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ARTICLE

Mapping the potentials and pitfalls of using European law for strategic litigation against illiberal reforms

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Abstract

The toolbox for resisting illiberalism is quite diverse. It includes high-level diplomatic negotiations concerning sanctions to enforce democracy and citizens' mobilisation for local causes. This article focuses on strategic litigation as legal mobilisation, relying on the language of rights and the rule of law and addressing courts as defenders of liberal democracy. Such mobilisation leads to litigation before national and European courts concerning issues such as media freedom, judicial independence, minority rights or the rights of migrants. In order to be authoritative, however, courts need support from political institutions at national and EU levels from the transnational judicial community and from civil society. The embeddedness in structured civil causes and organisations seems particularly relevant in the context of strategic litigation. This article aims to map out particular factors in the EU legal and institutional systems that directly affect the prospects of strategic litigation against illiberal reforms using EU law.

On the one hand, the EU legal system does not provide direct access to the Court of Justice of the EU (CJEU). The multilevel system of judicial protection in the EU means that litigation aimed at resisting illiberalism mostly needs to start before national courts, making it vulnerable to political capture of national judiciary. On the other hand, the EU law system is based on the purposive constitutional framework of the Treaties. The tendency to follow a teleological interpretation of the CJEU makes it a promising ground for advocating for new interpretations of the law in light of a changing social context. Finally, EU law is a system with a particular legal culture and a field of experts who are well-versed in applying that culture. This field does not directly overlap with the specialised lawyers who often initiate strategic litigation; who tend to be experts in the fields of migration, transparency or the environment; and who do not have a broader understanding of EU law and its integration logic.

Keywords: European Union; international courts; legal mobilization; rule of law

1. Introduction

Many societies in Europe and beyond face an increasing polarisation regarding liberal democracy. In the 2010s in Europe, Hungary and Poland were primarily studied as examples of countries where populist politicians questioning liberal democratic values controlled the government (Drinóczi and Bień-Kacała 2021; Sadurski 2022). Hungary has even been famously called an 'illiberal democracy'.[1] Poland was ruled by an illiberal government from 2015 to 2023. However, the struggle for liberal democracy is more complex than just controlling the government. Instead, liberal democracy is undermined through a multiplicity of political reforms, institutions' legal acts

[1]Viktor Orbán's speech at the XXV Bálványos Free Summer University and Youth Camp, 26 July 2014, Băile Tuşnad, available at https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.

and the mainstreaming of far-right discourses. Law has proven to be a powerful instrument in this social struggle because it is mobilised by various stakeholders – state and non-state actors who are right-wing and left-wing, the economically powerful and the underdogs – all of whom have different ideologies. Putting law in its social context here means taking seriously the realities in which the legal mobilisation takes place geographically, politically and temporarily.

In the context of social polarisation, we have seen courts rise to the position of powerful social actors deciding directions for reforms regarding climate change, migrant rights and media freedom. Strategic litigation against illiberal reforms is a form of legal mobilisation that relies on the language of rights and the rule of law and that addresses courts as defenders of liberal democracy (Zemans 2014). In order to be authoritative, however, courts need support from political institutions at the national and the European Union (EU) levels, from the transnational judicial community and from civil society (Caserta and Cebulak 2021).

This article aims to map out particular factors in the EU's legal and institutional systems that affect strategic litigation against illiberal reforms using EU law. On the one hand, the EU legal system does not provide direct access to the Court of Justice of the EU (CJEU). The multilevel system of judicial protection in the EU means that litigation geared towards resisting illiberalism often needs to start at local, first-instance courts, making it more cumbersome and difficult to implement the litigation after the judiciary has been submitted to political constraints. On the other hand, the EU law system is based on a purposive constitutional framework of the Treaties. The tendency to a teleological interpretation of the CJEU makes it a promising ground for advocating for new interpretations of the law. Finally, EU law is a system with a specific legal culture and a field of experts who are well-versed in applying it. This field does not directly overlap with the specialised lawyers who often initiate strategic litigation. The litigators tend to be experts in the fields of migration, transparency or environment and do not consider re-framing their case in order to rely on other areas of EU law. The EU tends to adopt a lot of legislation based on its competence to regulate the internal market and the transformative potential of this legislation for strategic litigation is often clear only to generalist EU lawyers.

Their embeddedness into structured civil causes and organisations seems particularly relevant in the context of strategic litigation. While it is relevant to reflect on the potential of strategic litigation to resist illiberal reforms and to study its dynamic under EU law, we should keep in mind its limits: academic literature and reflections of strategic litigation practitioners have shown that in order to be successful in attaining its goals, strategic litigation needs to be part of a broader political campaign (Fischer-Lescano 2021). Strategic litigation and the social movement should be mutually reinforcing, which means that their interests and strategies should align and be elaborated together (Open Society Justice Initiative 2017, 82). By singling out strategic litigation, this article does not seek to attribute to it a crucial role among other tools of advocacy and social engagement. Instead, studying strategic litigation allows us to reflect on the roles that the law, the lawyers and the judges play in dealing with the rise of modern illiberalism. Rather, strategic litigation foregrounds the litigants and the other actors involved in the litigation, which helps us uncover a more socio-legal picture of judicial functions in times of populism.

This article proceeds in three steps: first, a definition of illiberal reforms as an object of legal mobilisation is set out. Second, the article offers some reflections on the specific characteristics of strategic litigation against illiberal reforms. Third, the analysis systematically highlights the procedural, constitutional, political and socio-legal factors that affect strategic litigation against illiberal reforms under EU law. The main goal of the article is to map out the particular features of law and the judicial politics in the EU that actors initiating strategic litigation have to take into account. This particular legal opportunity structure of EU law is co-constitutive of the strategic litigants who use EU law as a tool for sociopolitical change. While many features apply generally to EU law, the EU's relationship with liberal democratic values makes strategic litigation against illiberal reforms a particularly interesting case study.

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2. What is the enemy? Illiberalism, rule of law violations and populism

This article proposes a definition of illiberal reforms that can be used when analysing how EU law can be judicially mobilised. Instead of studying entire regimes as liberal or illiberal democracies, the notion of illiberal reforms provides a finer-grained framework. In general, reforms are any public measures, at the EU or the national level, that produce effects for the rights holders. Those measures can be passed according to formal rules of enacting legislation or represent an illegal abuse of public authority. They are illiberal in nature if they reflect illiberal ideology. This can mean, in particular, focusing on majoritarian solutions and limiting the rights of individuals, especially minorities.

In order to empirically map out and investigate the toolbox of legal mobilisation using EU law, we first need to establish a conceptual framework for resisting modern illiberalism. This article does not propose a new general definition of illiberalism. Rather, it develops a functional, analytical framework allowing us to conduct socio-legal studies of the legal mobilisation against illiberal reforms.

The starting point is a four-element definition of illiberalism following Marlene Laruelle (Laruelle 2022):

- Illiberalism as an ideological universe with a certain thick, substantive ideological content;
- Illiberalism as a backlash against all the liberal scripts;
- Illiberalism as proposing majoritarian, nation-centric and sovereigntist solutions;
- Illiberalism as shifting the discourse from politics to culture.

An important conceptual element for comparing legal mobilisation to illiberal reforms is understanding illiberalism as an ideology. If we understand illiberalism as an ideological universe, we will move away from studying democratic backsliding as a agentless phenomenon and illiberal political systems as "the other". We need to acknowledge illiberalism as an ideology present in all modern democratic societies as well as in those where illiberal politicians are not in government and have not introduced institutional changes.

