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Introduction: Legal Mobilization and Accommodating Social Movements

THROUGH THE COURTROOM DOORS

In November 1979, Canadians with disabilities met in Ottawa to lobby the federal government on the issue of accessible transport, which, they argued, was crucial to achieving equality and social inclusion.[1] Paradoxically, many activists, who had traveled from across Canada, encountered numerous barriers en route to Ottawa because of the difficulty of finding suitable modes of transport. Some attendees resorted to traveling in freight trains because their personal wheelchairs could not be accommodated in the passenger service cars. The struggle did not stop there. Upon their arrival in Ottawa, they discovered that the inaccessibility of the House of Commons made it impossible for some advocates to carry out meetings with Members of Parliament (MPs). In the late 1970s, such experiences of segregation were common for persons with disabilities. However, the incident was not all bad for the activists meeting in Ottawa; they effectively harnessed their stories to

[1] These activists gathered for the second annual "Transportation and the Disabled" conference. The gathering was organized by what was then known as the Coalition of Provincial Organizations of the Handicapped (COPOH), a nascent nongovernmental organization that brought together equality-seeking disability activists. Immediately following the conference, activists presented their concerns at the Canadian Transport Commission Hearings, and many were invited by Members of Parliament to meet at their offices in the House of Commons.

garner media support for their campaign and to stir debate within the political establishment. The government could no longer ignore the voice of Canadians with disabilities.

Almost thirty years later, the Supreme Court of Canada delivered its judgment in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, in favor of the Council of Canadians with Disabilities (CCD).[2] At the heart of this case was the decision made by VIA Rail in late 2000 to purchase 139 rail cars ("Renaissance cars") at a significant discount. The train cars were affordable because they were no longer usable for service through the Channel Tunnel; they were inaccessible to persons with disabilities and, hence, violated antidiscrimination legislation in the United Kingdom. Over the next six years, disability activists poured organizational resources – time, money, and energy – into a series of cases challenging this purchase. In *VIA Rail*, activists argued that the objectives of a national transport system must range wider than getting people from point A to point B as cheaply as possible. The Court agreed, finding that accessible transport is critical to enabling persons with disabilities to pursue educational opportunities, gain employment, enjoy recreation, participate in democratic processes, and live independently in the community. The judges ruled that the purchase of inaccessible carriages violated the equal rights of persons with disabilities: transport had moved into the realm of human rights law and policy.

Disability rights activists in Canada were jubilant about the Supreme Court decision in *VIA Rail*. With this decision, they saw the promise of equality established twenty-five years earlier in the Canadian Charter of Rights and Freedoms (1982) fulfilled, and they felt that their message

[2] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650. CCD was the progeny of COPOH: the organization changed its name in the mid-1980s to better reflect the discursive shift that was occurring in the realm of disability politics at the time. CCD waged a protracted legal campaign against VIA Rail Canada, which operates the national passenger rail service on behalf of the Government of Canada.

about the importance of accessible transportation had finally resonated. However, the final decision was extremely close, and activists were aware of how little it advanced the equality agenda and how difficult it would be to ensure effective enforcement of the Court's decision. Perhaps even more sobering was the realization that the issue of accessible transport – key during the movement's birth – was still capturing the full attention, resources, and energy of the disability rights movement three decades later.

These two examples of relatively small but significant victories for disability rights in Canada shed light on how the social movement has changed in terms of audience and tactics over thirty years. Yet, they also demonstrate those elements that remained the same: the grievances being expressed and the ideas of what true equality for persons with disabilities entails. These examples of the struggle for equality in transport are far from isolated. The campaign for rights and protection from discrimination on grounds of disability has become globalized.[3] The question of disability rights touches on issues ranging from inclusive education, autonomy in end-of-life decision making, and the politics of caregiving. In trying to make disability rights "real," activists rely on a number of tactics and strategies that increasingly include the use of law and courts.

