T. Zaring, “Regulatory Networks: Power, Legitimacy, and Compliance” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey Dunoff and Mark Pollack (Forthcoming: Cambridge University Press, 2013), 244.

that with the rise of such transnational interest groups ‘cross-border collaboration among domestic regulatory agencies have become a defining feature of contemporary global governance’.<sup>90</sup> In social movements literature<sup>91</sup>, while the overall literature focused on distinction between formal and informal political methods and related motivations for NGO’s participation, less attention is paid on how (a) and (b) phases are being addressed by interest groups through legal mobilization.<sup>92</sup> Therefore our study is interested in addressing NGOs use of strategic litigation for influencing the *a* and *b* phases.

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<sup>90</sup> Ibid

<sup>91</sup> See also, See also Steven M. Buechler, "New Social Movement Theories," *The Sociological Quarterly* 36, no. 3 (1995): 441-464; Thomas R. Rochon and Daniel A. azmanian, "Social Movements and the Policy Process." *The Annals of the American Academy of Political and Social Science* 528 (1993): 75-87.

The Annals of the American Academy of Political and Social Science 528 (1993): 75-87.  
<http://www.jstor.org/stable/1047792>.

<sup>92</sup> See the relevant publication, Morris, Aldon & McClurg Mueller, Carol. (1994). *Frontiers in Social Movement Theory*. Social Forces. 72. 10.2307/2580310.

### 1.3) Role of the supranational court system in the European Union

The effective protection of citizens' rights has been one of the most important aspects of constitutional democracies.<sup>93</sup> 'The idea of a written constitution (...) there is a set of constitutional provisions on rights and liberties, and there are mechanisms for the protection and enforcement of those rights and liberties by an independent judiciary'.<sup>94</sup> In the European Union, the protection of citizens' and residents' rights are protected and ensured as a sole duty of the member state governments and these rights are monitored and enforced by the supranational legal system and the organs of the Council of Europe.<sup>95</sup>

Under the effect of this system, András Sajó<sup>96</sup> defines the European legal system as a product of the long process of juridification<sup>97</sup> which makes the European system fundamentally different than other continental legal adjudication systems because of the unique 'multidimensionality of constitutional protection'<sup>98</sup> in the European Union. The multidimensionality of the constitutional protection of rights in Europe is maintained by the European Court of Human Rights as well as by the Court of Justice of the European Union (CJEU).<sup>99</sup>

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<sup>93</sup> Lech Garlicki; Cooperation of courts: The role of supranational jurisdictions in Europe, *International Journal of Constitutional Law*, Volume 6, Issue 3-4, 1 July 2008, 509

<sup>94</sup> Garlicki, "Cooperation of courts," 509.

<sup>95</sup> *Ibid*

<sup>96</sup> Originally cited in Garlicki, "Cooperation of courts," 509., See the relevant publication, András Sajó, *Limiting Government: an Introduction to Constitutionalism*, p, 243 (Central European Univ. Press 1999).

<sup>97</sup> *Ibid*

<sup>98</sup> Garlicki, "Cooperation of courts," 509

<sup>99</sup> Garlicki, "Cooperation of courts," 509, 510

According to Garlicki, the European Union's 'supranationalization' is deeply connected with human rights values under the European Convention on Human Rights.<sup>100</sup> The Council of Europe as the key role player runs the supranationalization of the European legislation in many aspects (such as economic and political rights).<sup>101</sup> The integration and governance of the human rights are specifically fostered by the help of the aforementioned supranational courts.<sup>102</sup>

While the Strasbourg court as Council of Europe's organ emerged as an important enforcer of human rights among member states, CJEU's role with regard to human rights protection in the European Union has been more complex. This is because CJEU is mainly designed to address and achieve greater political and economic integration between EU Member States and to ensure the compliance with EU legal framework.<sup>103</sup> However, it also comes to hear complaints brought up by individuals<sup>104</sup> concerning human rights violations by EU institutions and/or EU member states.<sup>105</sup>

After exhausting the local courts rule, individuals, NGOs can lodge an application before the ECtHR. Therefore, socio-legal literature suggests that Strasbourg court presents the most accessible (or visible) legal opportunity structure for non-governmental entities to seek domestic or European level influence. Although the significant share of the ECtHR judgements designed to punish violations through

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<sup>100</sup> Garlicki, "Cooperation of courts," 512

<sup>101</sup> Ibid

<sup>102</sup> Garlicki, "Cooperation of courts," 510

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> See the RULES OF PROCEDURE OF THE COURT OF JUSTICE, Third-party proceedings (Article 97), Preliminary issues (Articles 91 and 92). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legisum%3Aai0049> Accessed on 28<sup>th</sup> May 2018

compensation payment for the victims, judgements are also used by interest groups for pushing social and policy change in the member states, as well as at the European Union level.<sup>106</sup>

Interest groups or individual's engagement with CJEU have been more complicated compared to ECtHR and therefore are assumed to be less friendly with non-state entities. However as the Charter of Fundamental Rights and the EU secondary legislation is binding for all member states, CJEU as the sole judicial authority among member states has the right and obligation to enforce those rights under the Article 51 of the EU Charter of Fundamental Rights.<sup>107</sup> Furthermore, this framework creates new opportunities for the CJEU to also contribute to sectoral policy development, and offer an alternative space for NGOs' influence.<sup>108</sup> While NGOs, may from time to time be able to litigate on their own name when their prerogatives are at stake, or back individual litigation, their abilities to intervene as third parties before the CJEU are very limited. For example, in the context of preliminary ruling proceedings, on those organizations that were listed as third parties in the domestic proceedings, which led to the preliminary reference, can submit written or oral observations before the CJEU.

*Preliminary reference* of CJEU, which is regulated under the article 234<sup>109</sup>, allows member state's judges to ask the CJEU for a clarification of the interpretation of the

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<sup>106</sup> Cichowski, *The European Court and Civil Society*, 11.; See also the Cichowski, 2013

<sup>107</sup> European Parliament, Directorate general for internal policies policy: The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures,

<sup>108</sup> Cichowski, 2007, p.12

<sup>109</sup> See the RULES OF PROCEDURE OF THE COURT OF JUSTICE, Preliminary issues (Articles 91 and 92).

*acqui communautaire*.<sup>110</sup> Therefore, if the non-governmental organizations or individuals persuade the national court to send the preliminary reference, individuals or non-governmental organizations can indirectly seek influence engaging with EU law and EU legal system.<sup>111</sup> This may suggest that under the effect of the CJEU's supremacy and direct effect doctrine<sup>112</sup> court rulings may play a crucial role in development or transformation of law and policy.<sup>113</sup> Thus, studying NGOs' indirect use of preliminary reference is an important area of study and deserves fruitful attention.<sup>114</sup> Furthermore, Article 6(2) of the Treaty on European Union<sup>115</sup> allows a formalization of dialogue between CJEU and ECtHR to preserve the specific features of European Convention for the Protection of Human Rights in the European Union. Such dialogue allows two supranational courts to seek influence in protection and provision of human rights; it also allows NGOs to engage with two courts to seek national and international influence.

Overall, both ECtHR and CJEU provide unique opportunities for NGOs to make a legal claim and use litigation as a strategy to seek enforcement of human rights or reformation of a specific area of case law or policy. Therefore studying NGOs' use of both CJEU and ECtHR is particularly vital to understand how courts are emerging as effective spaces for NGOs to seek influence through using the European Union legal framework.

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<sup>110</sup> Cichowski, *The European Court and Civil Society*, 15-16

<sup>111</sup> Cichowski, *The European Court and Civil Society*, 27

<sup>112</sup> Armin Cuyvers, "The Scope, Nature and Effect of EU Law" in *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, ed. Emmanuel Ugirashebuja et al., (2017), 162.

<sup>113</sup> Cichowski, *The European Court and Civil Society*, 27

<sup>114</sup> *Ibid*

<sup>115</sup> Treaty on the Functioning of the European Union, 2012/C 326/01

#### 1.4) Existing literature on legal mobilization

The literature on the legal mobilization can be divided into two categories: scholars who focus on agents who mobilize the law from top to down and those who focus on agents who mobilize the law from the bottom to up.<sup>116</sup> Scholars that adopt the top-to-down approach are primarily interested in studying the judiciary's ambitions to influence EU policy using the law and judicial impact.<sup>117</sup> Other scholars adopt the bottom-to-up approach, which covers non-governmental agents. In this sense, bottom-to-up studies focus on how interest groups mobilize the law to press for social change, enforce compliance with existing laws and policies, or seek policy and law-making influence. The bottom-up approach can also be categorized as scholarship that focuses on agent-level, structural, or environment-based analysis.<sup>118</sup> Structure-based explanations mostly examine the utilization of access and availability of the particular structures such as political opportunity structures (POS) and legal opportunity structures (LOS)<sup>119</sup>.

Explanations deploy access and availability arguments when explaining interest groups' choices regarding strategic litigation. As highlighted by Chris Hilson, the lack of POS may affect the choice to adopt a litigation strategy as a replacement for lobbying<sup>120</sup>. The choice of protests as a strategy may be affected by poor POS and LOS. For instance, Kitschelt<sup>121</sup> states that interest groups are most likely choose protest as a political strategy

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<sup>116</sup> Vanhala, "Anti-discrimination policy actors and their use of litigation strategies," 740-742.; Allison and Vanhala, "Legal Mobilisation" Cichowski, *The European Court and Civil Society*, Conant 2002;

<sup>117</sup> Allison and Vanhala, "Legal Mobilisation"

<sup>118</sup> Christine Rothmayr Allison and Lisa Vanhala, "Legal Mobilisation: Europe in, 4

<sup>119</sup> Hilson, "New social movements: the role of legal opportunity," 238-255.

<sup>120</sup> Hilson, "New social movements: the role of legal opportunity," 238-240

<sup>121</sup> Cited in Hilson, "New social movements: the role of legal opportunity," 243



to seek influence in a political regime where POS is limited, and the regime is strong, rather than regimes where POS are open, yet regime is weaker.

Explanations based on the rivalry between POS and LOS assume that when organizations are unable to use POS effectively at the national level, they may consider the availability of transnational POS or LOS. Similarly, Cichowski<sup>122</sup> states that '[international] litigation dynamic starts as a result of strategic demand by individual or group who are either disadvantaged or advantaged by an available set of rules.'<sup>123</sup> For example, in the last decades interest groups like environmental, animal welfare, LGBTI, and women movements have exploited European supranational legal opportunities over or in combination with political opportunities for social change.<sup>124</sup>

Agent-level<sup>125</sup> explanations are primarily focused on resource mobilization and identity.<sup>126</sup> Resource mobilization (RM) theories often discuss organization's financial means (i.e. ability to hire lawyers, also access to pro-bono lawyers), experience and knowledge (the organization's capacity to litigate), and staff (i.e. how many legal advisers work for the organization) as an explanatory variable to understand organizations' choices regarding strategic litigation.<sup>127</sup> RM theory suggests that organizations are rational actors, therefore they desire to mobilize their resources in the most efficient and effective way.<sup>128</sup> To that end, interest groups choose strategies (and sectors) based on their available

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<sup>122</sup> Cichowski, *The European Court and Civil Society*, 8

<sup>123</sup> Ibid

<sup>124</sup> Cichowski, *The European Court and Civil Society*,

<sup>125</sup> See the relevant study, Jacquot and Vitale, "Law as weapon of the weak?," 596-604.,

<sup>126</sup> Hilson, "New social movements: the role of legal opportunity," 238-240

<sup>127</sup> Conant et al., "Mobilizing European law."

<sup>128</sup> Jenkins, J. Craig. "Resource Mobilization Theory and the Study of Social Movements.", 1983, pp 527-534

resources. Also, NGOs, which have tried strategic litigation several times and failed to win actual improvement in conditions that were targeted (i.e. policy reform) may decide to try a different strategy, primarily if it has relied on pro bono or volunteer legal professionals in the past and does not have legal professionals “in-house.” An organization that does have in-house legal staff and has had some successes may stick to a litigation strategy.

Furthermore, resource mobilization theory also argues that social movements, which accomplish desired goals by using the similar structures frequently (i.e. strategic litigation), store up an organizational capacity that increases their likeliness to use similar structures more.<sup>129</sup> Different scholars of socio-legal analysis focus on different aspects of RM. Some focus on an organization’s financial means, ability to hire in-house lawyers, and access to pro-bono lawyers<sup>130</sup> others focus on legal capacity.<sup>131</sup> In surveying the literature on RM-based explanations, Lisa Conant draws the conclusion that there has been little research that unpacks different types of resources, suggesting that RM analysis deserves more in the depth-level analysis.

On the other hand, identity-based explanations<sup>132</sup> tend to focus on unit analysis and an organization’s identity-based preferences. In other words, an organization’s choice of strategy is not determined by its access to POS or LOS or resources but by its identity or preferences. For instance, Vanhala<sup>133</sup> and Jacquot, Vitale<sup>134</sup> suggest that some of the

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<sup>129</sup> See the relevant organizational capacity analysis at Dosh, P. Land, Protest, and Politics: The Landless Movement and the Struggle for Agrarian Reform in Brazil, (2010).