Many scholars have been taking democracy as a starting point of their analysis of the actions that I dub 'illiberal reforms'. Tom Ginsburg uses a narrow definition of democracy that is composed of three elements: first, it requires a government that is characterised by competitive elections in which parties can lose and concede. The second requirement is a minimal set of rights regarding freedom of speech and association that are guaranteed to everyone. The third element is the rule of law, which governs administration (Ginsburg 2021, 21). This definition is useful for studying either how anti-democratic politicians behave once they are in power (Sadurski 2022, 7) or how we can affect regime change or democratic backsliding (Ginsburg 2021). A focus on democracy as a regime type seems, however, less suitable for studying legal mobilisation because legal mobilisation is a piecemeal process that does not directly address an overall regime change.

All recent populist and illiberal governments formed in Europe in the last decade operate within the general premise of democracy. For this reason, scholars have been focusing on the challenges to certain crucial elements of a democratic system. Three related elements of democracy have been highlighted in the study of recent challenges to European democracy: (1) democratic backsliding/decay, (2) populism and (3) rule of law. It is important to acknowledge the normative premises that each of these concepts implies when they are adopted as a framework for an empirical analysis.

First, democratic backsliding (Bormeo 2016; Kelemen and Blauberger 2017), or democratic decay (Daly, 2019), proposes a relative measure of how democracies change. Due to the lack of common standards and enforceable legal norms about liberal democracy or the rule of law, it often seems more practicable to evaluate the countries by their own standards. The idea is that democracies should not go back on the democratic standards that they once guaranteed, whether

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regarding individual rights or institutional power distribution. That approach seems to have also recently been adopted by the CJEU with regard to judicial independence in the European Union. The EU does not have the ability to establish a common standard of judicial independence, but the Court can enforce the rule that a Member States cannot 'amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law'.[2] The concept of democratic backsliding is important to emphasise in order to highlight the gradual and state-led nature of the process of democratic backsliding. They focus on the institutional process and not on the ideology of its agents.

Second, the concept of populism has also been used in very insightful studies of new types of political behaviours. While the rise of populism in society tends to coincide with the rise of illiberalism, the phenomena should still be distinguished in order to have a nuanced understanding in a concrete context of the ideologies at play (Blokker 2021). While some authors narrowly define populism as a technique or technology used in the political arena (Mudde 2007), other authors define populism as an ideology (Sadurski 2022). The latter definition points out the contrast between populism and democracy (Müller 2017, 11). Populists tend to present themselves as the true representatives of unified people. The concept of the people is constructed based on nationalism and on majoritarian and identarian narratives. In that sense, populism can be defined as neutral in terms of the left and the right wings of the political spectrum (Mouffe 2018). The populism narratives of a polarised society have also been deployed to study judicial behaviour by using the concept of 'judicial populism' to investigate how judges adopt populists' discourses as underlying narratives for their reasoning (Bernstein and Staszewski 2021, 283). The concept of populism seems, however, to be difficult to align with the backlash against democracy. Populists are, at least discursively, not against a democratic system; instead, their backlash seems to be directed against liberal scripts. In particular, the political liberal script relating to pluralism and separation of powers seems to be the thorn that triggers populists' institutional reforms. Populists in power tend to influence the legal structures so that they favour right-wing legal mobilisation (Kocemba and Stambulski 2024).

Third, many legal scholars tend to focus on the concept of the rule of law when studying anti-democratic reforms (Bogdanowicz and Schmidt 2018; Emmons and Pavone 2021; Pech and Scheppele 2017). Historically, their debates focus on the distinction between a narrow and a broad concept of the rule of law, where the narrow one would focus on the formal respect of the constitutional procedures by the state organs, whereas the broad one would also encompass substantive guarantees of fundamental rights and human dignity. Many scholars have claimed that the shortcoming of the narrow definition of the rule of law was tragically displayed by the Nazi regime, which prima facie respected the formal legal requirements. Still, many of the modern populist regimes have committed clear violations of the formal rule of law, which has led to a revival of calls for compliance (Merdzanovic and Nicolaidis 2021). In the European Union, the democratic problems in two of its Member States, Hungary and Poland, have been famously dubbed the 'Rule of Law Crisis'.[3]

Traditionally, the concept of the rule of law came with a strong normative commitment to uploading it as a value, which would also guide many academic publications representing renewed calls for respecting the rule of law. In the meantime, however, many scholars have called for a more socio-legal approach to studying the actual implementation of the rule of law in society and the economy (Krygier 2016). In the international law context, for example, this has often meant unmasking the rule of law as an 'empty signifier' that can be strategically deployed depending on the political context (May 2014). The rule of law has thus often been deployed as a tool of de-politicisation. International rule of law practitioners have developed a set of specific standards

[2]CJEU, C-896/19, 20 April 2021, *Repubblika v. Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 63.

[3]See e.g. European Commission, Viviane Reding (2013) Speech: The EU and the Rule of Law – What next? Available at https://ec.europa.eu/commission/presscorner/detail/es/SPEECH_13_677.

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and rule of law indicators (Humphreys 2010). The idea of the rule of law as more technical and non-political has also permeated the debates in the EU context. The Court of Justice of the EU has focused on the rule of law as a single value among the list of democratic values enshrined in Article 2 TEU. The European Commission, as the executive and traditionally technocratic organ of the EU, has also adopted the rule of law language. However, it seems that the concept of the rule of law might instead mask than illuminate the ideological clashes if we want also to include the clashes surrounding certain illiberal reforms and their liberal opposition.

This article proposes a conceptual framework that can be deployed apart from the particular context of the democratic backsliding in Hungary and Poland and can be useful for debating and equipping the EU law and its governance for the broader challenges stemming from the rise of modern illiberalism. Such an approach can contribute to the debate about the existential challenges facing the EU constitutional order. The systemic threat to the EU acquis and the EU's way of operating results not only from illiberal regimes blocking the enforcement of EU law in certain Member States but also from individual illiberal reforms that aim at excluding certain groups from society and the economy by depriving them of access to the rights guaranteed under the EU legal order. Such reforms in the past included hosting secret CIA black sites by Lithuania, Poland and Romania in the early 2000s following the 9/11 attacks[4] and the mass deportations from France of Bulgarian and Romanian citizens of Romani origin in 2010.[5] While the regimes did not qualify as illiberal as a whole, these particular policy measures did represent illiberal reforms.

3. What is the strategic litigation against illiberal reforms?

Legal mobilisation implies consciously or even strategically using the law. It adopts the right's language to pursue the goals of the affected communities (Epp 1998 18). Legal mobilisation is also linked to particular venues: it uses the law and the courts to press for social change (Passalacqua 2021). Strategic litigation, one of the forms of legal mobilisation, is a judicial procedure initiated in an individual case with the purpose of triggering broader socio-political change (for a similar definition, see Duffy 2018 3). Litigation is a formal procedure before courts or other bodies who are competent to make decisions in adversarial procedures. Strategic litigation against illiberal reforms focuses on judicial proceedings aimed at challenging the validity or interpretation of national or European legal norms that reflect an illiberal agenda either by undermining democratic values or by having exclusionary effects for parts of society.

3.1 Actors of strategic litigation

Most studies focus on civil society and non-governmental actors as initiators of strategic litigation using EU law. These actors are a particular type of 'individual', which in EU law includes natural and legal persons; actors such as companies, non-governmental organisations (NGOs), lobby organisations, civil society organisations (CSOs); and individual applicants. The focus is on actors involved in litigation in various capacities, such as plaintiffs, *amicus curiae* or advisers. Multiple actors are often involved (e.g., individual applicants supported by NGOs and collective actors representing individuals), and identifying who will formally act as applicants is a crucial step when bringing a strategic case to court.

Some studies differentiate based on the normative desirability of strategic litigation. Many studies differentiate between right-wing and left-wing litigation (Kocemba and Stambulski 2024). The underlying focus is often the difference between a liberal-progressive and a conservative legal

[4]European Parliament, Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (2006/2200(INI)), 14 February 2007.