The disability rights movement offers a rich case study of the mobilization of law by social movement actors. The modern disability rights movement has been transformational: over the past twenty-five years, it has engaged a broad spectrum of issues that deeply affect individual and collective identities. For some disability advocacy organizations, the courts have been a primary locus of movement activity; other organizations have completely foregone the judicial route in attempting to achieve their goals. Some activists who were hesitant about participating in litigation in the past have become active players in legal venues.

[3] R. Daniel Kelemen, *The Rise of Adversarial Legalism in Europe* (Cambridge, MA: Harvard University Press, Forthcoming).

Groups that, at certain times, were particularly active in the courts have been completely absent during other periods. This variation across groups and over time presents a puzzle: why do some disability groups turn to the courts as part of their campaigning work, often despite significant resource and procedural hurdles, whereas others, implicitly or explicitly, eschew this approach?

This book addresses this question by telling the story of how and why disability activists have deployed legal norms in their quest for societal equality and by exploring the outcomes of this legal action. Building on the momentum of recent work, I employ a sociological theory of institutions to account for variation in the use of legal action across the population of disability organizations. I offer a distinctive framework that puts the spotlight on two dimensions. First, I look at social movement framing processes: the way in which activists transform their vision and goals into plausible rights claims. Then, I explore the social movement politics surrounding these processes. In developing this framework, I challenge conventional wisdom about what matters most in understanding legal mobilization. Looking at financial resources and political or legal contexts only takes us part of the way in explaining the how, when, and why of legal mobilization. I suggest that, by taking social movement identity politics into account, we may find that there has been a fundamental misunderstanding of the causal mechanisms at play. Only by taking a holistic view of the full range of factors shaping the decision by SMOs to turn to the courts can we truly understand disability rights activism and the evolution of judicial understandings of equality.

Empirically, the disability rights movement provides an illuminating example of the power of the relationship between rights, ideas, and collective identity. This book also highlights the consequences of disability movement politics for legal mobilization and vice versa, engaging with important debates in the disability studies literature. Theoretically, this book contributes to the growing body of research on the judicialization of politics in advanced industrial democracies.

It does so by developing an approach to explain why some disability activists – particularly collective actors – are willing and able to use law and legal action to achieve their goals, and why others are not. After a discussion of existing explanations of legal mobilization, I develop a theoretical framework that complements these current approaches. Later in this chapter, I narrow the focus to the empirical subject of the book by exploring why the issue of legal mobilization of disability rights is important and instructive.

UNDERSTANDING LEGAL OPPORTUNITY: BALANCING STRUCTURE AND AGENCY

The term "legal mobilization" means different things to different people; academics, activists, and legal actors conceptualize the use of legal action by social movements in a wide variety of ways.[4] One of the earliest and most cited formulations put forth in the political science literature for the term "legal mobilization" is the basic premise that "the law is . . . mobilized when a desire or want is translated into a demand as an assertion of rights."[5] It has also been used to describe processes "by which legal norms are invoked to regulate behaviour" and a "planned effort to influence the course of judicial policy development to achieve a particular policy goal."[6] Michael McCann adopts an interpretive understanding of legal mobilization; he emphasizes "an understanding of law as identifiable traditions of symbolic practice," legal discourses as "constitutive of practical interactions among citizens," and the inherent

[4] Christopher P. Manfredi, *Feminist Activism in the Supreme Court* (Toronto: UBC Press, 2004).

[5] Frances K. Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System," *American Political Science Review* 77(3), 1983, p. 700.

[6] Robert O. Lempert, "Mobilizing Private Law: An Introductory Essay," *Law and Society Review* 11(2), 1976, p. 173; Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (Princeton, NJ: Princeton University Press, 1990), p. 40.

malleability of legal symbols and discourses that might be mobilized to fight policy battles and advance movement goals.[7] While emphasizing different understandings of the power that law can and does exert in social life, what unifies these approaches is the idea that law has the potential to be an effective instrument for political and social change.[8]

Legal mobilization can include many different types of strategies and tactics, such as raising rights consciousness among particular communities or the public, delivering public legal education or specialized legal education, lobbying for law reform or changes in the levels of access to justice, providing summary legal advice and referral services, and undertaking strategic or test case litigation. I do not make an assessment of the relative benefits and disadvantages of using these various activities to achieve particular goals. Rather, necessitated by scope, this inquiry generally focuses on the use of strategic litigation. The terms "test case" and "strategic litigation" generally refer to those cases in which an organization or individual entreats a court or tribunal to a) look at an issue for the first time or potentially reconsider an issue that has been decided in the past, b) decide an issue that will affect a significant number or class of people, and/or c) consider a particular perspective on an issue that has hitherto not been included in existing jurisprudence.