<sup>130</sup> Conant, Hofmann, Soennecken & Vanhala, 2017, 7

<sup>131</sup> Ibid

<sup>132</sup> See the relevant scholarship on Vanhala, “Anti-discrimination policy actors and their use of litigation strategies”.

<sup>133</sup> Vanhala, “Anti-discrimination policy actors and their use of litigation strategies”.

<sup>134</sup> Jacquot and Vitale, “Law as a weapon of the weak?”.

women's interest groups in Europe do not turn to litigation, because they prefer other mobilization strategies over LOS even though they have a capacity or access to use it.

Recent research such as Jacquot and Vitale's study on 'Law as a weapon of the weak'<sup>135</sup> is drawing on mixing the two categories and utilizes both agent-level and structural based explanations to explain the choice of the strategic litigation. Following this trend, this thesis uses existing findings from both agent-level and structure-based research to address NGOs' choices regarding litigation in the European Union.

Following in particular Lisa Conant's note<sup>136</sup>, this study unpacks organizations' level of legal experience as a specific resource type to explain their choices to use or not use strategic litigation. I argue that organizations tend to build institutional capacity when litigating within the European court system, thus gaining sufficient experience to expand their further strategic litigation interest. Also effective utilization of strategic litigation over a time might encourage other organizations to opt for litigation.

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<sup>135</sup> Ibid

<sup>136</sup> Conant et al., "Mobilizing European law," 7.

### **1.5) Chapter Conclusion**

This chapter presented the findings of relevant literature and attempted to conceptualize the European supranational court system and the increasing role of NGOs in the European Union. In addition, I presented my research question and hypothesis, suggesting why a different scope and approach is necessary to study the choice of strategic litigation. In the next section, I present the Dublin system, relevant legal criticisms, and the legal struggles of NGOs against the Dublin system.

## **Chapter-2) Country responsible for asylum application - The Dublin System**

The system for the determination of the country responsible for an asylum application, in short, the ‘Dublin system,’ has emerged as a product of European integration in the asylum field. Since the first Dublin regime was introduced in the 1990s, it has triggered substantive criticism from legal scholars as well as European NGOs for being incompatible with the EU human rights norms and exposing asylum seekers to ill-treatment and human degradation. First section of this chapter, I briefly introduce the historical development of the Dublin system and contemporary functions. In the second section of this chapter, I address the central legal criticisms and reactions from NGOs on the European Asylum policy and the Dublin regulations. I will particularly focus on how NGOs can extend their struggle against the Dublin system by turning to courts.

### **2.1) Development of the Dublin system**

The establishment of European Schengen system, which allows people to move without border control in principle, has also brought the question of the irregular asylum management. Responding to this question, the Dublin system emerged at the beginning of the 1990s as a first attempt to harmonize European asylum policies. The First convention was adopted in 1997, later reformed in the Dublin II regulations in 2003 and the last one in 2013, known as Dublin III.<sup>137</sup> The main aim of the Dublin Regulation is to ensure that only one member state is solely responsible for examining an asylum claim for international protection. Second, it seeks to prevent someone from claiming asylum in the

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<sup>137</sup> Dublin II of the regulation (EC) No. 343/2003

country of their choice (also known as asylum shopping<sup>138</sup>) or from traveling to other countries while the asylum claim is being processed. Third, is to ensure that asylum seekers have effective access to asylum procedures.

For many scholars of European integration, the Dublin system first emerged as a ‘necessity’ to cooperate in asylum management after the abolition of the member states borders<sup>139</sup>. In the beginning, it was seen as a sole convention that supposedly regulates the asylum management among member states, but later due to a deepening need for European integration in the asylum area, it has arguably transformed into a more comprehensive agreement and profoundly influenced European Asylum case law.<sup>140</sup> The first Dublin convention was mainly designed to regulate the examination of the asylum applications among member states, and avoid duplication of asylum claims. However shortly after the Convention had entered into force, member states have raised various problems concerning the ineffectiveness of the convention. Ucarer<sup>141</sup> argues that the first Dublin convention was ineffective in harmonizing asylum policies and were increasing the likelihood of *refoulement*. Therefore, it was a necessity for member states to agree upon a new agreement that will provide a better ground for harmonization in European asylum policy.<sup>142</sup>

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<sup>138</sup> See the Migration and Home Affairs’ definition, [https://ec.europa.eu/home-affairs/content/asylum-shopping\\_en](https://ec.europa.eu/home-affairs/content/asylum-shopping_en)

<sup>139</sup> Uçarer, "Managing Asylum and European Integration: Expanding Spheres of Exclusion?" International Studies Perspectives 2, no. 3 (2001): 288-304. <http://www.jstor.org/stable/44218171>

<sup>140</sup> European Commission, DG Migration and Home Affairs, ‘Evaluation of the Implementation of the Dublin III Regulation’, (18March2016) [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation\\_of\\_the\\_implementation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf)

<sup>141</sup> Ibid

<sup>142</sup> Ibid

Responding to those problems and call for better harmonization in asylum area, the Dublin convention was revisited in 2001,<sup>143</sup> and relatively new Dublin Regulation was adopted in 2003<sup>144</sup>, with a deeper aim of integrating European Asylum policy and asylum processing among member states. The Dublin Regulation that was adopted in 2003 is today still largely in force after slightly being reformed in 2013 following The Hague Programme's recommendations.<sup>145</sup>

In line with efforts to improve Common European Asylum System (CEAS) in 2007, new EU rules and procedures developed in the area of EU asylum policy in order to bear deeper harmonization in the EU asylum rules and increasing sense of responsibility among member states.<sup>146</sup> Therefore several complementing directives has been issued (or revised) by the European Commission's policy plan. Such as new Reception Conditions Directive<sup>147</sup>, revised Qualification Directive<sup>148</sup>, and EURODAC regulation<sup>149</sup> to complement and support the Dublin Regulations.

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<sup>113</sup> See European Commission policy draft – Evaluation of the Dublin Convention. Working paper no SEC(2001)755', June, 2001

<sup>144</sup> Council Regulation (EC) No 343/2003 of 18 February 2003

<sup>145</sup> European Council, the Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ2005 C 53/01.

<sup>146</sup> European Commission, 'Common European Asylum System' [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en)

<sup>147</sup> Directive 2013/33/EU of the European Parliament and of the Council

<sup>148</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011

<sup>149</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013

## 2.2) Criticism and problems with European Case Law

Despite the fact that, through ‘large public consultations’ European Commission has been bearing various NGOs, political parties, and member states recommendations in the process of transforming CEAS and the Dublin regulations,<sup>150</sup> many NGO’s, human rights activist claim that their voice went unnoticed by the commission.<sup>151</sup> There are different problems raised by different parties. For instance member states in transit zones of irregular migration (which received a large influx of asylum seekers) often criticized the Article 10,<sup>152</sup> and Annex II of the Regulation (EC) no 1560/2003,<sup>153</sup> (later, Article 17(1) of Regulation (EU) No 604/2013) which defines the responsible state in the case of ‘irregular border crossing’ to the EU territory. The claim is that Article 10, as well as Article 15 on the humanitarian clause<sup>154</sup> are punishing transit countries by leaving those member states alone in confronting the influx of asylum seekers, as they constitute the EU’s external borders.<sup>155</sup>

From the perspective of NGOs and human rights scholars, the Dublin II and III systems were criticized for not complying with the Geneva Convention and the EU Charter of Fundamental Rights, which contain legal obligations for member states to offer effective

<sup>150</sup> European Commission, ‘Common European Asylum System’ [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en)

<sup>151</sup> EDAL coordinator, interview by author, Brussels, April 25th 2018.

<sup>152</sup> Article 10(1) of regulation (EC) No. 343/2003

<sup>153</sup> Regulation (EC) No 1560/2003 of 2 September, Regulation(EC) No 406/2002 of 28<sup>th</sup> February.

<sup>154</sup> Article 15 of the regulation (EC) No. 343/2003

<sup>155</sup> Similar to this claim see CJEU – Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union, 6 September 2017



protection to asylum seekers. For instance, the international and EU law, protects access to effective remedies. Thus, all EU member states expected to do so.

The current Dublin system attempts to define the effective remedies by the Article 27(1) as ‘*an appeal or a review.*’ However according to the European Commission DG Migration and Home Affairs report<sup>156</sup>, because of the lack of effective definitions of the time limits, the right of access to effective remedies significantly varies in the cases of the automatic transfers under the Dublin regulations. Therefore article in a way shows incompetency with the European Convention on Human Rights *Article 2 and 3* and International Covenant on Civil and Political Rights.<sup>157</sup>

Similarly, the Article 27(2) defines the asylum examination periods with a definition of the ‘*a reasonable period of time,*’. Such sweeping definition of the article leaves judicial discretion to the member states. Therefore, it has been argued that such ‘imprecise’ definitions leads to different set of practices among the member states.<sup>158</sup> Furthermore, current Dublin III regulations do not bring the relevant obligations for ensuring the access to effective remedies. It has been commonly argued by NGOs that without complementary mechanisms that would ensure access to effective remedies, only placing ‘access’ to asylum seekers is not enough for complying with effective remedies rule under the article 47.<sup>159</sup>

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<sup>156</sup> Report, 2016, Evaluation of the Implementation of the Dublin III Regulation, European Commission DG Migration and Home Affairs.

<sup>157</sup> European Council on Refugees and Exiles, THE ROAD OUT OF DUBLIN: REFORM OF THE DUBLIN REGULATION(2016), <https://www.ecre.org/wp-content/uploads/2016/10/Policy-Note-02.pdf>

<sup>158</sup> Ibid

<sup>159</sup> Article 47 of the Charter: Right to an effective remedy and to a fair trial

As highlighted by the International Commission of Jurists (ICJ) report<sup>160</sup>, in the several cases, ECtHR ruled under the article 13 of the Charter that effective access needs to be complemented by legal<sup>161</sup> and language support. CJEU also addressed the issue of effective remedies and urged member states to provide a practical time limit that would enable asylum seekers to bring effective action against the relevant decision of the authorities.<sup>162</sup>

ICJ report<sup>163</sup> stresses out that, in order to set effective ensuring mechanisms for access to effective remedies, the new Dublin IV regulations must ensure precise time limits and set other necessary grounds and obligations for ensuring that asylum seekers have the efficient way of accessing the effective remedies.

### **2.3) Problems of protection of minors and vulnerable applicants**

Article 7 of Dublin is regulating the responsibility of the allocation of minor asylum seekers with their family members. The article is also heavily criticized by several NGOs due to ineffectiveness of the criteria of bringing family members and minors together.<sup>164</sup> As demonstrated by Germany's largest refugee rights organization the article 7 and other subsequent articles on minors and family unification *infringes*<sup>165</sup> the European

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<sup>160</sup> Report, 2016, Comments of the International Commission of Jurists on specific procedural measures in the Recast of the Dublin Regulation, International Commission of Jurists

<sup>161</sup> M.S.S. v. Belgium and Greece, ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011, para. 301.

<sup>162</sup> See the relevant case, CJEU, C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration, 28 July 2011, para. 66 ; <http://www.asylumlawdatabase.eu/en/content/cjeu-c-6910-brahim-samba-diouf-v-ministre-du-travail-de-l%E2%80%99emploi-et-de-l%E2%80%99immigration>

<sup>163</sup> Report, (2016) Comments of the International Commission of Jurists on specific procedural measures in the Recast of the Dublin Regulation, International Commission of Jurists

<sup>164</sup> Article 7(1) of regulation (EC) No. 343/2003

<sup>165</sup> Report(2017) PRO ASY, RSA, The Dublin family reunification procedure from Greece to Germany

Convention on Human Rights and the Charter of Fundamental Rights of the European Union, together with the constitutional right of safeguarding family unity under the Article 24 of the charter.<sup>166</sup> Furthermore, CJEU ruled on 6 June 2013<sup>167</sup> that, in line with the principle of “child’s best interests” under the Asylum Procedures Directive,<sup>168</sup> member state governments must provide special conditions to unaccompanied minors. The judgement also suggests a transfer of unaccompanied children under Dublin regulation would be violating the case law of the CJEU.

#### **2.4) Problems with the relocation of the asylum seekers (charge/take back requests)\**

Current Dublin regulations under the article 22(1) and the article 23(1,7) regulate the examination of the asylum claims. In accordance with this set of articles, member states must ensure, accept, reject, or proceed with the take-charge request within two months after the exact submission of the asylum claim. However, although the majority of the member states respected the relevant time periods<sup>169</sup>, in receiving the take back charges (request of transfers) occasionally, some member states declined the request and invoked the reconsideration request under the Article 23(2)<sup>170</sup>. In such cases, asylum seekers are exposed to inhuman treatment at reception centers and forced to wait several months.<sup>171</sup>

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<sup>166</sup> Press release (2017) Pro ASYL, RSA, No more separations of families!