[5]European Parliament, Resolution of 9 September 2010 on the Situation of Roma and on Freedom of Movement in the European Union, 9 September 2010.

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mobilization (Blokker 2024). The latter tends to mobilise 'against rights' – opposing the establishment of new rights or restricting the interpretation of existing rights. For some authors, it is the actors that make the difference. Whether strategic litigation is initiated by civil society or companies can make the difference between legal mobilisation and 'lawfare' (Handmaker and Taekema 2023). Lawfare happens 'when government or corporations undermine the rule of principles' (Handmaker and Taekema 2023, 1). This distinction is particularly relevant in the context of illiberal reforms, where law is often reduced to an ideologically neutral tool. Cases can be brought by public or private litigants to reduce public participation or to gain individual benefits that go beyond the favourable ruling in a particular case. In the EU context, Member States can sometimes bring cases to the CJEU to legitimise their illiberal reforms. An example is the case brought by the Hungarian and Slovak governments to challenge the directive to distribute asylum seekers among Member States. In the context of the so-called migration crisis, the EU institutions decided on specific measures to help the particularly affected countries to redistribute temporarily the asylum seekers among other EU Member States. In this context, Hungary and Slovakia brought infringement proceedings against this decision of the Court.[6] The political salience of the case was reflected in the plethora of basic EU law principles that the parties said the Council had potentially violated, including principles of proportionality and solidarity in the EU. Additionally, Poland, as an intervening party, argued that the Council's decision would disproportionally affect countries that are 'virtually ethnically homogeneous, like Poland'.[7] The Court dismissed the case. Following this unsuccessful challenge, some Central and Eastern European governments did not take measures to implement the politically uncomfortable decision.

Companies can also initiate strategic litigation against illiberal reforms other than lawfare. In the EU context, many crucial cases that moved forward the process of European integration were initiated by companies as applicants (Kelemen 2011). The links between strategic litigation involving economic actors and resisting illiberal reforms are not always remote or contingent. In the case of *Centro Europa 7*, the private company attempted to challenge, through litigation, the practice of the media conglomerates owned by Silvio Berlusconi to block the frequencies of other channels.[8] This lawsuit, brought before different national and European courts, was meant to defend media pluralism in Italy.

A type of actor initiating strategic litigation that is particularly relevant in the context of resisting illiberal reforms is non-majoritarian state institutions themselves. In the context of the rule of law crisis in the EU, national judges have been a particularly relevant type of actor. As illiberalism advances majoritarian and sovereigntist solutions, the independence of institutions that can block political reforms or challenge cultural narratives is often criticised or reduced. Similar to NGOs, states or companies, judges can be actors in cases that support and challenge the illiberal agenda (Krzyżanowska 2024). In Croatia, judges are responsible for a significant part of the SLAPP lawsuits brought against newspapers that publish stories about potential corruption (Spaic-Kovacic 2023). At the same time, judges from Poland, in particular, have been active in using EU law avenues in support of political campaigns to defend their independence (Grabowska-Moroz 2024). This active role of judges included actions both in the realm of their judicial function (such as referring preliminary ruling questions at the last minute before a reform entered into force) and in the realm of the judges' role as individual applicants trying to affect the change of policy vis-à-vis the judiciary in general. Judges' associations are also a particular type of NGO that is positioned between CSOs and trade unions. They have been crucial in initiating cases

[6]CJEU, 6 September 2017, Case C-643/15, *Slovak Republic and Hungary v. Council of the European Union*, EU:C:2017:631.
[7]Idem. para. 302.
[8]CJEU, 31 January 2008, C-380/05, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, ECLI:EU:C:2008:59. The case was also brought before the European Court of Human Rights: ECtHR, 7 June 2012 [GC], *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, App. No. 38433/09.

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aimed at effecting broader legal or political change. In Poland, judicial associations such as Wolne Sądy (the Free Courts Initiative) or Iustitia were crucial in mobilising EU and ECHR law in resistance to populist impacts on the Polish judiciary (Grabowska-Moroz 2024). The CJEU, for the first time, established the principle of judicial independence as a general principle of an EU law in a case initiated by the Portuguese Judges Association.[9] In August 2022, a group of judges' organisations – the Association of European Administrative Judges (AEAJ), the European Association of Judges (EAJ, a regional branch of the International Association of Judges [IAJ]), Rechters voor Rechters (Judges for Judges) and Magistrats Européens pour la Démocratie et les Libertés (MEDEL) – with the support of the Good Lobby Professors, filed a direct action before the General Court to annul the Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland.[10] In these cases, the judges act as victims whose individual rights are affected by the reforms but also act regarding a more general interest.

3.2 Objectives of strategic litigation

Objectives of strategic litigation have to go beyond the individual case: they cannot be focused on enforcing the ruling of the court with regard to the applicants but, instead, must focus on bringing about change (De Silva and Plagis 2023, 38). This change can range from legislative change, change of the practice of political institutions, social change or change of public discourse (by drawing attention to an issue).

Strategic litigation has traditionally been associated with progressive causes (Kocemba and Stambulski 2024). However, limiting the study of legal mobilisation and strategic litigation from the onset to instances of pursuing progressive objectives would neglect an important part of reality. NGOs have also often initiated strategic litigation for conservative reasons. The increased influence of conservative NGOs has been studied in the context of *amicus curiae* interventions before the European Court of Human Rights (ECtHR) (Cliquennois, Chaptel and Champetier 2024; van den Eynde 2013). Often, in an attempt to de-politicise strategic litigation as a practice, we define it in ideologically neutral terms. Can the objective of legal, social or political change, however, be a conservative one? Or do conservative NGOs instead initiate litigation to preserve the status quo and achieve a chilling effect for any change?

Instead, some sociological studies of legal mobilisation suggest that the stagnation (or even regression) in terms of rights enforcement in societies stems from the conflict between progressive and conservative objectives pursued by civil society (Bob 2012). Global civil society is not a harmonious field where like-minded NGOs and conservative and progressive civil society mobilisations co-exist (Bob 2012 7). Right-wing legal mobilisation against rights has been a globally growing phenomenon (Payne, Zulver and Escoffier 2023). Basically, movement provokes a counter-movement, which makes it necessary to study legal mobilisation in a particular political context. In terms of the ideological objectives pursued by actors, we can expect that in societies with politically strong liberal movements, the counter-movement will be that of the right-wing mobilisation. This article focuses on mapping out the potential of mobilising EU law in a setting where populist political forces are in power. In such a setting, strategic litigation against illiberal reforms can be seen as a counter-movement.

Strategic litigation is broader than public interest litigation (Cummings and Rhode 2009) or cause lawyering (Sarat and Scheingold 2006), which means that it also encompasses cases being brought for far right-wing ideologies or private general interest. It is still, however, linked to a progressive understanding of law as a transformative tool of society rather than as just a reflection of its commonly accepted rules. In order to study strategic litigation in times of populism, it

[9]CJEU, 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117.
[10]CJEU, filed 28 August 2022, T-532/22, *Association of European Administrative Judges v. Council*, pending.

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appears to be suitable to adopt a value-neutral definition of it: the goals of strategic litigation go beyond just winning the case in court.

While some commentators have been questioning the usefulness of liberal rights frameworks in times of global inequalities, others have been highlighting the importance of mobilising human rights, especially in times of populism (De Búrca, 2021). This is also the perspective used by strategic litigation against illiberal reforms. While those reforms adopt a more majoritarian logic, the litigation objectives often focus on leveraging the judicial case to increase awareness and frame certain issues as inalienable rights – outside of majoritarian decision-making. By focusing on strategic litigation against illiberal reforms, it becomes clear that such litigation would defend liberal democratic values, such as individual rights, rights of minorities and checks and balances.