Whether seeking to create, expand, clarify, narrow, or nullify rights or pursue other goals through the use of litigation, activists and organizations can enter the courtroom in one of several ways. Carol Harlow and Richard Rawlings first developed the distinction between proactive litigation strategies and reactive litigation strategies.[9] For them, proactive litigation describes those situations in which groups act as

[7] Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994), pp. 8–9.

[8] Manfredi, *Feminist Activism*, p. 10.

[9] Carol Harlow and Richard Rawlings, *Pressure Through Law* (London: Routledge, 1992).

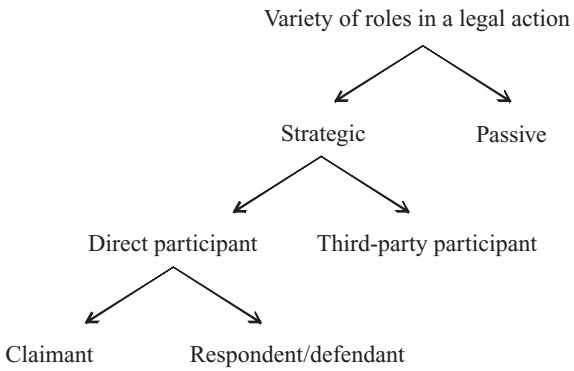

Figure 1.1. Range of Roles in Legal Mobilization.

the litigant, seeking to take their cause to the courts. Reactive litigation is the response of groups that choose to undertake civil disobedience. In these situations, activists purposefully flaunt laws they see as unjust or immoral, with the aim of being arrested and brought before a judge or jury. Activists entreat the judge or jury to overturn or, at least, not enforce the law they see as unjust. Although this framework is a useful analytical contribution, it is also reflective of a relatively simplistic understanding of the range of roles groups can play and the intentions behind particular actions.

To overcome these difficulties, I propose a categorization that hinges the definition of legal mobilization on the identified intentions of the collective actors involved in the litigation (see Figure 1.1). When an organization purposefully turns to the courts to pursue its goals, its action can be classified as strategic. In the strategic category, the type of role played by an organization can be further broken down: the organization can be either a direct participant – the claimant (or supporting an individual claimant) or a respondent (or supporting a respondent) – or a third-party participant. Most studies on the use of strategic litigation have focused on the former – what Harlow and Rawlings referred to as "proactive litigation strategies," whereby groups pursue cases themselves or directly support an individual litigant. Activists can

also act strategically so as to be required to appear before the court as respondents or defendants; that is, they will purposefully act unlawfully with the intention of appearing before the court, with the hope that the court will highlight what they see as unjust laws or clarify that the actions of the authorities are not underpinned by law.[10] An organization can also apply for leave to intervene as a third-party intervener. Interveners are not directly involved in the legal dispute of the case but volunteer to offer information – usually in the form of a brief or testimony, or both – to the court on a point of law or to provide other perspectives on the case and the potential consequences of deciding it one way or the other.[11]

In contrast, when an organization is required to appear before the court but prefers not to, and does not use this action as a way of pursuing goals, this strategy can be classified as passive. An organization can be pulled to court as either a respondent or defense in a criminal case. This is most often passive litigation, although, if the organization takes this opportunity to pursue policy or other goals, this type of litigation then falls under the strategic category.[12] The switch from passive to

[10] This tactic can backfire if the court then confirms the existence of a law or power that was controversial until that point.