<sup>167</sup> See the case of C-648/11, MA, BT and DA v Secretary of State of the Home Department, 6 June 2013, <http://www.asylumlawdatabase.eu/en/content/cjeu-judgment-case-c-64811-ma-bt-and-da-v-secretary-state-home-department-6-june-2013>

<sup>168</sup> Council Directive 2005/85/EC

<sup>169</sup> Report (2016) The Reform of the Dublin III Regulation by Policy Department C - Citizens' Rights and Constitutional Affairs European Parliament

<sup>170</sup> Ibid

<sup>171</sup> See the report (2016) The Reform of the Dublin III Regulation by Policy Department C - Citizens' Rights and Constitutional Affairs European Parliament

## 2.5) Problems of the implementation of automatic transfers

The Implementation of the automatic transfers arguably has been one of the most problematic aspects of the Dublin III regulations. Because of the lack of effective definitions, asylum seekers are often being left in long procedural fights between member states, which often caused human degradation and ill-treatments. Concerning the implementation of the automatic transfers, specifically the article 26 (notifying the transfer decision) article 29 (time limits of the transfers) and use of detention (article 28) have been often criticized for not complying with the ECHR.<sup>172</sup>

Article 28 which regulates the use of procedure for detention has received also large legal criticisms. It has been argued that the article 28 under Dublin III which provides the definition of ‘*in order to secure a transfer procedure*’ detention shall take place.<sup>173</sup> However such definition does not specifically define in which stage of asylum seekers examination, act of detention can put in action by the member state.<sup>174</sup>

According to the European Commission Policy Department – Citizens’ Rights and Constitutional Affairs report, practices of detention differ significantly by each member state. For instance, often detention of asylum seekers practices start from the very beginning of the procedure (before the responsible state is defined according to the Dublin regulation).

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<sup>172</sup> See ICJ report; See also the comment report by the ECRE on Regulation (EU) No 604/2013

<sup>173</sup> Ibid

<sup>174</sup> See the report (2016) The Reform of the Dublin III Regulation by Policy Department C - Citizens' Rights and Constitutional Affairs European Parliament

Similarly, detention conditions also greatly vary in the member states, leading to uncertain conditions.<sup>175</sup> This is because detention conditions are not sufficiently defined in the regulation. For example, in Netherlands and UK, asylum seekers are detained with required conditions under the Reception Conditions Directive (RCD).<sup>176</sup> Whereas in Greece and Bulgaria detention centers often lack sanitary facilities and are often overcrowded.<sup>177</sup> Therefore, article 4(1) of the Dublin Regulation has been criticized for not establishing sufficient protection conditions for asylum seekers in the stage of asylum examination.

ICJ's proposal for new Dublin Amendments and Joint declaration by the Refugee/Asylum rights organizations<sup>178</sup> demonstrate that in order to comply with the EU charter, new Dublin regulations should define effective access to social assistance for asylum seekers, in any stage of detention or examination of asylum seekers.

Overall criticisms mostly concentrated on a lack of refugee protection due to automaticity of the deportations, and ineffectiveness of the Dublin system. Furthermore, several NGOs have demonstrated that there are likely to be more human rights violations of asylum seekers, if the existing Dublin regulations remain with current settings.<sup>179</sup> In short, “the first country of asylum” or “safe third country” is disregarded in reality<sup>180</sup> and asylum seekers are often left in situations where their rights are absorbed.<sup>181</sup>

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<sup>175</sup> Ibid

<sup>176</sup> Ibid

<sup>177</sup> Ibid

<sup>178</sup> (2017) REFUGEE POLICY IN EUROPE – NO TO THIS DUBLIN IV REGULATION! – Joint declaration by the Refugee/Asylum rights organizations ([https://www.proasyl.de/wp-content/uploads/2015/12/No-to-this-Dublin-Regulation\\_German-NGO-Policy-Paper\\_Dec-2016.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/No-to-this-Dublin-Regulation_German-NGO-Policy-Paper_Dec-2016.pdf))

<sup>179</sup> Ibid

<sup>180</sup> Ibid

<sup>181</sup> European Council on Refugees and Exiles 'ECRE's concerns about EU proposals for expanded use of the Safe third country concept, October 2016.

## 2.6) The New Dublin System and NGOs

On May 4<sup>th</sup>, 2016<sup>182</sup> the European Commission decided to recast the Dublin III Regulation in light of the reformed CEAS, calling for deeper integration and harmonization of the European Asylum policy.<sup>183</sup> Following this call, a significant share of NGOs across Europe showed remarkable interest in influencing the new amendments by using political and legal opportunities<sup>184</sup>. There have been growing political mobilization efforts by refugee/asylum rights organizations, through protests<sup>185</sup> as well as advocacy efforts.<sup>186</sup> There is also evidence of increasing efforts by refugee rights organizations to exploit legal opportunities for influencing the redesign of the Dublin Regulations.

Furthermore, after the CJEU and ECtHR landmarks decisions challenging vital elements of the Dublin III Regulation, it appears that legal opportunities for reforming the Dublin III regulation through litigation gained visibility and attracted the attention of the NGOs. While more NGOs were able to participate in the amendments of the Dublin III, through consultations held in European Parliament, many of the rights organizations were

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<sup>182</sup> See the ECRE's report on Commission proposal for reform of the Dublin system

<sup>183</sup> Briefing(2016) Reform of the Dublin system European Commission decision No:ST-53/2016

<sup>184</sup> See the ECRE's report on Commission proposal for reform of the Dublin system

<sup>185</sup> Also see Newstalk(2015)'Amnesty stage international Dublin protest calling for repeal of 8th amendment'. See also the See the Dublin protests (Thousands of Migrants Are Protesting Outside a Train Station in Hungary, As Europe's Crisis Keeps Getting Worse, <http://nymag.com/daily/intelligencer/2015/09/migrants-protest-outside-hungarian-train-station.html>)

<sup>186</sup> See the deceleration of Amnesty International and ECRE both reiterate call on European states not to send asylum seekers back to Bulgaria under the Dublin Regulation (<http://www.asylumlawdatabase.eu/en/content/amnesty-international-and-ecre-both-reiterate-call-european-states-not-send-asylum-seekers>)

still excluded in the formation of the Dublin III or their influence was limited.<sup>187</sup> Therefore, I argue that the NGOs struggle against Dublin regulations may profoundly be extended by using the European courts as swords and the European Human rights as shields to battle against the Dublin regulations.

### **Chapter-3) Quantitative Results**

In this chapter, using quantitative data from European Court of Human Rights Database (ECHRd) and European Database of Asylum Law (EDAL), first I examine the dynamics of different interest groups mobilization trends before the European Court of Human Rights between the years of 1960-2014. Then focusing on Refugee/Asylum interest type and using the quantitative results, I explore my central hypothesis whether organizations prior effective legal experience with European court system has an effect on the choice of strategic litigation. The findings in this chapter will be compared with the qualitative findings in chapter four.

#### **3.1) Variables**

This chapter presents the detailed examination of the variables used in this study. Relying on European Court of Human Rights Database (ECHRd), this study uses nominal and continuous cardinal variables that are statistically measurable and comparable. Some

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<sup>187</sup> See the consultation paper, commission of the European communities/Green Paper, on the future of Common European Asylum system, [https://ec.europa.eu/home-affairs/what-is-new/public-consultation/2007/consulting\\_0010\\_en](https://ec.europa.eu/home-affairs/what-is-new/public-consultation/2007/consulting_0010_en)

of the non-nominal variables in the ECHRD dataset are replaced with measurable cardinal variables.

A multi-linear regression model is adopted to show whether interest groups with prior experience with the court increases their likeliness for future engagement with the Court. Effective prior experience measured by the number of court judgements and importance of the court judgements. In the design of the variables, intervention type, interest mode (dummy) and importance of the court decision are used as independent variables and with the number of cases as a dependent variable.

***Interest mode*** (coded as partid1-25)

In the original dataset, each judgement (and therefore each case) is coded with a specific organizational participation mode. However, for our interest in this study, I have re-coded and created a new interest type called Refugee/Asylum NGOs by inserting each organization working in refugee/asylum rights area into this newly created interest type and excluded them from other interest groups/NGOs. The variable is used to as dummy variable to differentiate interest groups litigation dynamics from each other.

***Intervention type*** (coded in original dataset as partmode, 1-5)

In the dataset, each organization with a particular case is assigned with the type of the intervention. Namely, the partmode ranked the organization's participation mode with each case. Intervention types are defined as 1, Intervening as victim, 2, representing an applicant, 3, third party intervention 4, Court invites the party as amicus and 5, third party intervention request rejected by the court. This variable is used as an independent variable to track the organizations involved with the court based on their intervention type.

***Importance of the court judgements*** (coded as impt)



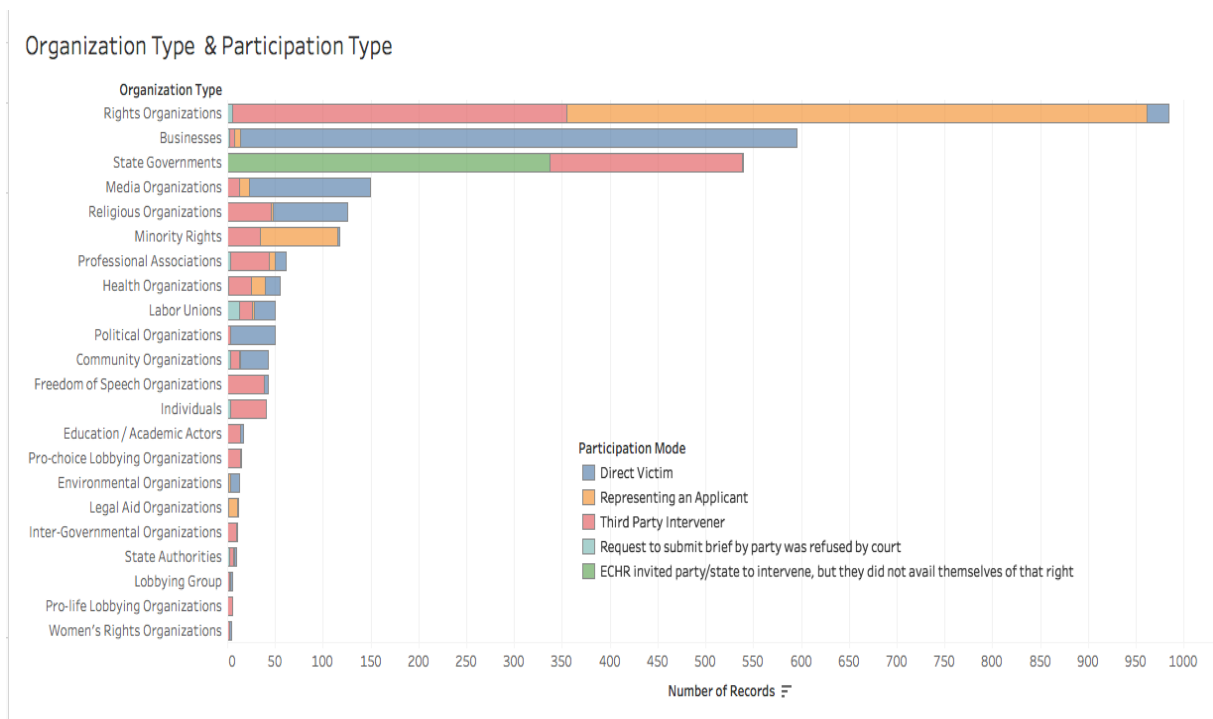
ECtHR internally categorizes the court judgements into a level of importance based on its influence on the European case law. Using this variable as an independent variable, I assume that for the cases that are attributed by a higher ranking of importance by the court, organizations are likely to gain adequate experience using the European Court of Human Rights and EU's legal framework. In other words, drawing from the resource mobilization theory, I deploy the importance of the court judgements as an essential part of the organizations 'effective legal experience' because it shows that organizations have a capacity of influencing case law through using strategic litigation. See the Appendix-HH for a detailed explanation of the variable –importance of the court judgements.

**Year of the case issued (coded as dtelgd in the original dataset)**

This variable is used as a continuous dependent variable that helps to track the yearly development of the mode of the participation by the organizations and importance level of the judgements. Although time does not directly represent any political significance in this study, it helps to understand how participation of interest groups had increased based on their 'effective legal action' in the past.

### 3.2) Quantitative results<sup>188</sup>

Despite the fact that it is now widely accepted that individuals and interest groups use the ECtHR more than ever before, there is only few studies that quantitatively addresses the different characteristic of the participation modes based on interest type. The following results illustrates the average of organization participation mode using 4939 judgements<sup>189</sup> between the years of 1960 to 2014, segregated based on their interest type and participation type.



(Figure 1 1 Organization interest group and Participation type before the European Court of Human Rights<sup>190</sup>)

<sup>188</sup> Quantitative results in this chapter generated by using the free version of Tableau software.