Challenging illiberal reforms before courts poses particular challenges in terms of the risk of reinforcing illiberal narratives. If we understand illiberalism as a backlash against liberal economic, political or cultural scripts, strategic litigation counters it by non-majoritarian means: it relies on the judiciary providing checks and balances to protect rights, even if the rights holders have been 'outvoted' in a majoritarian democratic process. In this particular instance, when such strategic litigation against illiberal reforms relies on EU law, it also relates to the backlash against the liberal economic and geopolitical scripts (Laruelle 2022, 312).

4 What is special about strategic litigation against illiberal reforms in EU law?

According to a well-established narrative among EU studies scholars, the CJEU has for decades managed to act as the 'engine of European integration' while avoiding the spotlight of public and political debates (Schmidt and Kelemen 2013; Stein 1981; Weiler, 1991). This lack of public attention has also been true of strategic litigation using EU law. Many key judgments pushing forward European integration have been achieved through strategic litigation (Pavone 2022). Achieving legal, political or social change through the Court in Luxembourg, however, was a way to reach the goal without triggering agonistic, confrontational debates. It was also a quiet way to build up legitimacy for a solution that, at the time, needed to be implemented by the national administrations.

Strategic litigation using EU law has now gained more public attention. This development is probably due to several reasons. First, we can observe more public interest litigation with NGOs acting as applicants before the CJEU. The early cases involved 'ghostwriters' – that is, cases brought in the name of individual applicants, who were either scouted by the interested lawyers or turned out to have close connections to, back in the first decades of European integration, the small group of EU lawyers (Pavone 2022). In those cases, their broader sociopolitical goals stayed naturally more hidden than in cases of public interest litigation brought by NGOs as applicants.[11] While the times of quiet integration through law are over, the roles of the Court and lawyers in European governance remain central: they hold a 'critical position in a political system deprived of a State capable of organising stable relationships and hierarchies between groups and institutions' (Vauchez 2008, 130). Second, the circle of lawyers familiar with EU law has grown over time. While the field might have become weaker in terms of identifying with EU law as a primary and exclusive category, it has grown in terms of numbers (Vauchez 2013). The EU has gained competencies to adopt legislation in fields such as migration and criminal law, where there has always been more strategic litigation. The lawyers and NGOs active in such fields and experienced with strategic litigation in front of national and international courts and tribunals have naturally expanded their palette to include EU law. The CJEU is also proactive in spotlighting litigation brought by private applicants and NGOs (Hermanse, Pavone and Boulaziz 2023). The knowledge, familiarity and trust in the EU legal system has also grown among national judges, making them more willing to refer preliminary ruling questions to the CJEU (Mayoral 2017). The third reason

[11]See e.g. CJEU, 23 April 2020, C-507/18, *Associazione Avvocatura per i dritti LGBTI*, ECLI:EU:C:2020:289.

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contributing to the growing public attention to EU litigation is more specific to the context of illiberal governments. In this context, EU litigation amounts to a systemic challenge of the national political agenda and is bound to draw more backlash. Resistance against the judgments of international courts is also bound to draw them more into the political spotlight (Madsen, Cebulak and Wiebusch 2018). In spite of the political stand-off between Warsaw and Brussels regarding democratic backsliding, Poland is probably the country right now where the CJEU has the most 'brand recognition'. Polish residents are confronted regularly with images of the Kirchberg courtroom and the CJEU's president, Koen Lenaerts, as well as with the contents of the Court's final rulings and interim measures. If strategic litigation is brought before the CJEU in such a context, its political salience is automatically boosted.

Against the background of the increased public attention to EU law as a tool of strategic litigation, this article seeks to map out certain key features that make EU law relevant (or not) for strategic litigation against illiberal reforms. Those particular features of EU law that affect its suitability as a strategic litigation tool lie in the institutional arrangements among the CJEU, the EU legal framework and the political context of the EU's commitment to democratic values.

4.1 Procedural features affecting EU strategic litigation

From a lawyer's perspective, the most obvious factors that affect strategic litigation using EU law are the procedural factors that shape the channels of accessing the CJEU. There are three main ways for actors to bring a case before the CJEU, and each has consequences regarding who can be an applicant and how the legal questions have to be framed. The three main types of actions in EU law include direct actions, preliminary rulings and infringement procedures. Direct actions are often the default tool for strategic litigation, but they are relatively limited in EU law. When it comes to annulment proceedings meant to review the legality of EU legislation under article 263 of the Treaty of the Functioning of the EU (TFEU), NGOs and individual applicants fall under the category of non-privileged applicants. Non-privileged applicants have standing to bring an annulment case before the CJEU only if they are 'directly and individually concerned'.[12] Since the *Plaumann* judgment, and even after the Lisbon Treaty reform, which changed the wording of Article 263(4) TFUE, the CJEU has stuck to an ultra-narrow interpretation of the standing requirement for legal and natural persons (Craig 2003). Even transnational and legally well-equipped movements, such as climate change litigation, have failed to change this procedural feature (Pagano 2022). The case of *Carvalho* and others drew quite some public attention, even if the case was rather obviously inadmissible.[13]

Another possible direct action that has been used by strategic litigants is the action for damages under Article 268 TFEU. A key illustration of such an action for damages is a pending case brought before the CJEU asking for damages for a Syrian family with four young children for the pushbacks executed by Frontex.[14] The family was deported from a Greek island to Turkey, where they were separated from their children and imprisoned, only to find their way to northern Iraq eventually. The filing of the case is part of a broader international campaign organised by the Dutch Council for Refugees, BKB, Sea-Watch Legal Aid Fund, Jungle Minds and the Amsterdam-based law firm Prakken d'Oliveira.[15] Similar to the example of strategic litigation, the legal mobilisation around the rights of asylum seekers around the Mediterranean is part of a broader transnational legal campaign. Even those specialised legal campaigns are unlikely to change the procedural set-up of EU law, with their limited access through direct actions. The fact that those direct actions are still being filed, in spite of the low chances of them going beyond the stage of

[12]CJEU, C-25/62, 15 July 1963, *Plaumann & Co. v. Commission*, ECLI:EU:C:1963:17.

[13]CJEU, T-330/18, 8 May 2019, *Armando Carvalho and Others v. European Parliament and Council*, ECLI:EU:T:2019:324.

[14]CJEU, T-282/21, pending.

[15]Prakken d'Oliveira (2023) *EU agency Frontex sued over illegal pushbacks*. News report available at https://www.prakkendoliveira.nl/en/news/2023/eu-agency-frontex-charged-over-illegal-pushbacks.

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admissibility, shows the power of direct actions for strategic litigation. Direct actions allow for the classic imaginary but understandable framing of the individual taking on the public power, whether it is in the form of a state or an international organisation.

The second procedural feature that makes up the characteristics of EU law is the prevalence of preliminary ruling procedures under Article 267 TFEU, which is a channel for individual applicants to access the EU justices indirectly. Preliminary rulings represent around seventy percent of judgments before the Court of Justice, and they are aimed at guaranteeing uniform interpretation of EU law across the entire EU. This type of two-level judicial proceeding reduces the agency of strategic litigants over the case. NGOs may perceive the reference to the CJEU as uncertain when initiating a procedure before a national judge because national judges have the right, although not the obligation, to refer questions regarding the interpretation or validity of EU law to the Luxembourg Court. In contrast, the highest courts have, in principle, an obligation to refer, but even that obligation can, in practice, often be avoided by engaging in an autonomous interpretation and application of EU law. Many academic studies have focused on national judges as key actors in deciding on the faith of preliminary ruling procedures (de Witte et al 2016; Krommedijk 2021). The judges enjoy significant discretion in deciding whether to refer a case to the EU court or to apply national law to the case at hand. This makes strategic litigation using EU law before national courts unpredictable.

