The Journal of Illiberalism Studies
Vol. 4 No. 1 (2024): 45-56.

Scholarly Activism for the Rule of Law in the EU

POLA CEBULAK

Abstract

The engagement, or even activism, of scholars promoting the rule of law has been celebrated recently in the European Union (EU). But how often do we reflect on its risks? This self- reflection paper focuses on three cautionary tales of the mobilization of legal scholars for the rule of law in the EU. As scholars, our political or public engagement risks reinforcing the center-periphery dynamics of European legal expertise, if carried out without involving the affected communities. Further, it risks reinforcing the critiques of judicial activism, if it focuses on the institutional independence of the courts rather than the substance of their rulings. Finally, it even risks reinforcing illiberal narratives more generally, if the scholarly interventions do not manage the difficult task of legitimizing the proposed liberal solutions. This does not mean that scholars should refrain from social activism. This reflection is rather meant to reinforce the professional ethics and moral awareness of academics when mobilizing against illiberal reforms and narratives.

Keywords: rule of law, European Union, scholarly activism

Pola Cebulak
Assistant Professor in European Law, Vrije Universiteit Amsterdam, Netherlands
p.cebulak@vu.nl
DOI: 10.53483/XCOV3567

Social polarization has trickled down to debates regarding academic ethics. Depending on one's view on climate change, academic research helping to prevent it might be perceived as either a necessary neutral contribution to the production of knowledge for dealing with this global challenge, or simply as partisan support for political views not shared by everyone.[1] Similar backlash has been faced by scholars researching migration issues.[2] This has led many European universities to revisit their policies on ethics and academic activism. In this broader social context, this paper focuses specifically on the mobilization of legal scholars at European universities in the specific context of the European Union's (EU) engagement with the illiberal reforms in Hungary and Poland during the period from 2011 to 2024. The question of scholarly activism and legal mobilization in the context of illiberalism causes a particular set of ethical tensions.

When discussing the societal impact of legal mobilization against illiberalism, we need to reflect on its impact on illiberal discourse, reforms, and social polarization. If we understand illiberalism as an ideology and not as a violation of the values enshrined in liberal-democratic constitutions, then legal mobilization in the courts and through law journals can also become forums for ideological debates and power struggles. In order to assess the broader societal impact of this mobilization, it is necessary to reflect on the embeddedness of scholars in the affected communities, illiberal backlash against the judiciary and the rhetorical effects of a legal framing of political and social problems. Our political or public engagement as scholars risks reinforcing the center-periphery dynamics of European legal expertise, if carried out without involving the affected communities. Further, it risks reinforcing the critiques of judicial activism, if it focuses on the institutional independence of the courts rather than the substance of their rulings. Finally, it even risks reinforcing illiberal narratives more generally, if the scholarly interventions do not manage the difficult task of legitimizing the proposed liberal solutions. Based on some anecdotal evidence on the engagement of legal scholars with countering illiberal reforms in Hungary and Poland within the framework of the EU, this paper highlights crucial points for reflection about the engagement of EU legal scholars with illiberalism.

Highlighting the cautionary tales of scholarly activism in the context of the EU rule of law crisis (as the tensions between Brussels, on the one side, and Budapest and Warsaw, on the other have been dubbed), contributes to the reflection on the methods and ethics of studying illiberalism. This framework attempts to bring together more general discussions with regard to scholarly activism, which can also concern other domains such as climate change or migrant rights.[3] The purpose of identifying these cautionary tales is not to elaborate a set of systematic solutions, but rather a set of ethical questions that we should repeatedly ask ourselves as researchers involved in pursuing broader socio-political change.

This reflection paper is written from the insider perspective of EU legal scholars, stemming from the newer EU member states and taking a stance on the illiberal developments in our societies. As a scholar studying judicial politics in Europe, educated and based in the founding EU Member States and seeking to be engaged with the democratic backsliding in Hungary and Poland, I consider myself well placed for a self-reflection on the field of EU lawyers. In this context, EU lawyers mobilize

1 Lisa Gilson, "Activism versus Criticism? The Case for a Distinctive Role for Social Critics," *American Political Science Review* 118, no. 2 (February, 2024): 1–14, https://doi.org/10.1017/S000305542300045X.