<sup>189</sup> Joint-litigation cases are excluded.

<sup>190</sup> See the larger version of the results at the Appendix-D

Although findings are not unexpected for scholars of ECtHR these graphs are useful in the sense to present focus of interest groups on particular types of participation modes. For instance, freedom of speech organizations and women rights organizations solely focus on third party intervention. On the other hand, Environmental organizations and political organizations primarily participate as ‘direct victims’ at ECtHR. It is interesting to observe that rights organizations, media, and labor unions proactively use more than one type of intervention strategies. In addition, interest groups which are participating with all type of intervention strategies tend to focus on at least on type of intervention strategy.

For instance, media organizations use three different modes of participation but most of this involvement piled under the direct victim participation mode. Also, Women rights organizations use all modes of participation but focus on third party intervention mode. While each organization selects a specific intervention type based on its organizational priorities, one can argue that the intervention type might be part of strategic litigation. In other words, some organizations may focus on a certain type of intervention mode as part of their strategic litigation or available resources. For example, interest groups that have been using litigation by intervening as the third party (if they have in-house lawyer) may develop organizational capacity and skills to specialize in third party intervention.

This is a crucial finding that may challenge the earlier studies in the socio-legal literature which tend to show litigation as a homogenous action, ignoring different dynamics in participation mode. Also, the illustration shows that while non-profit interest groups such as rights organizations, minority rights and freedom of speech organizations merely participate at the Court as direct victims (average of 0.10), other organizations such as media, business, and professional organizations frequently participate as direct victims

(average of 0.58). Furthermore, non-profit organizations predominantly participate with third party intervention (0.52), followed by representing an applicant (0.38) and direct victim participation modes (0.10). This can be explained mostly because profit organizations participate in the court when their interest is at stake. One can also argue that this finding shows consistency with resource mobilization based explanations that are focusing on the relationship between organizations financial resources and mobilizing the European law.<sup>191</sup> On one hand, an organization with larger financial capabilities may choose to intervene as a direct victim because they can afford it. On the other hand, non-profit organizations may tend to use more third party-intervention strategy, which has lower cost compare to intervening as a direct victim

In the next section, a multilinear regression model is used with a continuous dependent variable to test stated hypothesis. Multi-linear Regression analysis is used to explain the relationship between Y as a number of cases (continuous dependent) and X as prior legal experience with the court (independent variable). This will show us the likeliness of the organizations' engagement with the court based on their effective legal action experience in the past. Our variables are formed with the following equation.<sup>192</sup>

$$Y_i = \alpha + \beta X_i + \gamma I_i + \varepsilon_i$$

Our dependent variable is a number of applications represented with Y, the independent variable is the importance of the court judgements X. Also, I is representing the interest type as an independent variable (Refugee/Asylum organizations = 1 and other

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<sup>191</sup> Lisa Conant, Andreas Hofmann, Dagmar Soennecken & Lisa Vanhala, 2017, p 8

<sup>192</sup> I have replicated the formula from the following study. Lewis-Beck, Michael S., Alan Bryman, and Tim Futing Liao *The SAGE Encyclopedia of Social Science Research Methods*. Thousand Oaks, CA: Sage Publications, Inc., 2004. doi: 10.4135/9781412950589.

interest types are coded with 0 to highlight our focus interest group) and ( $\gamma$ ) next to I, give us the significant variances between the two intercepts. Alpha represents the common within importance of the court judgments(also known as common computing area), beta represents the intercept for interest type. ‘i’ represents time as employed in the multi-linear function. Although I aim to test the relationship between all organizations participation and importance of the court judgements, the interest type variable is used to observe the differences between interest groups. Meaning that it acts as a sole control variable to test whether interest groups (in this case Refugee/Asylum NGOs) will likely to use litigation more based on their prior legal experience in the past.

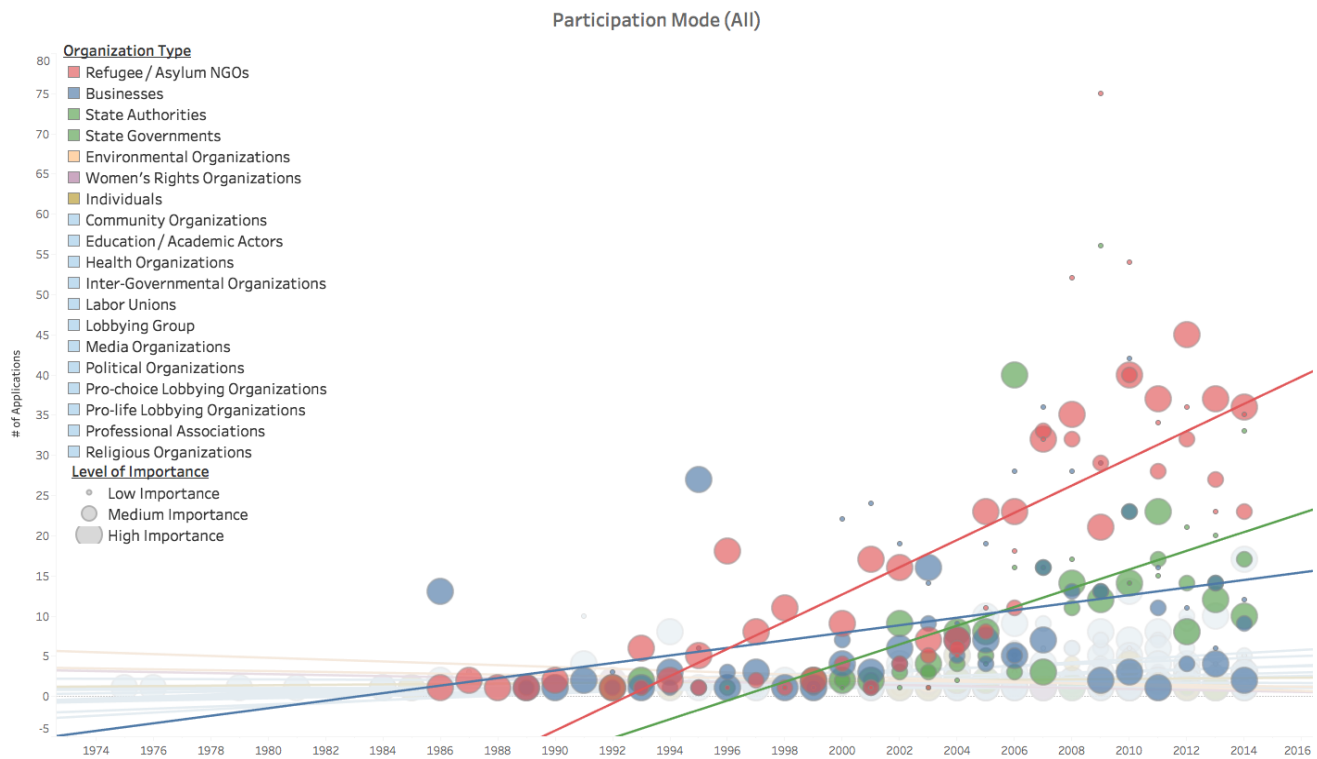


Figure 1 2 Results-2; (All participation mode) Linear regression model of participation mode and importance of the court judgement<sup>193</sup>

<sup>193</sup> See the larger version of the results at the Appendix-E

Results on the above presents the first multi-regression model. R-squared value of X+Y slope for Refugee/Asylum NGO's occurs at 0.332073 while the P-value is  $<0.01$ <sup>194</sup> making our regression model statistically significant. In other words, previously filing more lawsuits before the ECtHR and previously attaining a number of important judgements at the court is increasing the likeliness of litigation. In a detailed glance, a Refugee/Asylum organization that litigated in the court by the years of 2002, 2004, and 2007, shows continuously greater number of appeals and higher number of important court judgements in the following years.

Furthermore, Refugee/Asylum NGO's cases seamlessly sustain more significant court judgements (0, 43) compared to an average of Environmental and Women rights organizations (0, 37). Relatively, Refugee/Asylum NGO's linearly litigate more as they enjoy a longer history of using the ECtHR and they receive more high important court judgments. In contrast, results show that although Environmental organizations are increasingly bringing more cases to Strasbourg after the 2000s, their average with importance of the court judgements significantly less than Refugee/Asylum rights organizations.

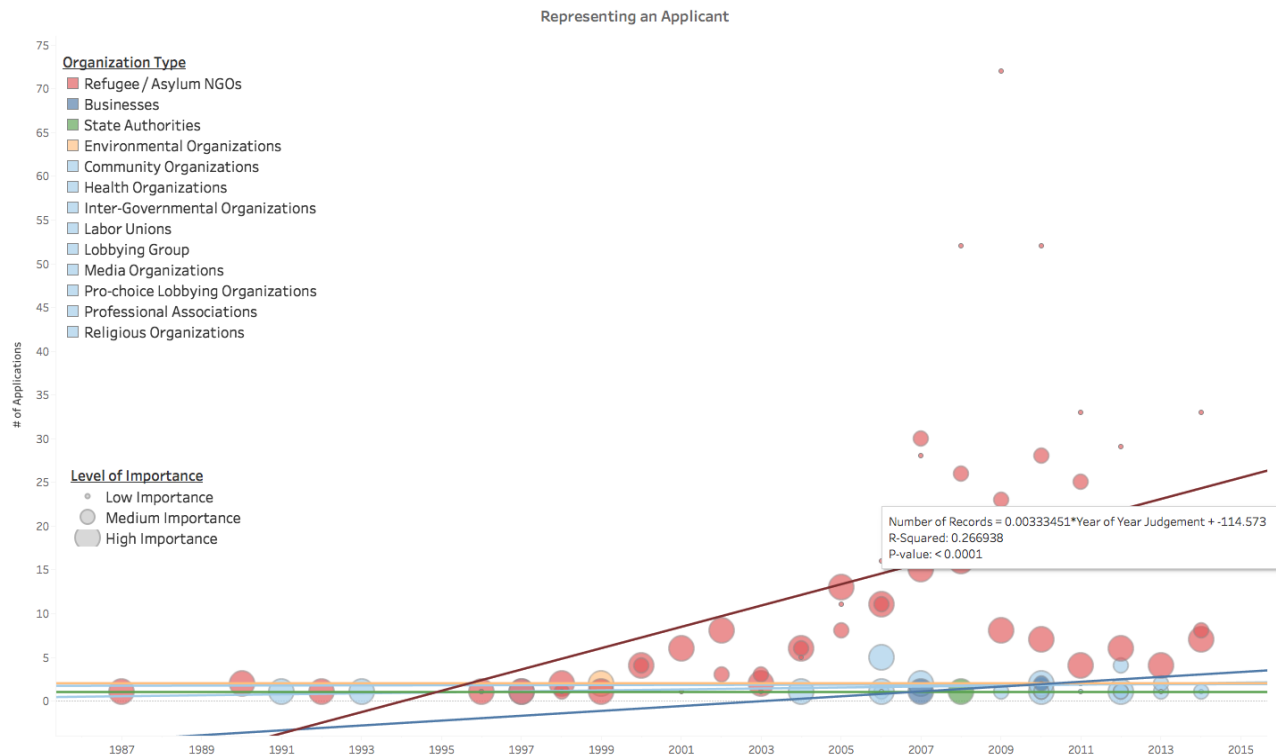
Following this results it may be argued that since refugee/asylum organizations are increasingly litigating at the court before the 1990s, they were effectively developing necessary skills, organizational capacity in using the ECtHR and its legal system to seek national and European Union level influence. Whereas Environmental organizations with a relatively shorter history of litigation at the court, owns less potential to develop

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<sup>194</sup> P significance occurs at  $<0.5$

necessary skills and organizational capacity. Therefore, this empirical causation shows that legal action experience does matter in effecting the choice of litigation. It may be expected that organization with a longer history of litigation, may develop better skills and capacity to increase its potential to gain more important judgements that will mutually foster its choice of the strategic litigation.

The result of our first regression model is empirically confirming our hypothesis that interest groups are likely to use litigation strategy more as they own more prior effective experience with ECtHR. Regression model appears statistically significant and provides empirical ground in understanding the relationship between the legal action experience and the choice of strategic litigation. However the direction of causation is not well explored with the current quantitative design. In other words, it is not clear whether interest groups intervene more at the court because of the high important court judgements or further participation leads to a higher trend of court judgements. To examine this dynamic better, in next section I deploy the same equation based on specific participation mode.