The role of national judges as gatekeepers of preliminary ruling procedures is especially relevant in cases of strategic litigation against illiberal reforms. Submitting the judiciary to the control of the ruling party is one of the first steps in the transnational populist playbook (Scheppele 2013, 559). This leads to the risks of the malfunctioning of the multilevel system of judicial protection in the EU (Lenaerts 2020). At the same time, it risks blurring the difference between judges as institutional actors dealing with cases and judges as private applicants. There are instances of national judges taking an active role in turning certain cases into high-profile challenges to governmental reforms by referring them to the CJEU.[16] The empowerment and other factors might affect judges' decisions to refer preliminary ruling cases to the court in Luxembourg (Dyevre et al 2019; Wallerman 2019). In those cases, judges act in their institutional judicial capacity and not as actors of strategic litigation. In addition to those cases, however, there are cases brought by individual high-profile judges as applicants to challenge the illiberal judicial reforms in Hungary and Poland (Halmai 2017).[17] In those cases, judges can also become strategic litigants.

In a preliminary ruling procedure, even after the case goes beyond the national court and a question is asked of the CJEU, the applicants have a limited influence over the case's legal framing. The national as well as the EU judges often tend to (re)formulate the legal questions themselves (Šadl and Wallerman 2019). The CJEU has the competence only to answer questions about the validity or the interpretation of EU law. It remains to the national judges to decide who wins the case. The reasoning style of the CJEU is laconic and mostly limited to statements related to the particular case at hand (Bengoetxea 1993; Conway 2012). This might require translation to the general public. For instance, in the case brought by Front Polisario to challenge the validity of the EU–Morocco agreement, which was being, in fact, applied to imported products from Western Sahara into the EU, the CJEU decided that Front Polisario lacked standing because the EU could not possibly be violating international law by applying the bilateral agreement that it has with Morocco to a third party, such as Western Sahara.[18] This

[16]CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, 19 November 2019, *A.K. and Others v. Sąd Najwyższy*, *CP v. Sąd Najwyższy* and *DO v. Sąd Najwyższy*, ECLI:EU:C:2019:982.

[17]ECtHR, 23 June 2016, *Baka v. Hungary*, App.no. 20261/12 and ECtHR, 10 October 2022, *Żurek v. Poland*, App.no. 39650/18.

[18]CJEU, Case C-104/16 P, 21 December 2016, *Council v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario),* ECLI:EU:C:2016:973.

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required some sorting out in order to spread the message about this procedural dismissal being, in fact, a success for Front Polisario.[19]

Apart from initiating legal proceedings as litigants, NGOs might have limited possibilities to intervene in preliminary ruling procedures. If strategic litigation is supposed to be part of a broader political campaign, then NGOs will mostly be involved. In preliminary ruling procedures, NGOs can be intervening parties only if they are intervening in the national procedures (Krommendijk and van der Pas, 2022). Then, all parties to the national procedures can also present arguments before the CJEU. The admittance of NGOs as intervening parties depends, however, completely on national law and its application by national judges. At times, it might even be possible to admit an NGO as an intervening party to the national procedures even after a reference to the CJEU is made so that the NGO can partake in the European procedure (Krommendijk and van der Pas 2022, 1399). This happened in the case of Confédération marocaine de l'agriculture et du développement rural (Comader) being admitted as an intervening party to the national procedure after a case initially instigated by Western Sahara Campaign UK was referred to the Court in Luxembourg.[20]

The third procedural channel for a case to reach the CJEU is through an infringement procedure. Infringement procedures cannot be brought by individual applicants – only by the European Commission, other EU institutions or Member States. This leaves the strategic litigants with the necessity of prodding an institution or government that might be inclined to judicially challenge an action of a particular Member State. The European Commission has traditionally relied heavily on legal or natural persons denouncing EU law violations at the national level. In the past decades, however, the European Commission has partially stepped down from its role as the 'guardian of the Treaties', as the amount of infringement proceedings that it has been bringing has significantly lessened across all areas of EU law (Kelemen and Pavone 2023). These institutional developments have reduced the potential of using indirect strategic litigation through the European Commission and infringement proceedings.

The practical features of the procedures at the CJEU should also be taken into account when studying strategic litigation using EU law. If a national judge refers the case, the time it takes to start a case and obtain a judgment from the CJEU in Luxembourg is significantly shorter than the time needed to exhaust the national remedies and obtain a ruling from the ECtHR in Strasbourg. The average duration of proceedings before the Court of Justice in 2021 was 16.6 months.[21] The ECtHR in Strasbourg states on its website that it desires to deal with a case within three years, although the actual duration is often longer. The duration might be affected in specific cases by the availability of interim measures at both courts. Also, in certain areas, the applicants do not need to exhaust national remedies before filing a case in the Strasbourg court, whereas direct access to the Luxembourg court is generally barred. This might make the ECtHR a more attractive option in cases of systemic deficiencies in a country. Moreover, when appearing before the CJEU, individuals must be represented by a lawyer authorised to practice in one of the EU Member States.[22] This means that individuals who can represent themselves in national administrative proceedings often need to bring in EU law expertise at this stage of the proceedings.

4.2 Constitutional features affecting EU strategic litigation

The EU legal framework has particular effects on strategic litigation challenging illiberal reforms under EU law. First, the EU is not a sovereign state but an international organisation claiming to

[19]EU Court protects Western Sahara from EU–Morocco trade deal, 21.12.2016, available at https://wsrw.org/en/archive/3695; Saharawi refugees celebrate victory in EU court, 21.12.2016, https://wsrw.org/en/archive/3696.

[20]See Opinion of AG Wathelet, C-266/16, 10 January 2018, *Western Sahara Campaign UK*, ECLI:EU:C:2018:1, para.33.

[21]Court of Justice of the European Union, Report on Judicial Activity 2021.

[22]Article 19 Statute of the Court of Justice of the European Union.

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have established an autonomous and self-contained legal order (Eckes 2020). The principle of autonomy results in a relatively holistic approach of the CJEU to the EU legal order. Its process of constitutionalisation means that the Court establishes common principles across various policy domains. The logic of the functioning of the EU legal order as a whole must be known to the lawyers arguing the case. Profound knowledge of international refugee law might not be sufficient to argue an asylum law case before the CJEU, as the CJEU can develop its own definition of international law terms, such as *non-international armed conflict*.[23]

A second feature is the particular type of politicisation of the CJEU. The commitment of the judicial branch to a political project, such as European integration under the EU's umbrella, has been problematised in light of the separation of powers doctrine and judicial legitimacy (Lenaerts 2013). There has also been the question of to what extent the CJEU channels the political preferences of the EU Member States (Alter 2014; Micklitz and De Witte 2012; Schmidt 2018) or of other interest groups (Conant 2002). Other scholars have turned their attention to the institution itself – the autonomisation of the CJEU as a court (Pierdominici 2020) and its legal reasoning (Beck 2013; Bengoetxea 1993; Conway 2012). As a result, the CJEU is characterised by a close relationship with the EU institutions in view of their commitment to the common project of European integration. It is not a politicised court in terms of 'left' and 'right' politics: it lacks presence in public debate, and it shows immense deference to its own precedent in order to increase the legitimacy of its decisions. This is closely related to the self-referential character of the EU law academic debates discussed above. In view of the overarching research question regarding empowerment through strategic litigation, a particular prompt appears relevant, namely, that strategic litigation using EU law might be aimed at strengthening the autonomy of the EU legal order.