2 See Sarah Bracke, "Zorgen bij de UvA om 'woke': 'De academische vrijheid zit in een grote crisis,' " *NRC Handelsblad*, February 23, 2023, https://www.nrc.nl/nieuws/2023/02/24/ongemak-aan-de-uva-waar-eindigt-debat-en-begint-belediging-2-a4158028?t=1709038367.

3 Gilson, "Activism versus Criticism? The Case for a Distinctive Role for Social Critics," 1–14.

the law and the judicial venues to counter political reforms which pursue an illiberal agenda. This self-reflection on the power and vulnerability of academics studying illiberalism is necessary not only from the point of view of academic integrity, but also for their societal impact. In my research, I seek to maintain objectivity in presenting a variety of evidence and opinions, but not neutrality with regard to the challenges faced by our societies. This reflection paper is not based on systematic research and data, but rather framed as a provocative self-reflection of scholarly activism against illiberalism by EU lawyers.

In order to understand the scholarly engagement with the law and politics of the EU around the rule-of-law crisis, it is necessary to highlight certain features of this particular socio-legal situation. The values of liberal democracy have been codified in the EU legal system in a particular historical and political context of the end of the Cold War and the construction of the internal market. These legal guarantees have not proven easy to operationalize. Instead, they have provided a platform for political and legal mobilization that has led to many indirect solutions for enforcing democratic standards in Hungary and Poland from 2015 to 2023. Against this background, I highlight three focal points of ethical concern around academic activism specifically in this socio-legal context of the EU rule-of-law crisis. These cannot simply be avoided. Rather, they should serve as the difficult questions that help us maintain reflexivity with regard to our professional ethics.

EU Law against Illiberal Reforms

The mobilization of EU law by scholars, searching for creative solutions to enforce liberal-democratic values in the backsliding member states of the EU, is rooted in the structure of EU law. The ways that these values have been constitutionally embedded and the political stalemates in the main institutions have shaped the space for creativity of engaged legal scholars. In order to delimit that creative space, it is important to highlight certain features of the history and politics of enforcing liberal-democratic values by the EU.

Historical Baggage of Liberal-Democratic Values in EU Law

The undermining of liberal democracy in Hungary and Poland has been framed in EU policy circles predominantly as the "Rule of Law Crisis."[4] Viktor Orbán and the Fidesz party took power in Hungary in 2010. In Poland, Prawo i Sprawiedliwość (Law and Justice: PiS) led by Jarosław Kaczyński, was in power between 2015 and 2023. During this period, both countries have introduced reforms curtailing freedoms of the press and of assembly, judicial independence, women's rights, data protection, and have carried out restrictive migration policies.[5] The EU institutions have gradually built up a set of legal and political tools to push back against these illiberal reforms.[6]

4 See for example Laurent Pech and Kim Lane Scheppele "Illiberalism Within: Rule of Law Backsliding in the EU." *Cambridge Yearbook of European Legal Studies* 17 (2017): 3–17, https://doi.org/10.1017/cel.2017.9; Cassidy Emmons and Tommaso Pavone, "The Rhetoric of Inaction: Failing to Fail Forward in the EU's Rule of Law Crisis," *Journal of European Public Policy* (July, 2021): 1611–1629, https://dx.doi.org/10.2139/ssrn.3780011; Piotr Bogdanowicz and Matthias Schmidt, "The Infringement Procedure in the Rule of Law Crisis: How to Make Effective use of Article 258 TFEU," *Common Market Law Review* 55, no. 4 (2018): 1061–1100, https://doi.org/10.54648/cola2018093.