[11] This is commonly known as *amicus curiae* – a "friend of the court." In Canada, the terminology is slightly different. In addition to interveners, there is another type of third-party participant, an *amicus curiae*, who is requested by the court to appear to provide advice or legal opinion to the Court if the Court feels that a particular perspective is missing from its analysis and there have been no applications for leave to intervene to present a particular perspective.

[12] A recent example is the use of an injunction by the British Airport Authority (BAA) during the Camp for Climate Action protest in August 2007 at London's Heathrow airport. Environmental protection organizations and individuals gathered near the airport over several days to protest the expansion of the airport and the increasing use of aviation and its environmental consequences more generally. The campaigners actually benefited from their opponent's use of the courts to try to stop several individual activists and one organization, Plane Stupid, from attending the protests: the injunction had the unintended effect of generating publicity and public sympathy for the protestors, all at a minimal cost to the campaigners themselves.

strategic litigation is generally not predictable and therefore is difficult to manage. However, if harnessed in an effective way, responses to injunctions and other legal tactics can be very useful in supporting an organization's goals.

What, then, are the conditions under which civil society organizations are likely to rely on litigation strategies to further their interests and advance their goals? What are the factors that shape the decision to turn to the courts, and why do some civil society organizations make this move, whereas others do not? A number of theoretical perspectives have been advanced in existing studies (mainly in the political science literature) on the assertion of legal rights by groups and individuals across a wide range of issue areas; however, three theoretical approaches have dominated the literature: 1) political opportunity structure (POS) approaches; 2) more recently, elements of legal opportunity structure (LOS) approaches; and 3) resource mobilization (RM) theories. Later in this chapter, I develop and deploy a sociological–institutionalist approach to account for why, when, and how some groups are more likely than others to rely on litigation strategy as part of their overall logic of action. I also discuss why the comparative approach taken here, as well as the case study of the disability rights movement, is beneficial in highlighting the theoretical value of my approach.

Insiders and Outsiders: Political Opportunity Structures and Legal Mobilization

Political scientists have often traced the turn to the courts by groups that are "disadvantaged" in traditional political arenas.[13] Early studies,

[13] In discussing these groups I tend to use the terms "social movement organization" (SMO), "civil society organization," and "interest group" interchangeably. However, it must be acknowledged that different bodies of literature in sociology and political science vary in their meanings of these terms. For example, the term "social

relying mainly on case studies of the American civil rights movement, argued that groups lacking influence over members of the executive, legislative, or regulatory bodies are more likely to turn to the judicial branch to pursue their policy goals. The literature on the use of European Community (EC) litigation strategies by interest organizations has also identified "political strength" as a factor that conditions the take up of strategic litigation. In more recent debates, political scientists have tended to conceptualize this notion of political disadvantage or strength using the tools of POS approaches, which explore the contextual incentives and constraints that SMOs face in the political environment and which may shape their strategy choices.

The core idea uniting opportunity structure approaches is that the most important determinant of variations in levels and forms of collective action by social movement groups is opportunity, not grievances, resources, or something else. The term "opportunity," as Ruud Koopmans points out, is rarely defined. It generally refers to constraints, possibilities, and threats that originate outside the mobilizing group, but that influence its chances of mobilizing or realizing collective interests.[14] Most POS approaches now consider both an input and an output dimension. Herbert Kitschelt writes that "the capacity of political opportunity structures to implement policies – as well as their openness to societal demands – ought to be seen to determine the overall responsiveness of politics to social movements."[15]

movement" tends to refer to groups advancing a common interest through collective action outside the sphere of established institutions; whereas "interest group" is used to describe groups established to influence political actors. However, many groups (e.g., Greenpeace or the Campaign for Nuclear Disarmament) engage in both protest and political lobbying.

[14] Ruud Koopmans, "Political. Opportunity. Structure. Some Splitting to Balance the Lumping," *Sociological Forum* 14(1), 1999, pp. 93–105.

[15] Herbert P. Kitschelt, "Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies," *British Journal of Political Science* 16(1), 1986, p. 63.