A third legislative factor affecting strategic litigation against illiberal reforms under EU law is the limited scope of application of the Charter of Fundamental Rights of the EU (CFR). The CFR is not a general human rights catalogue setting up minimal standards to be followed on European territory. Instead, its scope of application is tied to the competencies conferred upon the EU by the Member States. As a result, the CFR's actions of EU institutions and the actions of Member States may occur only if they are implementing EU law. As a result, the possibility of challenging illiberal reforms based on fundamental rights under EU law is limited.

A ruling that marks a turning point in the Court's jurisprudence on democratic values is the case of *Associação Sindical dos Juízes Portugueses* (*ASJP)*. From this moment onwards, the Court started using the concept of judicial independence to address the judicial reforms in Poland, in particular. In its *ASJP* judgment, the CJEU was asked whether the austerity measures leading to salary reductions for Portuguese judges infringed on the principle of judicial independence. Portugal was required by the EU and international institutions to reduce its excessive budget deficit and enacted Law No 75/2014, putting in place the mechanisms for the temporary reduction of remuneration and the conditions governing their reversibility, which affected all public servants. The trade union of Portuguese judges sought to annul remuneration reduction before the Supremo Tribunal Administrativo (Supreme Administrative Court), which referred to a preliminary ruling question concerning the principle of judicial independence. The question relied on the codification of this principle in Article 47 of the Charter of Fundamental Rights of the EU (Charter) and in Article 19(1)2 TEU, which states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Following its previous case law regarding the post-crisis measures, the CJEU decided that the Charter was not applicable in this case because the measures fell outside of its scope of application.[24] According to

[23]CJEU, 30 January 2014, C-285/12 *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, ECLI:EU:C:2014:39.

[24]CJEU, 20 September 2016, joined cases C-8/15 to C-10/15 P, *Ledra Advertising et al.*, ECLI:EU:C:2016:701; General Court, Order of 27 November 2011, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Spyridon Papaspyros and Ilias Iliopoulos v. Council of the European Union*, T-15 /11,EU:T:2012:627.

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Article 51 of the Charter, it applies only when Member States are 'implementing EU law'. However, the Court followed a different route and decided that it could evaluate whether the Portuguese measures were compatible with the principle of judicial independence as an unwritten general principle of EU law derived from Article 19 TEU. In this specific case, the Court concluded that Article 19 TEU did not preclude the temporary pay cuts in the Portuguese judicial sector. However, in the Polish context, the result was the opposite: the CJEU de facto infused the contents of Article 47 Charter into Article 19 TEU, the article with a broader scope of application (Pech and Platon 2018).[25] Hence, even if Member States are not implementing EU law, their judicial reforms need to be compatible with the principle of judicial independence, as defined by the CJEU.

Fundamental rights are used in many cases with regard to illiberal reforms as a supplementary legal basis, but they are not necessarily used as the only ones. In April 2017, the Hungarian Parliament passed the so-called "lex CEU". While this law is framed in an abstract and general manner, it is de facto aimed at closing down the Central European University's operating as a foreign university in Budapest.[26] With regard to the legislative acts substantially shutting down the Central European University (CEU), the Commission has invoked a number of EU norms that might be infringed upon, ranging from 'fundamental internal market freedoms, notably the freedom to provide services and the freedom of establishment' to more fundamental rights–related norms, such as 'the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union'.[27] The Commission has instituted infringement proceedings on this issue. On 6 October 2020, the Court sided with the Commission and declared that Hungary has violated the norms of the General Agreement on Trade in Services (GATS) – an international treaty currently included in the framework of the World Trade Organization (WTO) – as well as internal market norms and norms of the Charter of Fundamental Rights of the EU relating to academic freedom, the freedom to found higher-education institutions and the freedom to conduct a business.[28] In its judicial reasoning, the Court appears to have foregrounded the GATS and made EU law considerations secondary, examining them in more detail in seventy paragraphs while devoting only seventeen paragraphs to examining all the fundamental rights combined. In the proportionality analysis, courts traditionally weigh the broader broader policy considerations, such as public security, order or health, against the gravity of the interference with fundamental rights. In the CJEU's CEU ruling, the proportionality analysis is, in fact, limited to one paragraph, which refers to the analysis of economic freedoms.[29] The CJEU adopted a similar approach of relying mostly on market freedoms and combining those freedoms with fundamental rights in the case concerning the 'Lex NGO', which discriminated against certain non-governmental organisations for receiving foreign funding. The Court considered it a violation of the free movement of capital as well as of the rights to private life, data protection and freedom of association enshrined in the CFR.[30]

The limited scope of the application of fundamental rights is related to the fourth factor affecting strategic litigation against illiberal reforms under EU law: namely, the justiciability of Article 2 TEU. Article 2 TEU contains a list of values to which the EU is committed, which could be summarised as democratic values of the EU. For a long time, scholars and legal practitioners have doubted whether this article could be considered justiciable, thus leading the CJEU to

[25]CJEU, 27 February 2018, Associação Sindical dos Juízes Portugueses *v. Tribunal de Contas*, ECLI:EU:C:2018:117.

[26]Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, CDL-AD(2017)022, 9 October 2017, endorsed by the Venice Commission at its 112th Plenary Session (Venice, 6–7 October 2017), 9 October 2017, CDL-AD(2017)022.

[27]European Commission press release, 'Hungary: Commission takes legal action on Higher Education Law and sets record straight on "Stop Brussels" consultation', 24 April 2018, available at http://europa.eu/rapid/press-release_MEX-17-1116_en.htm.

[28]CJEU, 6 October 2020, C-66/18, *European Commission v. Hungary*, ECLI:EU:C:2020:792.

[29]Idem. para. 240.

[30]CJEU, 18 June 2020, C-78/18, *European Commission v. Hungary*, ECLI:EU:C:2020:476.

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conclude that a Member State had violated democratic values (Hillion 2016; Spieker 2019). Up until the end of 2022, the European Commission had not tried to include Article 2 TEU under the grounds for its infringement proceedings.[31] In the context of illiberal governments in Hungary and Poland, it has been especially sensitive not to grant them a political win. Had the CJEU concluded that the Hungarian or Polish governments had not violated the rule of law, pluralism or minority protection, this could have meant a serious setback to the efforts to expand the EU's activity in the field of promoting democratic values. On 19 December 2022, the European Commission filed a case of infringement against the Hungarian anti-LGBT law, invoking, among others, Article 2 TEU as a ground for its legal plea.[32] This is the first time that a plea of violation of Article 2 TEU values by the illiberal governments in Hungary and Poland is being brought to the CJEU. If the Court accepts that illiberal reforms can be judicially scrutinised based on values enshrined in Article 2 TEU, more direct avenues for strategic litigation against such reforms could result.

The final factor affecting strategic litigation under EU law is the varied amount of secondary legislation across different policy fields. Cases are often argued with a particular legal framing that results from the particularities of the EU legislative framework. Addressing judicial reforms limiting the independence of judges as instances of discrimination at work might seem futile from the perspective of a strategic litigant.[33] At the same time, it might be the most straightforward case to make under an EU legal order where democratic values are not considered justiciable but a long history of enforcing the principle of non-discrimination at the workplace exists.[34] Moreover, when it comes to the principle of non-discrimination at work, the EU judges can rely on EU secondary legislation, which lays out a lot more clearly than the Treaties what types of actions are forbidden under EU law.

The amount of secondary legislation differs across various policy domains, depending largely on the existence and type of EU competencies. While the EU has a long-standing shared competence in the field of the internal market, the Area of Freedom, Security, and Justice (encompassing migration policy, cooperation in civil and criminal matters and border controls) is marked by more rules requiring special legislative procedures, with more than a qualified majority of votes in the Council necessary to adopt secondary legislation. In the domain of justice administration, for example, the EU has not established common standards through legislation, as doing so remains a domain of national competencies. While the EU has committed to do more on media pluralism, this also remains a domain with little secondary EU law. The lack of secondary EU legislation leaves the potential strategic litigation in those domains with only the option of finding indirectly related secondary legislation that could apply or rely on broader Treaty norms or general principles of EU law.