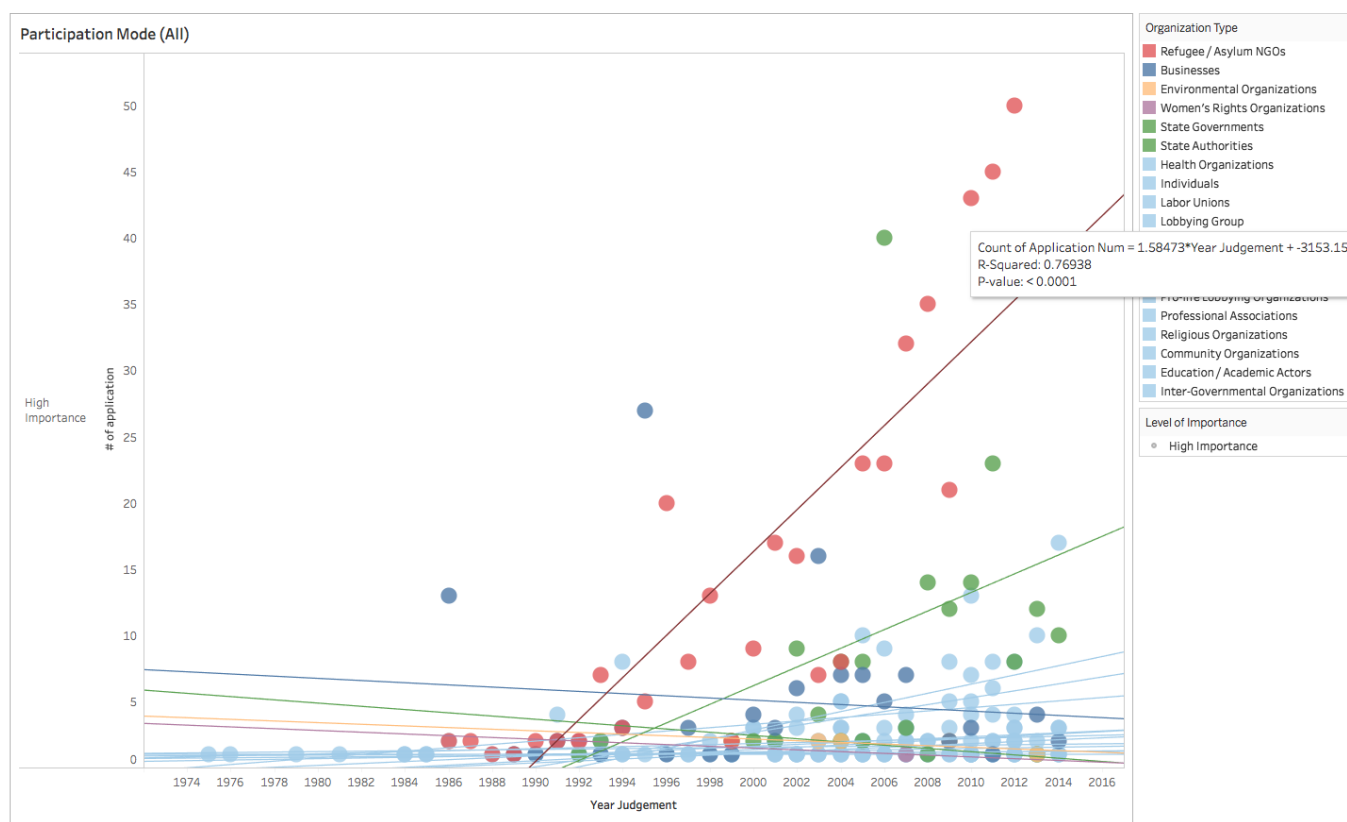


*Figure 1 3 linear regression model of Representing an applicant intervention type and importance of court judgements*

The Results on the above present the participation mode of the representing an applicant, segregated by the interest type of the organization. Instead of examine all participation modes, in this regression model I have excluded the other participation modes and focused on organizations, which are intervening at the court with ‘representing an applicant’ mode.



Similar to findings in the first regression model, Refugee/Asylum organizations emerges with R-square of 0.266938 and P-value of 0.0001.<sup>195</sup> Meaning that there is a significant relationship and it re-confirms our hypothesis that refugee/asylum organizations are likely to use strategic litigation based on their past legal action using the ECtHR. With this model, it is more evident that refugee/asylum organizations are increasingly using the Strasbourg court starting from the 1990s and they are receiving higher important court judgement linearly starting from 2000s. To deepen our analysis of dynamics between importance of court judgements and the participation, in next model, I utilize the only high importance of court judgements as X intercept to examine the previous models in detail.



*Figure 1 4 Illustration of an important decision –overall mode- based on interest groups: extended analysis of first regression model.*

<sup>195</sup> P significance occurs at <0.5

Results show that in the high importance dimension, Refugee/Asylum NGO's significantly appeal continuously more cases when there is a previously higher importance level of the judgements. Intercept appears with R-Square of 0.76938 and P-value  $<0.001$ . Meaning that the regression model is significant but the variance level occurs higher than previous models. Therefore, it is essential to note that the direction of the causation is still under question with the current results, meaning that it is not clear whether it is the participation experience that renders more participation and important judgements or the other way around. Also it may have been also argued that organizations selects cases that may feasible to accomplish important judgements. To clarify this complexity and find out the direction of the causation, the findings presented in this section will be questioned through legal practitioners' views in chapter four.

### **3.4) Limitation on data and analysis**

Although the European Court of Human Rights Database (ECHRd) presents a unique and Large-N structure, I have identified few significant issues primarily based on the methodology of the data-set structure. First, since some of the cases were intervened by multiple organizations, at a different stage of the case proceedings, in the dataset some cases are assigned to more than one organization, in some cases multiple interest types are also involved in one case. Original dataset avoids such replication by introducing a second participation ID, however to my knowledge, it was not possible to use second participation ID to avoid duplications in the dataset, and therefore I have excluded the cases that were subject to joint litigation. Second, by creating the new interest type Refugee/Asylum NGO's, rights organizations and the minority interest types are entirely merged with the Refugee/Asylum NGO's interest type. This is because it would have been taken a lot of time to examine 4939 judgements from 127 organizations to differentiate Refugee/Asylum

NGO's. Therefore, these two interest types are merged under the Refugee/Asylum NGO category. Although these two limitations have no direct effect on the statistical results, the author acknowledges such minimal data manipulation within the ethical research rules. Furthermore as mentioned above, the direction of the causation is not clear with the current findings. Therefore, our findings show very limited robustness for generalizable results.

### **3.4) Chapter Conclusion**

In this chapter, I have presented the quantitative dynamics of the interest groups participation before the European Court of Human Rights. The findings of this chapter present an interesting dynamic between participation mode and the importance of the court judgements. While some interest groups focus on a particular mode of participation, such as intervening as a third party, other focuses on more than one participation mode. This finding shows that participation mode is another important element of strategic litigation before the ECtHR. This is important to point out since most of the strategic litigation literature treats all litigation strategies homogenously.

Since there is a significant variance in the participation mode, results show that interest type separation is necessary element in studying the organization's choice of strategic litigation. Furthermore, testing the hypothesis, the multi-linear regression model presents that interest groups with a longer history of participation and the higher average of important court judgements will likely to participate more in the court. Although these findings are statistically significant, the direction of the causation is not clear and requires empirical shreds of evidence to support the finding.

As discussed in the relevant section, our findings in this section might be statistically significant, but it needs empirical support since our quantitative design did not include any

robustness checks nor control variables. In the next section, I will triangulate the findings with the qualitative results and will attempt to justify our hypothesis by looking at Refugee/Asylum organizations legal action dynamics with ECtHR and CJEU with focus on reforming the Dublin regulations III.

## **Chapter-4) Qualitative Results and Dublin Cases**

This chapter consists of two sections. In the first section I present the qualitative findings from interviews with legal practitioners with the aim of justifying the quantitative findings. Then in the second section, I focus on the CJEU and ECtHR cases that are used in the battle against the Dublin regulations.

### **4.1 Interviews with legal practitioners**

NGO's in the European Union have participated in policy-making for a long time, and they have played a vital role in the improvement of the current asylum regime. Some scholars argue that their effectiveness is often limited to specific areas of policy and European case law (Guiraudon, 2000). For instance, while European NGOs, have continuously fed European case law on asylum and influenced the Policy, in the previous Dublin amendments in 2013, their voices went unheard by decision makers.

In the legal struggle against the Dublin regulations, while some NGOs used strategic litigation to pressure their national governments, other NGOs used court judgements for pressuring European Commission and European level policymaking processes.<sup>196</sup> As it has been shown in the chapter three, in the last past two decades Refugee/Asylum NGOs are increasingly litigating before the European courts. For a long time NGOs engagement heavily relied on litigation efforts before the European Court of Human Rights. This is because CJEU did not rule on preliminary reference on asylum cases before the year 2009 and it was not seen as a feasible avenue by NGOs until the first judgements came from CJEU.<sup>197</sup>

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<sup>196</sup> EDAL coordinator, interview by author, Brussels, April 25<sup>th</sup> 2018.

<sup>197</sup> After Lisbon Treaty in 2009 came into entry, it made the Charter of Fundamental rights legally binding under the case law of CJEU. Relatively CJEU issued more judgements on Asylum field and Human Rights.

In the last several years, after CJEU's expanding interest over Asylum cases, this view has changed, and CJEU also became a new venue for non-governmental organizations to seek influence.<sup>198</sup>

Interviews show that each organization utilizes the European court system according to its own priorities and available resources. While some organizations' focus on gaining influence on national courts and policies others tend to focus on influencing EU level policy and law making. Therefore, organizations which focus on addressing the problems at the national level specialize and develop their legal capacity (if they have in-house lawyers) to file lawsuits that show breaches of legislative obligations at home.<sup>199</sup> Differently, other organizations which are seeking influence at the EU level, prefer to file lawsuits to address European Union directives and regulations and develop their institutional capacities to succeed within the EU framework.

Although historically the CJEU seemed less friendly to NGOs, after the CJEU began increasing its involvement in asylum cases<sup>200</sup>, refugee/asylum organizations became equally interested in using both CJEU and ECtHR to challenge the Dublin regulations.<sup>201</sup>

It is also evident that an organization selects cases that are important to their strategy of influence. For instance, while the HHC focuses on Hungary's legislation problems with the asylum system and therefore litigates cases that are important at the national level, ECRE only focuses on the cases which has potential to shape European case law, directives

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<sup>198</sup> EDAL coordinator, interview by author, Brussels, April 25th 2018.

<sup>199</sup> Senior Legal Officer, interview by author, Budapest, April 24th 2018.

<sup>200</sup> Report(2018) ECRE, ELENA, List of Relevant Asylum Judgments and Pending Preliminary References from the Court of Justice of the European Union

<sup>201</sup> See the Appendix – X

on asylum. The interviews also revealed that NGOs played a crucial role in the implementation and reformation of asylum law in member states, pushing for policy reform and using the European courts as a tool to contest local policy choices.<sup>202</sup>

Often, NGOs use European courts as an arena to fight national authorities (including national courts) who fail to comply with EU directives and regulations.<sup>203</sup> Especially in some member states, where NGOs are the only voices of asylum seekers and refugees. When certain people's lives are under threat due to a breach of the European human rights norms or the systematic policy, European supranational court systems offer more extensive and potentially more effective legal opportunities than the restricted POS of the some member states. Although national NGOs are also interested in influencing EU level policy and law, due to overwhelming national legislation problems in the field of asylum, they tend to use their limited capacity to conduct strategic litigation only at the national level<sup>204</sup>

Notably, the interviews with ECRE and HHC staffers show that past legal experience and litigation capacity is a significant factor when adopting a case to litigate strategically. One interviewee suggests that with past litigation experience, their organization is more competent at selecting cases that address systematic problems of asylum policies. In other words, through using the litigation strategy, organizations cumulate experience in using European courts and legal framework, which relatively extends their institutional capacity that may feed future litigation efforts. The interviews also suggest that as organizations litigate in certain areas of asylum law such as reception conditions or Dublin conditions, they accumulate more experience and relevant skills in those specific areas. It is reasonable

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<sup>202</sup> Senior Legal practitioner, interview by author, Brussels, April 26<sup>th</sup> 2018.

<sup>203</sup> Senior Legal officer from HHC, interview by author, Budapest, April 23<sup>th</sup> 2018.

<sup>204</sup> Ibid

to suppose that an organization's interest in litigation increases with its experience and skills in using the Supranational European court system.

The interview with ECRE also reveals that as more refugee/asylum organizations influence policy cycles and challenge existing law through strategic litigation, other refugee/asylum organizations increase their interest in using strategic litigation. For example, when an organization succeeds in stopping the automatic deportation via strategic litigation, it encourages other refugee/asylum organizations to use strategic litigation against the Dublin regulations because it shows the feasibility of the legal action.

This is mostly because strategic litigation for seeking influence at the EU level often begins prior to the specific violation. Organizations cooperate and build dialogue through transnational networks. The transnational networks such as ECRE or the European Network Against Racism serve as a bridge between organizations and lawyers to transfer their legal experiences and skills in using the European supranational courts. For instance, ECRE has a sub-network groups specializing in certain cases and countries, organizing workshops and joint-trainings with other organizations and lawyers to promote strategic litigation using both ECtHR and CJEU.

The findings above confirm the direction of our findings from the quantitative section. Interest groups are likely to litigate when they have gained prior effective legal action experience with the European supranational system and when they are able to influence a policy area through strategic litigation. In addition, it is evident that experience and legal resources are transferable and often travel between organizations through transnational



networks or umbrella organizations. In addition, experienced organizations' interest in litigation may have fostered other organizations' success in using the Courts as avenues to mobilize European law.