5 Tímea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (New York: Routledge, 2021).

6 Carlos Closa and Dimitry Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, UK: Cambridge University Press, 2016).

Initially, these reforms struck in a sensitive domain of the EU's governance structure as its commitment to democratic values had never been operationalized beforehand.

The commitment to liberal-democratic values has emerged incrementally and in particular historical moments with the European Communities. A major critical juncture had been the fall of the Berlin Wall and the end of the Cold War. The unwritten values of the EU have gradually been made more explicit and codified in various legal instruments relating to third countries and candidate countries.[7] However, internally, they remained largely presumed, without internal enforcement mechanisms. Since the onset of the European integration project, there has been an implicit expectation that economic integration would create solidarity among the member states.[8] However, the actual image of the common EU values was purposefully left open in the legal framework of the EU Treaties. While specific provisions of EU law regarding the internal market, environment, or agriculture were meant to be directly applied by national courts and administrations, there was no enforcement mechanism for the values of democracy, equality, or the rule of law. As a result, the EU has been characterized by a mismatch between the mechanisms foreseen for enforcing EU norms, on the one hand, and EU values, on the other hand.[9]

A political reshuffling took place in anticipation of the Eastern enlargement. The EU was facing the "Copenhagen dilemma" of matching the conditionality regarding EU values operationalized in the Copenhagen criteria with an enforcement system for these values vis-à-vis the member states inside of the EU.[10] The EU's increased presence as a global actor and its rule-of-law promotion beyond the EU's immediate neighborhood only added complexity to this tension.[11] In light of the imminent "big-bang" enlargement, the EU member states agreed to include general provisions codifying EU values and a procedure to be followed in case of their violation. This treaty amendment entered into force on May 1, 1999, with the Treaty of Amsterdam.

The democratic values of democracy, rule of law, and human rights protection became enshrined in European constitutional law only in the 1990s, decades after the establishment of the rules for the common internal market. They were meant to send a message to the prospective member states, emerging from behind the Iron Curtain, rather than create too many constraints on the existing ones. This can be illustrated by the classic liberal question of minority rights. European institutions were alert to the need to include the protection of minority rights within the accession negotiation packages with the Central and Eastern European countries, since allegedly those countries had more minorities than the existing EU member states.[12] However, these accounts of the scale of minorities depend also on the definition of minorities, in particular on the categorization of minorities from the

7 The Court asserting that the EU was a "Community based on the rule of law" already in 1986 in CJEU, April 23, 1986, C-294/83, *Parti écologiste Les Verts v. European Parliament*, ECLI:EU:C:1986:166.

8 Robert Schuman, "Declaration of 9th May 1950," (speech, May 9th, 1950), Foundation Robert Schuman, https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf.

9 Dimitry Kochenov and Petra Bárd, "Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement," *Reconnect Working Papers* no 1 (August, 2018): 1–29.

10 The Copenhagen criteria for accession to the EU were geographical (European country), political (democracy, rule of law, human rights, protection of minorities), and economic (functioning market economy). For more on the context in which they were established, see Ronald Janse, "Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement," *International Journal of Constitutional Law* 17, no. 1 (2019): 43–65, https://doi.org/10.1093/icon/moz009.

11 Kalypso Nicolaidis and Rachel Kleinfeld, "Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma," *SIGMA Papers*, no. 49 (2012), http://dx.doi.org/10.1787/5k4c42jmn5zp-en.

12 Nicolaidis and Kleinfeld, "Rethinking Europe's 'Rule of Law' and Enlargement Agenda," 11.

neighboring country living in the border regions, which are so common in Central and Eastern Europe. The reporting of the Open Society Foundation in response to this lack of common definition of minorities has suggested that the EU should "[e]ncourage dialogue among member States toward developing a common baseline understanding of terms such as 'minority,' 'minority protection' and 'integration,' encouraging definitions which are as expansive and inclusive as possible; articulate minimum standards to guarantee equal treatment for groups that do not fit within the definitions adopted."[13] It shows that there have been divergences in the legal approaches to minority protection between the "old" and the prospective member states. When the Treaty of Amsterdam elevated the constitutional values to the level of primary law, the values expressly mentioned were only: "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law." However, if avoiding mentioning the controversial question of minorities' protection at the time was a gesture of the EU member states reaching out to their new partners, it did not last for very long. The express mention of "rights of persons belonging to minorities" was introduced in Article 2 of the TEU by the Treaty of Lisbon alongside the mention of other values, such as "pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men."