The existence and density of the EU legal framework are related to the division of competencies between the EU and its Member States. Debates regarding that division have been central to the process of European integration. Critiques of the EU's overstepping its competencies and undermining the sovereignty of the Member States are not particularly illiberal in nature. Instead, they allow the illiberal actors to tap into the narratives commonly accepted as legitimate (i.e. ordinary) critiques of the EU. For instance, the Hungarian Minister of Justice, Judit Varga, stated that the 'enthusiasm in the EU for imposing rule of law criteria looks like Brussels asserting control in areas where it has no competence' (Varga, 2019).

[31]CJEU, *Commission v. Hungary*, Case C-769/22, pending.

[32]Idem.

[33]As was argued in the cases CJEU, 6 November 2012, Case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687 and CJEU, 15 November 2018, Case C-619/18, *Commission v. Poland*, EU:C:2019:531.

[34]CJEU, 8 April 1976, Case 43-75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56.

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4.3 Political features affecting EU strategic litigation

There are also a number of political factors that affect the strategic litigation against illiberal reforms under EU law. Strategic litigation is very time-sensitive. In order for it to achieve the desired broader sociopolitical change, the litigation has to correlate with a political environment in which at least some political actors are sympathetic to the cause. Political factors are especially important in the implementation of favourable judgments obtained through strategic litigation.

The political environment in the EU regarding the promotion of democratic values has changed significantly in the last decade. Traditionally, the EU was primarily an organisation of economic cooperation that was marked by market rationale being applied to the entirety of its actions (Bartl 2015). Its first reactions to the democratic backsliding in some Member States that began in the early 2000s were marked by a political stalemate. But gradually, around 2021–2023, more political consensus was reached to ostracise, and at least the Polish populist government emerged. But the question remains: to what extent can political momentum be used in the future to establish more durable mechanisms of democracy promotion in the EU Member States?

The political situation in the European Parliament and Council has been marked by a stalemate. Fidesz, the Hungarian ruling party, was part of the European People's Party (EPP) in the European Parliament. Fidesz, as a member of this parliamentary group, has contributed to electing Ursula von der Leyen as the Commission's president. This, in turn, has allowed Fidesz to use the EPP support to shield the party from certain criticism and pressure (Gostyńska-Jakubowska 2016; Wachs 2014). In spite of these tensions, in May 2017, the European Parliament adopted a resolution condemning 'a serious deterioration of the rule of law, democracy and fundamental rights' in Hungary.[35] Still, the majority of the EPP voted against the resolution (Gotev 2017). The European Parliament has also supported, by a resolution, the triggering of Article 7 TEU by the Commission, backing the so-called Sargentini report.[36] For a significant part of its mandate, the Hungarian Fidesz party has provided crucial votes for the election of the von der Leyen Commission (de la Baume 2019). Fidesz exited the EPP by a unilateral declaration in March 2021 (Macek 2021).

The European Council and the Council of Ministers have been experiencing similar blockages, which suggest resistance. Affirming a serious breach according to Article 7(2), TEU requires a unanimous vote (Gotev 2017). Moreover, even the four-fifths majority required to decide on the risk of a breach is unlikely to be achieved (Pech and Scheppele 2017). This inter-governmental stalemate does not create a supportive environment in which to bring strategic litigation under EU law or to enforce potentially more audacious rulings. In fact, the Council has expressed general criticism of the Rule of Law Framework of the Commission and a preference for softer, more diplomatic measures (Halmai 2018, 14).

In the meantime, the winds have shifted. In spite of the political stalemate on Article 7 TEU, an increased consensus on ostracising the Polish and Hungarian governments had crystallised. This led to the EU institutions finding 'indirect mechanisms' to defend EU values (Bonelli 2022). A paramount example of those indirect mechanisms is the Conditionality Regulation adopted in December 2020.[37] It is a regulation based on Article 322 TFEU, which makes the protection of the EU budget its main goal. The Conditionality Regulation gives the EU the ability to suspend paying out certain funds from the EU budget in cases of violation of the principle of the rule of law. During the legislative procedure, it became clear that the Legal Service of the Council, at least,

[35]European Parliament, Resolution of 17 May 2017 on the Situation in Hungary, 2017/2656(RSP).

[36]European Parliament, Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union Is Founded, 2017/2131(INL).

[37]Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, OJ L 433I, 22.12.2020, pp. 1–10.

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would oppose a very broad interpretation of the rule of law violation.[38] Otherwise, there is a risk of exceeding the legal basis of Article 322 TFEU. The violation must actually be linked to the spending of the EU funds at issue so that it would not be possible to, for example, block subsidies for building a bridge in a certain municipality due to the lack of the judicial independence of a constitutional court. Still, the political intention to use this Regulation to suspend funds for Hungary and Poland was clear (Kelemen 2020).

In view of these controversies, the compromise reached to overcome the risk of a Hungarian and Polish 'veto' threatening the approval of the 2021–2027 Multiannual Financial Framework and of the reform of the Own Resources Decision needed to greenlight the 'Next Generation EU' package was to wait for the implementation of the Conditionality Regulation until the CJEU ruled on its legality (Fisicaro 2022). This case represents an important instance of acceptance of the CJEU as an arbiter, not only by EU institutions but also by Hungary and Poland. The Grand Chamber of the CJEU ruled on the case on 22 February 2022, upholding the legality of the Conditionality Regulations and dismissing the claims raised by the Hungarian and Polish authorities.[39] The Court emphasised throughout the analysis of the individual provisions of the Regulation the need to demonstrate a genuine and direct link between breaches of the rule of law and sound financial management of the EU budget (Hoxhaj 2022). This narrow framing creates uncertainty as to the practical scope of the application of the Regulation in the future (Hoxhaj 2022).

The appropriate political timing of strategic litigation is always uncertain, as litigants have to play catch-up with changing political consensus. In the context of litigating against illiberal reforms under EU law, knowing the most advantageous timing has been particularly difficult in light of the political stalemate. In the context of the lack of political consensus to enforce democratic values in the EU, the CJEU has gradually emerged as an important ally of civil society. In this relatively hostile political context, however, the CJEU has had to develop its case law gradually and with sensitivity to the changing political environment. As a result, atomistic cases of strategic litigation, which were not arguing broad principles but rather focused on incrementally challenging individual violations of EU law, have more prospects of success (Mayer 2022).

4.4 Socio-legal features affecting EU strategic litigation

The final set of factors that highlight the dynamics of EU strategic litigation resisting illiberal reforms is socio-legal and actor-related. The trajectories of strategic litigation differ depending on whether it is initiated by individuals or NGOs or is part of a law clinic. Actors usually pursue overlapping goals when initiating strategic litigation, so they might frame its success in terms of those goals. In the context of illiberalism, it is particularly relevant to look at the backlash against the actors, which might be triggered by strategic litigation.

Actors of strategic litigation against illiberal reforms include, in particular, individuals, NGOs and law clinics. Individuals also include scholars who might want to instigate cases to bring about broader political, legal or social change. Recent cases brought by scholars include the challenge to the legality of border controls reintroduced by several Member States within Schengen[40] or access to documents requests appealed for the sake of

[38]Opinion of the Legal Service 2018/0136(COD) Proposal for a Regulation 135932/18 of the European Parliament and of the Council of 25 October 2018 on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States; discussed in Scheppele KL, Pech L, Kelemen D (2018) Never Missing an Opportunity to Miss an Opportunity: the Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism, *Verfassungsblog*, available at https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/.

[39]CJEU, 16 February 2022, C-156/21, *Hungary v. European Parliament and Council*, ECLI:EU:C:2022:97.