#### **4.2) Courts as an avenue to influence EU asylum policy and Dublin III regulations**

The previous section presented the reasons why NGOs' turn to strategic litigation based on interview findings in this section. Empirical results show that refugee/asylum NGOs have become increasingly interested in using strategic litigation as they enhanced their effective legal experience. In this section, I explore the choice of strategic litigation based on the organizations' success at achieving their goals. In this section, I explore the second component of the 'effective legal action'. In other words, organizations' prior achievement with legal action would foster the choice of strategic litigation. Furthermore, I focus on European civil society's legal mobilization to argue against the Dublin regulations. I will explore how refugee/asylum NGOs use both CJEU and ECtHR to challenge them in preparation for the upcoming renewal of debate on the Dublin IV regulation. I will also visit how preliminary references to the CJEU might be used by refugee/asylum NGOs to influence the upcoming amendments on Dublin.

As explained in Chapter Two, the Dublin regulations have been at the agendas of the refugee/asylum NGOs for a while. Therefore, NGOs have been proactively engaged

with different political and legal opportunity structures to challenge the Dublin regulations at both national and EU level since the first convention came into effect<sup>205</sup>.

While some organizations used court decisions to demand member state governments or courts to reject Dublin procedures in national legislation, others focused on using court decisions to pressure the European Council and European Parliament. In the struggle against the Dublin regulations, the case of *MSS v. Greece and Belgium* decision is frequently cited by NGOs across Europe as a landmark case.

#### **4.3) MSS. V. Greece and Belgium**

The ECtHR's 2011 judgement in *MSS v. Greece and Belgium* is often described as a landmark case leading to a recognition of the Dublin systems inheriting problems such as automatic transfers and the effective remedies as discussed on the Dublin chapter. In the case of *MSS V. Greece and Belgium*, the court concluded that Greece was violating Article 3 of the ECHR with inappropriate detention conditions and a deficient asylum system. More importantly, the court ruled that Belgium authorities have also violated Article 3 of the ECHR because Belgium returned asylum seekers to Greece under the Dublin procedures. The court opined that the Belgian authorities should have known about the plight of asylum seekers in Greece (poor detention and reception conditions, and the risk of inhuman and degrading treatment) in accordance with Article 3 of the ECHR. Therefore, Belgium should not have sent the asylum seekers back to Greece. According to the judgement, a member state has a duty to protect the rights of asylum seekers, even in the

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<sup>205</sup> First case against the Dublin regulations brought before the court in 2008, see the case of *K.R.S. v the United Kingdom* no. 32733/08 brought by British Refugee Council

case of Dublin transfers to other member states. Each state is obliged to meet its obligations under the ECHR.

MSS v. Greece and Belgium is heavily cited by international and national refugee/asylum rights organizations across Europe and was frequently used to push for new amendments to Dublin III<sup>206</sup>.

The MSS case also profoundly influences the transformation of European case law and challenges essential elements of the EU Dublin framework and most notably the automatic transfer back to the country of entry. Many NGOs have used the MSS court's judgement as a baseline precedent to challenge the Dublin regulations at the national and EU levels. In one of our interviews, a legal practitioner noted:<sup>207</sup>

*'Judgement from the case (Referring to MSS case) had a significant change in European policy and case law, in a way that for instance it significantly allowed NGOs to stop deportations to Greece and elsewhere where asylum seekers (were) exposed to the risk of ill-treatment. Now European states are not able to send people back because of the legal limits therefore it was a really important case brought by lawyers, NGOs and activists. And It had deep consequences in European Union' about pushbacks and deportations. Especially in Mediterranean sea because judgement also concluded that member states obliged to protect asylum seekers even outside of the EU, they (Italy or Greece) cannot for instance push back asylum seekers back to Libyan cost.'*

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<sup>206</sup> Senior Legal practitioner, interview by author, Brussels, April 25<sup>th</sup> 2018.

<sup>207</sup> Senior Legal practitioner, interview by author, Brussels, April 26<sup>th</sup> 2018.

Another interviewee highlights the importance of the *MSS* case as support for the supremacy of the fundamental rights of asylum seekers even at the external borders of the European Union. The *MSS* case also relies on the Dublin regulation when addressing the problematic aspects of automatic transfers between member states.

According to the EDAL database, *MSS* case has been cited in 38 other judgements of the CJEU and ECtHR to date, and several NGOs have cited it in the lawsuits.<sup>208</sup> It has also been cited in advocacy reports<sup>209</sup> by NGOs to push for greater reforms of the problematic articles of the Dublin regulations. For example, ECRE cited *MSS* case in its report demanding European Commission to ensure the recast of the Dublin regulations comply with ECHR and other EU Human rights legislation.<sup>210</sup>

#### **4.4) CJEU's first take on Dublin, N. S. and Others**

As discussed above, the CJEU's engagement in asylum cases arguably started after the *N.S* case. Until then, NGOs did not see the Luxembourg court as an arena to contest the provisions of the Dublin regulations. However, following (on) the Strasbourg's *MSS* case, a year later CJEU joined the Dublin debate with *N.S* case just before the Dublin amendments in the 2013. The *N.S.* case was referred to the CJEU by preliminary reference procedure by the request of the United Kingdom and High Court of Ireland for a decision on whether sending asylum seekers to a member state where asylum seekers may be at risk of ill-treatment.

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<sup>208</sup> EDAL Coordinator, interview by author, Brussels, April 25<sup>th</sup> 2018.

<sup>209</sup> See the Report(2016) International Commission of Jurists, 'Comments of the International Commission of Jurists on specific procedural measures in the Recast of the Dublin Regulation' 27 September 2016

<sup>210</sup> ECRE (2013). Lives on Hold European Comparative Report

The ECJ ruled for the first time on the Dublin regulations, saying that a member state should not transfer asylum seekers if there is a systematic flaw in the responsible member state's asylum system that increases the risk of inhuman and degrading treatment. NGOs see the CJEU ruling as an essential sign of recognition of the inherent problems in the Dublin regulations.

Interviews with ECRE reveals that the CJEU's rulings on the Dublin regulations and similar cases extended the LOS in the European Union for challenging the Dublin regulations.

#### **4.5) NGOs involvement with CJEU, case of Cimade, Groupe / C-179/11**

As suggested earlier, while the engagement of NGOs with Strasbourg has been more visible because of the direct intervention opportunities, on the other hand engagement with the Luxembourg court has been more complex and difficult to track. As discussed earlier, because sending preliminary reference depends on the national judges and court proceedings arranged between the applicant(s) represented by lawyer(s) and the member state's lawyer(s), it is not possible to track organizations' involvement in preliminary reference processes.

However, using the national court system in France, two French organizations brought a Dublin case at the CJEU through a preliminary reference from the *Conseil d'Eta*. The organizations claimed that under the Dublin II regulations, asylum seekers are excluded from enjoying rights under the Reception Conditions Directive (RCD) during the examination period under Article (7) of the Dublin regulations. CJEU ruled that the RCD apply even under the Dublin regulations. Therefore asylum seekers, even those in the examination stage must be accorded to the rights named in the RCD. Although the CJEU's judgement had a direct impact at the national level, it may be argued that it extended the

legal struggle against the Dublin system in the Luxembourg court. The decision also demonstrated that preliminary reference could be used by NGO to seek influence through the CJEU. Recognizing the CJEU as a new arena, NGOs' increasing their efforts to indirectly engage the CJEU in challenging the Dublin regulations through preliminary references.

#### **4.6) Is CJEU a new avenue against the Dublin regulations?**

For long time, NGOs relied heavily on strategic litigation before the Strasbourg court to challenge the European Asylum rules and policies. However since the amendment of the Dublin III regulations, 16 Dublin cases have been brought before the CJEU. Although it is not clear how NGOs are involved with preliminary reference processes, the CIMADE and GISTI examples show that NGOs can seek influence at the CJEU by pushing national judges.

Furthermore, CJEU judgements on the Dublin regulations have had an important impact on the German national court system and government. For instance, following the CJEU judgements in *Kaveh Puid and Tarakhel*, in which the CJEU ruled that the Dublin regulations have systemic deficiencies that may expose a transferred asylum seeker to inhuman or degrading treatment, the German Schwerin Administrative Court decided to temporarily suspend Dublin proceedings, citing earlier judgements of the CJEU, relevant European case law, and the German Federal Constitutional Court. After several other German administrative courts also decided to suspend Dublin procedures, Germany's

Federal Office for Migration and Refugees (BAMF) also decided to suspend the Dublin regulations for Syrian refugees in nationwide on August 24<sup>th</sup> of 2015.<sup>211</sup>

Following the decision, ProAsyl spokesperson Günter Burkhardt commented that Germany must suspend the regulations for all asylum seekers and abolish the failed Dublin system. Burkhardt also declared that the European Commission should suspend the regulations. One can argue that the CJEU judgements played a key role in influencing the German administrative courts, which later led to the nationwide suspension of the entire procedure. Although it is not clear what role NGOs might have played in obtaining the preliminary references, it is clear that by targeting preliminary reference procedures, NGOs may seek influence at both nationwide and European Union level. The importance of involving the European courts also came up in the interview with ECRE. Despite the fact that only national NGOs or lawyers can seek to intervene in national court cases, international organizations like ECRE and Oxfam International may also play a role by providing legal support, legal capacity training, and fostering the use of preliminary references by national actors.

#### **4.7) Chapter conclusion**

In this chapter, I presented the interview findings in line with selected cases from the European supranational courts. The legal practitioners' views have shown that NGOs that are working in the asylum field are extensively use litigation as a political strategy to battle against the Dublin regulations. Our qualitative findings confirm our earlier findings as described in Chapter Three; organizations with prior experience using the European court

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<sup>211</sup> Zeit Online, Deutschland setzt Dublin-Verfahren für Syrer aus , Accessed on May 23, 2018. <https://www.zeit.de/politik/ausland/2015-08/fluechtlinge-dublin-eu-asyl>

system and legal framework tend to opt for strategic litigation and build a larger institutional capacity to file better lawsuits in search of more effective decisions from the court.

Furthermore, several interviews highlight that an organization's experience and skills in using the European court and legal framework might also spread to other organizations, fostering the further use of litigation. Furthermore, as the CJEU issues more judgements against the Dublin regulations, it is possible that more organizations will become interested in using the CJEU as an arena to challenge the Dublin regulations through the preliminary reference process. In other words as the CJEU and ECtHR rule against the Dublin regulations in more cases, these two courts become more effective spaces for NGOs to conduct their legal battle against the Dublin regulations.



## Conclusion

International Courts as supranational bodies are fostering processes of global legalization in the international sphere, where non-governmental organizations increasingly accompany states in international legal system through their growing presence in international courts and multilateral institutions. In the European Union, non-governmental organizations have become important actors participating in governance and law making over last decades. NGOs played a vital role in influencing the policy and law-making cycles at both member states level and EU level through using the expanding legal and political opportunities within the European Union structures and politics. Although the European third-party sector is expanding its role and power, their influence often yielded to specific policy areas, and often their voice went unheard by the decision makers.

In effect, the NGO's in the European Union are continuously searching for the new opportunities (legal and political spaces) that may expand their area of influence in policy and law-making. Following the Rachel Cichowski's observation that NGO's are increasingly interested in exploiting the European supranational court system and mobilize European law to seek influence, this thesis examined when NGOs turn to utilize the European supranational court system to seek transformative influence in the European asylum policy and the Dublin regulations.

In order to do so, I focused my scrutiny on the gaps in the socio-legal literature. For this scrutiny this thesis asserted the agent level analysis focusing on organizational dynamics and interrogated the effective litigation experience as a resource to explain the choice of

strategic litigation in the European Supranational court system. Expound why and when European NGOs turn to the courts as mentioned above, this thesis have found the following evidences and observations through quantitative and qualitative analysis:

First, quantitative findings present an empirical relationship between prior effective experience of organizations and their choice of litigation. Organizations' with higher level of prior experience in filing lawsuits before the court and, organizations' prior achievements using the strategic litigation are empirically observed to increase the organizations' likeliness to use strategic litigation. Qualitative data confirms this empirical observation, but with currently available data, it is not permissible to generalize the findings of this thesis. Quantitative element of this thesis also reveals that Refugee/Asylum NGOs with in-house lawyers have developed more skills and capacity compared to other organizations with a shorter history of legal mobilization and no in-house lawyers. In effect, organizations with a longer experience of strategic litigation also develop better skills and organizational capacity to file for more effective lawsuits in search of more effective decisions from the courts.

Second, this study leads to a unique observation that experience and legal resources are transferable and may travel between organizations through transnational networks or umbrella organizations. Also, Refugee/Asylum organizations' emerging success in halting the Dublin automatic transfers through the strategic litigation substantively influence other Refugee/Asylum organization's choice of litigation to challenge the Dublin regulations. Evidently, such success legitimizes strategic litigation at the European supranational courts as a political strategy to adopt in challenging/transforming the European Asylum Policy and yet encourages other organizations to use strategic litigation as well.