[40]CJEU, 26 April 2022, C-368/20, *NW v. Landespolizei Steiermark*, ECLI:EU:C:2022:298.

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transparency at EU institutions.[41] A group of activists and academics has also challenged, before the European Court of Human Rights, Polish authorities' surveillance of opposition using Pegasus spyware.[42] A strong nexus of academic and civil society efforts emerged around enforcing the rule of law in Hungary and Poland. Platforms such as the Good Lobby Profs were created especially to merge academic expertise with strategic litigation practitioners to promote the rule of law.[43]

In the context of the double roles of the judges (as institutional actors and as actors instigating strategic litigation), the association of judges has also played an important role. Polish judges seem to have been particularly well-embedded in the transnational judicial networks that can trigger legal mobilisation (Matthes 2022). The transnational judicial associations have played a significant role in assisting in cases brought up in the name of individual judges. In a case filed on 28 August 2022, the judicial associations acted as applicants who wanted to draw public attention to the approval of releasing to Poland the funds from the EU's Recovery and Resilience Plan.[44]

The coalitions around resisting illiberal reforms did not grow equally across the EU. We can observe a certain centre-periphery dynamic as the civil society movements concerning the rule of law grew in Western Europe as a reaction to the democratic backsliding in Central and Eastern Europe. The European Commission, in its Rule of Law Reports, divides the stakeholders according to which Member State their submissions are substantively concerned. Since the first report was issued in 2020, it is clear that significant attention has been devoted to Hungary (30 contributions) and to Poland (36 contributions).[45]

To some extent, it can be viewed as natural that expertise regarding the strategic litigation in EU law would focus on Brussels, which is also the geographical centre of EU politics. Some key actors in the EU 'rule of law crisis', such as the Good Lobby, the European Network of Councils for the Judiciary and the European Commission, are located within a two-kilometre radius around the Place du Luxembourg in Brussels. This distribution of expertise affects the goals and political campaigns pursued by a large amount of strategic litigation against illiberal reforms in EU law. Strategic litigation should thus be framed jointly by civil society organisations and affected communities (Open Society Justice Initiative 2017) because the actors involved in strategic litigation decide on the framing of the political movement and determine the goals of strategic litigation (Vanhala and Hestbaek 2016). If the actors involved in strategic litigation are based closer to Brussels than to Warsaw or Budapest, their goals will tend to revolve more around building the resilience of the EU law and its institutions than around promoting liberal reforms in Poland or Hungary. When having a sociopolitical impact in the concerned Member States is one of the goals of strategic litigation, the involvement and empowerment of local actors appear crucial.

Strategic litigants also need to reflect on the effects of the legal framing of political and social problems on illiberal discourses. Illiberalism rejects rationalised liberal politics and its compromises (Laruelle 2022,. 312). Instead, it embraces polarisation and a shift to more cultural arguments and references to emotions. In such a context, de-politicising certain issues and turning them into legal questions to be solved by judges through the application of legal syllogisms can backfire and trigger an illiberal backlash. In many European countries, we are witnessing debates about 'juristocracy'/'dikastocratie' and strategic litigation, which are framed as threats to the ideals

[41]CJEU, 21 January 2021, C-761/18 P, *Päivi Leino-Sandberg v. European Parliament*, ECLI:EU:C:2021:52.

[42]ECtHR, *Pietrzak v. Poland*, App.nos 72038/17 and 25237/18, pending.

[43]See the description on the website of Good Lobby Profs, available at https://www.thegoodlobby.eu/profs/.

[44]CJEU, filed 28 August 2022, T-532/22, *Association of European Administrative Judges v. Council*, pending.

[45]As compared to the twenty contributions for Germany and the twenty-four contributions for France; see European Commission, Summary of the Targeted Stakeholder Consultation for the 2020 Rule of Law Report, available at https://commission.europa.eu/system/files/2020-10/2020_rule_of_law_report__summary_of_the_stakeholder_consultation_en.pdf.

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of majoritarian democracy and are advanced especially by populist arguments (Malsch 2020). In Hungary, George Soros, who, among others, was the founder of the Open Society Initiative, was one of the major faces of campaigns warning the population against foreign influence in Hungarian politics. In the Netherlands, the Parliament decided in February 2023 to initiate an inquiry into the possibilities of limiting access to the courts by environmental NGOs, such as Urgenda, who bring climate change litigation (NOS, 2021). These examples illustrate how strategic litigation is perceived as a counterpower to the parliaments and executives representing the democratic majority. In such a context, it depends on the actors involved in setting up the litigation to decide how intrinsically the legal arguments before the courts are linked to the challenge to illiberal discourses and how easily those counterpower narratives can be reconciled with the illiberal framings.

There is another factor that can affect whether strategic litigation is capable of reaching the broader sociopolitical objectives envisaged. If strategic litigation efforts are not linked to a political platform, they risk legitimising existing or future illiberal reforms. This is, of course, also true of the risk of 'giving a win' to illiberal governments, which was mentioned earlier as influencing the strategy of the Commission of not using Article 2 TEU in its infringement procedures. Moreover, following a CJEU judgment declaring that border controls within Schengen that go beyond six months are illegal, the Council of the EU proceeded to act on a long-dormant legislative procedure regarding the reforms of the Schengen Borders Code. The Court proposed to introduce practically unlimited exceptions for Member States to reinstate border controls based on national security (Cebulak and Morvillo 2023). It might thus seem that the Court's judgment, obtained through strategic litigation, has fostered the political consensus to limit the free movement of EU citizens.

5. Conclusions

In conclusion, studying strategic litigation against illiberal reforms using EU law in its legal and sociopolitical contexts can provide us with new insights into the roles of law and lawyers in times of populism and a rule of law crisis in the EU. This article aims to provide an analytical framework for such empirical study as well as to lay the groundwork for a theoretical reflection on the phenomenon of strategic litigation against illiberal reforms in the EU.

In order to delineate the mobilisation against particular legal acts, it appears suitable to rely on the concept of illiberalism, defined as an ideology that rejects the liberal scripts and promotes majoritarian and state-centric solutions instead. Legal mobilisation is a process of translating human desires into the language of rights and pursuing those rights before legal and judicial institutions. Strategic litigation is a subcategory of legal mobilisation that uses the cases brought to courts to pursue sociopolitical change beyond the courtroom.

Strategic litigation against illiberal reforms plays out in particular ways in the context of the EU's multilevel legal system. The EU has been dubbed the most authoritative of all international organisations (Hooghe et al 2019). Several features of this integrated EU legal system affect actors' decisions to rely on EU law for strategic litigation, the procedural strategies they use as well as the implementation of the rulings. EU law can be invoked before EU and national courts while having primacy of application over conflicting norms of national law.

Using EU law for strategic litigation against illiberal reforms comes with certain potentials and pitfalls. On the one hand, EU law is interpretatively rather open, and the CJEU is rather prone to rely on a teleological interpretation of norms, which favours progressive developments in the law. The duration of the proceedings is not too long for an international court, and its enforcement tools are comparatively strong. Substantively, the legal framework on democratic values of the EU has been significantly strengthened since 2015 and now offers

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various specific mechanisms to enforce those values. On the other hand, with the prevalence of the preliminary rulings procedure, actors tend to lose control over the framing of their cases. To win the case, it often seems opportune to rely on specific technical framing rooted within EU law, which is not always the most applicable to the broader sociopolitical goals. While the involvement of EU legal professionals with strategic litigation might be growing, the relevance of a solid general knowledge of EU law to litigating in Luxembourg might still represent a barrier for a large part of the human rights legal community. Finally, the backlash against strategic litigation that uses the EU to challenge illiberal reforms might be reinforced by the inherent scepticism of illiberal ideology towards European integration and institutionalised international cooperation.

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