Third, findings also show consistency with recent studies in the socio-legal literature which concludes that strategic litigation is a long process that requires a lengthy preparation period prior to filing lawsuits. Since Refugee/Asylum NGO's in the European Union profoundly interact with each other through transnational networks and umbrella organizations, they often influence each other's strategies. Through the transnational networks they exchange information, legal resources and more importantly shape each other's case selection and overall strategic litigation before the European Supranational Courts.

Fourth, the recent rulings of European Court of Human Rights and the European Court of Justice include a tone of criticism and addresses the problematic aspects of the Dublin regulations. Such rulings have influence on the Refugee/Asylum NGO's choice of litigation in challenging the Dublin regulations at home and EU level. The interviews also reveal that in light of increasing judgments from CJEU in the asylum field and Dublin regulations, Refugee/Asylum NGOs increasingly explore the ways to exploit CJEU as a new avenue to seek influence in the European Asylum policy. I have argued that strategic litigation at European supranational courts can open new effective spaces for creation and transformation of rules and new policies. CJEU and ECtHR rulings can potentially foster the organizations power to influence the European Commission and European Parliament. In effect, as more NGO's engage with the CJEU, in return their engagement may also create new opportunities for the court to increase its influence on the European Union. The recent expansion of CJEU's case law on asylum field shows evidence that CJEU is also emerging as an essential role player in shaping the EU's asylum area. In other words, while CJEU

constitutes a new legal arena for NGOs to exploit, in return CJEU may also benefit from NGOs increasing involvement with the court.

Overall relying on assumptions of resource mobilization theory, NGOs as rational choice makers, mobilize their available resources to achieve their desired goals. This thesis unpacked effective litigation experience as a specific resource and using quantitative and qualitative data, this study empirically observed the mutual relationship between choice of strategic litigation and prior legal experience in using the European supranational court system. It suggested that there is a significant relationship between the organizations' prior legal experience and choice of strategic litigation, but the direction of such causation requires further empirical data and analysis.

### **5.1) Limitation of the study and future research**

This thesis attempted to study the European supranational court system and the legal mobilization of NGOs for seeking policy influence at the European Union level. As mentioned earlier, based on the existing socio-legal literature, this study attempted to study dynamics between organizations and the European supranational Court system. Although both quantitative and qualitative research design are adopted to support our empirical observations, findings in this thesis require more comprehensive and detailed examination. For future research, the ECHRD dataset may be examined better and supported with substantive variables to construct more comprehensive regression tables with control variables. Collecting further data on organizations resources dynamics such as organization financial resources (EU funding, internal fundraising,), staff capacities and merging with

ECRD dataset, future resource mobilization research may conduct more in depth analysis of organizations choice of strategic litigation.

On the other hand, this thesis only interviewed two organizations and two lawyers. Future research may consider selecting more organizations to rely on further empirical findings to extend agent-level perspectives. Based on the empirical results of this study, strategic litigation often starts before the court proceedings, after interacting with other organizations in the field. Organizations are communicating with each other, create a dialogue, share their experiences, build common strategy within the interest sector, and organize workshops, legal trainings for strategic litigation. Therefore it may be worthwhile to explore transnational networks of NGOs as well as legal cross-dialogue between different organizations which are heavily understudied by the socio-legal literature to date.

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## Appendix –A) List of interviews

### List of interviews

|                            |  | List of interviews |                             |
|----------------------------|--|--------------------|-----------------------------|
| Title                      | Organization                                   | Interview Location | Date                        |
| 1 Senior Legal Officer     | Hungarian Helsinki Committee                   | Budapest, Hungary  | 24 <sup>th</sup> April 2018 |
| 2 EDAL program Coordinator | European Council on Refugees and Exiles (ECRE) | Brussels, Belgium  | 25 <sup>th</sup> April 2018 |
| 3 Lawyer                   | (Pro-bono) lawyer                              | Brussels, Belgium  | 26 <sup>th</sup> April 2018 |
| 4 Lawyer                   | Lawyer   | Brussels, Belgium  | 26 <sup>th</sup> April 2018 |

Note; In total, 5 interviews conducted. One organization excluded from the list and study due to organization's restrictions.

## **Appendix –B) Interview questions**

### **Interview Questions**

#### **Litigation as a political strategy and courts as venues to influence public policy; Empirical evidences from Refugee/Asylum Rights NGO's in EU.**

### **Quantitative Interview Design**

The qualitative research element seeks to gather the views of legal practitioners on the dynamics of legal mobilization through international litigation. We are specifically interested in addressing the following questions. (1) Why NGOs turn to international litigation: whether they seek policy-change by appealing the ECHR and CJEU or they use courts as venues to secure the implementation of existing law. The selected legal practitioners views will be confronted to quantitative findings in the context of triangulation. (2) What is the scope of 'judicialization /institutionalization through litigation'' within the context of European Refugee/Asylum law.

### **Structure of interviews**

The interview structure have been developed in line with CEU Ethical Research Policy and Guidelines. In this sense, this interview will be not conducted without taking consent from interviewed person. Furthermore, recording of interviews will be protected through encryption and will be not shared with third party entities in line with CEU Ethical Research Policy which guarantees confidentiality, anonymity, and privacy. For additional information on CEU ethical research policy, please visit (<https://acro.ceu.edu/ethical-research>)

The interview is designed as semi-structured. It follows a thematic framework but is kept very flexible to allow interviewed legal practitioners to address other problems/findings which were not observed or introduced out by this research. In other words the author of this research will moderate and guide the interviewee with thematic questions but will also ensure the interviewee is not manipulated. In this line, all interviews will be conducted in-

depth and one to one settlement. Ideally all interviews will last between 30 minutes to 45 minutes.

## Questions

**Question -1 :** Let's start with little bit your organization's stance in Refugee/Asylum law and challenges. Does your organization provide legal aid/support to Refugee/s Asylum seekers? Do you just provide legal advice or do you also represent refugees/asylum seekers in courts?

**Question 2;** Has your organization taken cases/submitted briefs to the European Court of Human Rights or European Court of Justice? If yes (if no move to question 2.1) could you please specify what was the type of engagement? Did your organization support a refugee/asylum seeker? Did they intervene as a third party? What was the specific violation?

**Questions 2.1; (If the question -2- answered by no) ;** Why your organizations did not intervene in? Was it a strategic choice or is it because of the various obstacles/limitations? (**I.e; available resources, access etc.**)

**Question 3;** How does your organizations decide to adopt cases? Do you make the decision based on specific importance of certain violations?

**Question-4;** Do you prioritize cases that may have jurisprudential impact? For example cases that may have contributed to policy changes at the national level or EU Directives & Regulations?

**Question 5;** Why did your organization decide to appeal cases to ECHR or ECJ? What was the violation that led appeal to court? Was the violation more about *clarification or modification of its case-law or was the aim using court decision to enforce existing case law in national court?*

**Question 6;** Did you cooperate with other NGO's or legal networks filling the appeals? If yes what was the purpose of your cooperation? Information exchange/Joint legal mobilization?

**Question 7;** Is there any specific European/EU asylum law your organization is aiming to change/improve by challenging throughout the ECHR or ECJ?

**Questions 8;** Does your organization participate in advocacy for asylum-refugee law improvement across EU? Does it participate in NGO Platform on asylum migration – European Commission? – Do you think EC consultations has effect in improving EU asylum law?



**Question 9;** Litigation is one process through which rule change can occur. In Europe, litigation before the ECHR and ECJ have influenced the EU and domestic law and policies. Do you think EU/domestic Asylum/Refugee law can be improved through NGO's judicial activism?

**Question 10;** We see that a lot of judges and domestic courts exchange information, communicate through various way, influencing each others' decisions. Do you think your organization can serve to this cross-fertilization between different national judges for improvement of European Case Law on Asylum-Refugee law?

## Appendix-C) Consent Form

### Consent Form

As a research intensive university, CEU values and protects academic freedom while safeguarding ethical principles in research such as respect for persons and their welfare and justice. In accordance with its mission, CEU aims to uphold the highest standards of ethics in its activities including research by the members of the CEU community (students, academic and administrative staff) as well as research supported by CEU. In line with this mission, we kindly ask you to sign this written consent form in the thesis entitled '*Litigation as a political strategy and international courts as venues to influence public policy; Empirical evidences from Refugee/Asylum Rights NGO's in Europe*', under supervision of Associate Professor Marie-Pierre F. Granger.

For further clarification and information;

Researcher student; M.Caglidil  
Phone +49 177 4779561

e-mail ; [Caglidil\\_Muhip@student.ceu.edu](mailto:Caglidil_Muhip@student.ceu.edu)

Supervisor ; Associate Professor Marie-Pierre F. Granger.

Phone : +3613283434

e-mail : [grangerm@ceu.edu](mailto:grangerm@ceu.edu)

I.....voluntarily agree to participate in this research study.

I understand that even if I agree to participate now, I can withdraw at any time or refuse to answer any question without any consequences of any kind.

I understand that I can withdraw permission to use data from my interview within two weeks after the interview, in which case the material will be deleted.

I have had the purpose and nature of the study explained to me in writing and I have had the opportunity to ask questions about the study.

I understand that I will not benefit directly from participating in this research

I agree to my interview being audio-recorded.

I understand that all information I provide for this study will be treated-confidentially.

I understand that in any report on the results of this research my identity will remain anonymous. This will be done by changing my name and disguising any details of my interview which may reveal my identity or the identity of people I speak about.

I understand that disguised extracts from my interview may be quoted in dissertation, conference presentation, published papers.

I understand that if I inform the researcher that myself or someone else is at risk of harm they may have to report this to the relevant authorities-they will discuss this with me first but may be required to report with or without my permission.

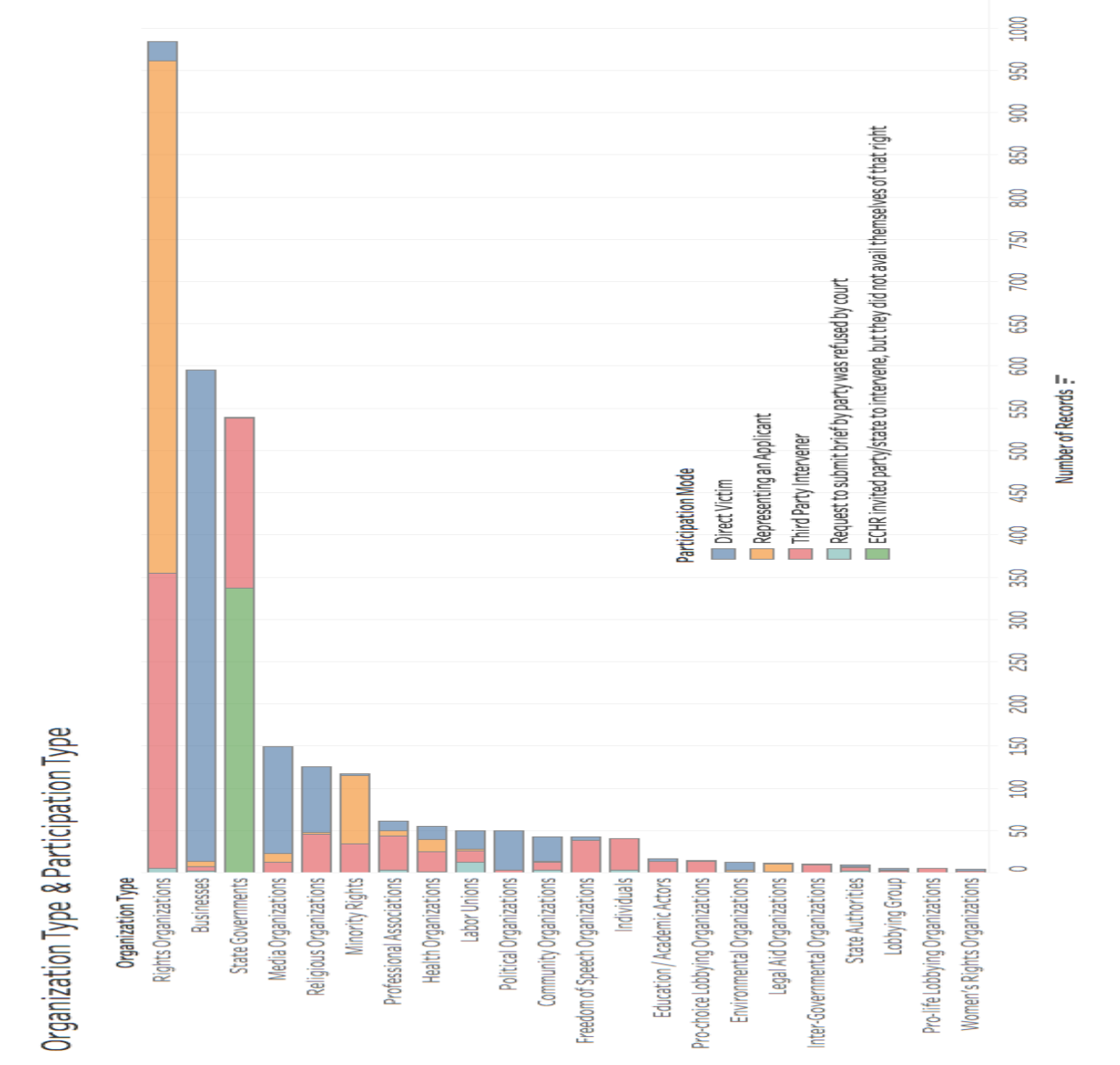
I understand that signed consent forms and original audio recordings will be protected through encryption and will be not shared with third party entities,

I understand that I am free to contact any of the people involved in the research to seek further clarification and information.

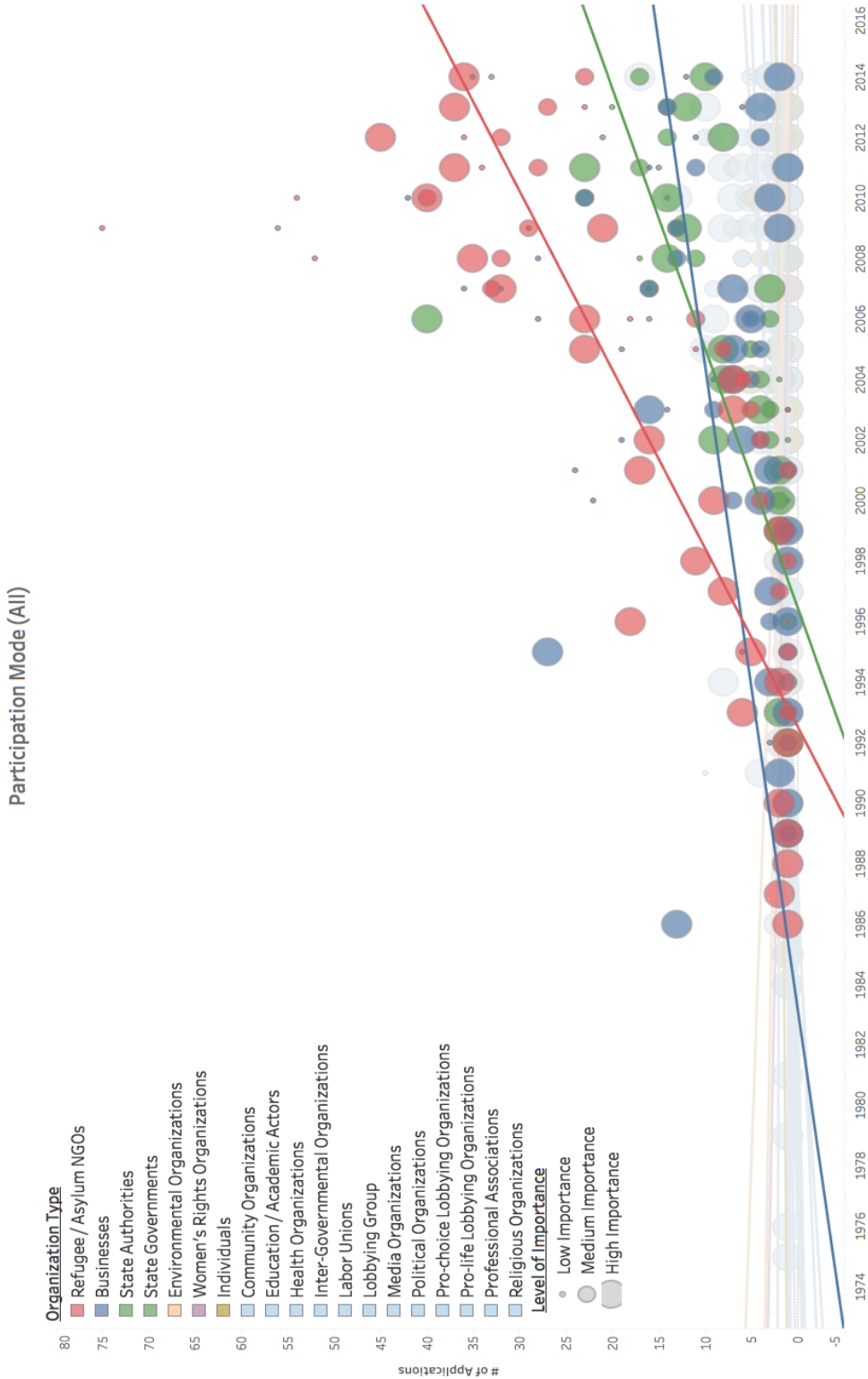
Name and signature of the participant

Date

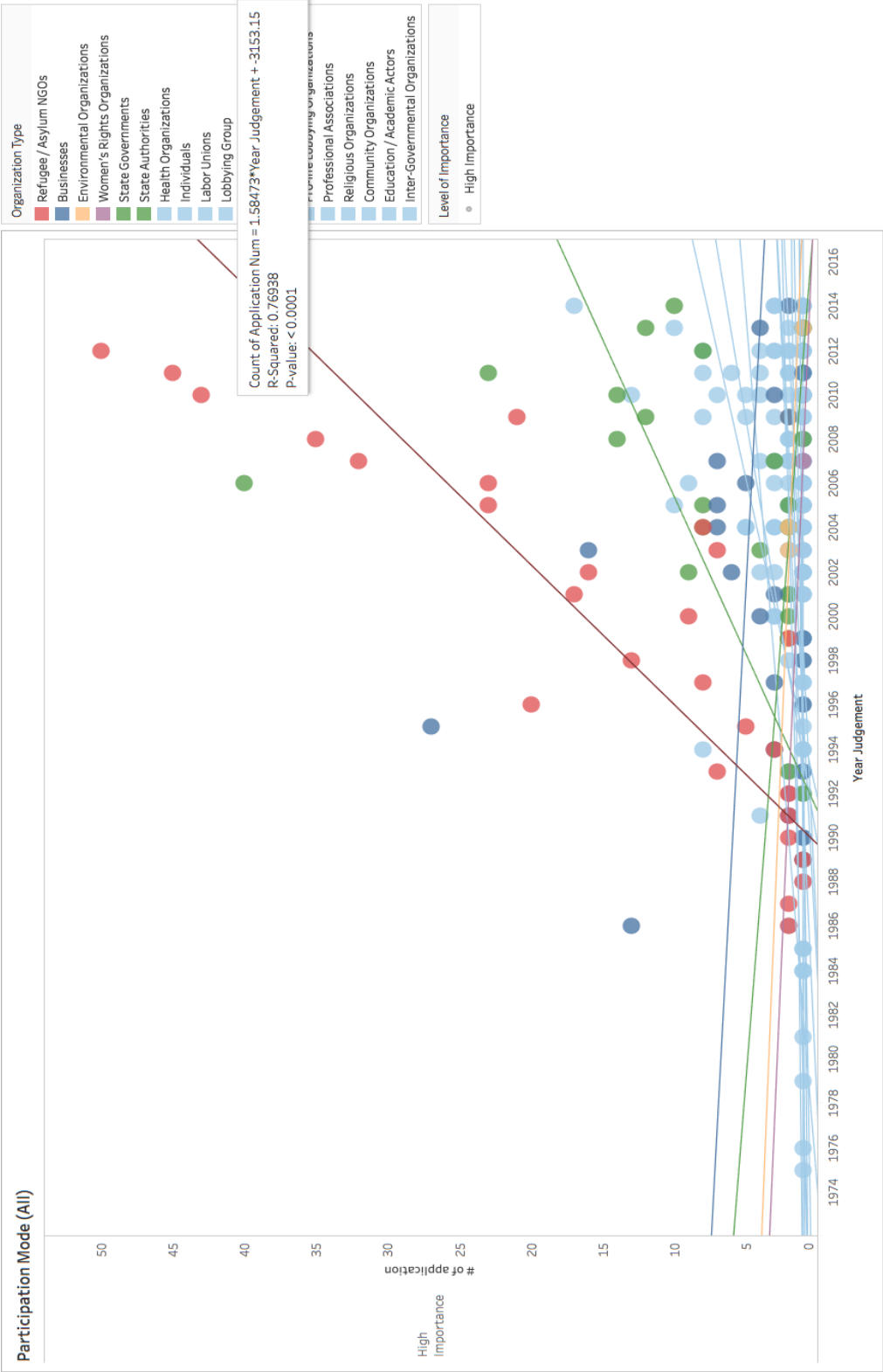
Appendix-D) Organization type & Participation type



Appendix-E) Regression results Refugee/Asylum NGOs



Appendix – F) Regression results – High Importance dimension



## **Appendix –G) Importance definitions in the dataset**

High importance (coded with number ‘3’):

*‘This includes cases that are published in the Case Reports, which are of highest importance and also those categorized as High Importance by the Bureau. This category is defined as: all judgements, decisions and advisory opinions which make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State.’ (Cichowski, Rachel A. and Elizabeth Chrun, 2017)*

Medium importance (coded with number ‘2’)

*‘This includes cases categorized as medium importance: Other judgements, decisions and advisory opinions which, while not making a significant contribution to the case-law, nevertheless go beyond merely applying existing case-law.’ (Cichowski, Rachel A. and Elizabeth Chrun, 2017)*

Low importance (coded with number ‘1’)

*‘This includes cases categorized as low importance: Judgements, decisions and advisory opinions of little legal interest, namely judgements and decisions that simply apply existing case-law, friendly settlements and strike outs (unless raising a particular point of interest). The importance levels are mentioned in the notice accompanying each document.’ (Cichowski, Rachel A. and Elizabeth Chrun, 2017)*







**Appendix – X - CJEU judgement on Dublin Regulation (EU) No 604/2013**

|   | <b>Applicant</b>                 | <b>Country</b>             | <b>Year</b> | <b>Main article in question</b>  | <b>Preliminary ruling</b>               |
|---|----------------------------------|----------------------------|-------------|--|---|
| 1 | Daher Muse Ahmed                 | Bundesrepublik Deutschland | 2017        | Determination of the Member State responsible for examining an application                     | Urgent Preliminary Reference            |
| 2 | Tsegezab Mengesteab              | Bundesrepublik Deutschland | 2017        | Transfer of responsibility to another Member State — Article 27                                | Preliminary Reference under Article 267 |
| 3 | Khadija Jafari and Zainab Jafari | Austria                    | 2017        | Determination of the Member State responsible for examining an application                     | Urgent Preliminary Reference            |
| 4 | X and X                          | Belgium                    | 2017        | Issuing of a visa on humanitarian grounds or because of international obligations              | Preliminary Reference under Article 267 |
| 5 | C. K. and Others                 | Republika Slovenija        | 2017        | Inhuman or degrading treatment   | Preliminary Reference under Article 267 |
| 6 | as                               | Republika Slovenija        | 2017        | Inhuman or degrading treatment   | Preliminary Reference under Article 267 |
| 7 | Aziz Hasan                       | Austria                    | 2017        | Irregular crossing of an external border — Period of 12 months from the crossing of the border | Preliminary Reference under Article 267 |
| 8 | T.                               | Deutschland                | 2017        | Determination of the Member State responsible for examining an application for international   | Preliminary Reference under Article 267 |

|    |                               |                           |      |  |   |
|----|-------------------------------|---------------------------|------|--|---|
|    |                               |                           |      | protection lodged in one of the Member   |   |
| 9  | Mohammad Khir Amayry          | Sweden                    | 2017 | Determination of the Member State responsible for examining an application for international protection                        | Preliminary Reference under Article 267 |
| 10 | K.                            | Netherland                | 2017 | Determination of the Member State responsible for examining an application   | Preliminary Reference under Article 267 |
| 11 | Shiraz Baig Mirza             | Hungary                   | 2016 | Criteria and mechanisms for determining the Member State responsible for examining an  | Urgent Preliminary Reference            |
| 12 | Council of the European Union | Slovak Republic & Hungary | 2017 | Article 289(3) TFEU — Whether conclusions adopted by the European Council are binding on the Council of the European Union     | Preliminary Reference under Article 267 |
| 13 | P.T                           | Czech Republic            | 2017 | Criteria and mechanisms for determining the Member State responsible for examining an application for international protection | Preliminary Reference under Article 267 |
| 14 | George Karim                  | Sweden                    | 2016 | Determining the Member State responsible for examining applications for asylum l   | Preliminary Reference under Article 267 |

|    |                       |         |      |  |  |
|----|-----------------------|---------|------|--|--|
| 15 | Mehrdad<br>Ghezelbash | Belgium | 2016 | No transfer within the time limit laid<br>down | Preliminary Reference under<br>Article 276 |
| 16 | Shamso<br>Abdullahi   | Austria | 2013 | Deadline for carrying out the transfer         | Preliminary Reference under<br>Article 277 |

-Last Page-