The initial codification of human rights and liberal-democratic values in the EU Treaties appears to fit well with the international logic that human rights rose to relevance during the Cold War, as they provided a language for the West to talk to the East.[14] Similarly, in the EU context, human rights and the commitment to liberal democracy were codified in a particular historical moment—after the Fall of the Berlin Wall and with the Eastern Enlargement of the EU being imminent. This particular historical baggage has contributed to the fact that the mechanisms meant to counter democratic backsliding and illiberalism were not meant to be applied outside of some extreme circumstances of general consensus over a country having to be suspended from EU membership. In fact, Article 7 of the TEU, which was meant to enforce democratic values, has never been used in practice. The protection of democratic values, enshrined today in Articles 2 and 7 of the Treaty on European Union (TEU), has been difficult to operationalize due to its historical baggage.

The EU Rule-of-Law Crisis

The commitment to and enforcement of liberal-democratic values in the EU has been subject to dynamic changes since 2015. Facing the pushback from the self-proclaimed "illiberal democracies" in Hungary and Poland, EU institutions have garnered more political commitment to enforce the values of liberal democracy enshrined in Article 2 of the TEU. The period between 2015 and 2023, when PiS was in power in Poland, was marked by a creative use of the existing legal framework of the EU to address the democratic backsliding in Hungary and Poland without expanding the EU's competences. Such strategies involve a certain degree of legal mobilization and creativity.

While the main political sanctioning route of suspending a member state according to the procedure of Article 7 of the TEU has remained blocked, EU institutions have deployed a plethora of tools addressing democratic backsliding indirectly.

13 "Monitoring the EU Accession Process: Minority Protection," *Open Society Institute*, (November 25, 2002): 67, https://www.opensocietyfoundations.org/sites/default/files/overview.pdf.

14 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge Mass.: Harvard University Press, 2010).

These measures often address specific domains, such as non-discrimination, media pluralism, or the EU budget.

A paramount example of the indirect mechanisms developed in response to the rule-of-law crisis is the Conditionality Regulation adopted in December 2020.[15] It is a regulation based on Article 322 of the Treaty on the Functioning the EU (TFEU), which makes the protection of the EU budget its main goal. The Conditionality Regulation creates the possibility for the EU to suspend paying out certain funds from the EU budget in cases of violations of the principle of the rule of law. During the legislative process, it became clear that, at least the Legal Service of the Council would oppose a very broad interpretation of the rule-of-law violation.[16] Otherwise, there is a risk of exceeding the legal basis of Article 322 of the TFEU. A violation must be actually linked to the spending of the EU funds concerned, such that it would not be possible to block subsidies for building a bridge in a certain municipality due to the lack of judicial independence of a constitutional court. Still, the political intention to use this regulation to suspend funds for Hungary and Poland was clear.[17]

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.[18] 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 February 22, 2022, upholding the legality of the Conditionality Regulations and dismissing the claims raised by the Hungarian and Polish authorities.[19] The Court emphasized throughout the analysis of 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.[20] This narrow framing creates uncertainty as to the practical scope of application of the Regulation in the future.[21]

Another example of softer measures used to address the illiberal reforms in Hungary and Poland is the Rule of Law Framework. This is essentially a structured dialog with a member state that the European Commission considers to be in violation of

15 "Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of December 16, 2020 on a general regime of conditionality for the protection of the Union budget," OJ L 433I, December 22, 2020, 1–10: https://eur-lex.europa.eu/eli/reg/2020/2092/oj.

16 Kim Lane Scheppele, Laurent Pech, R. Daniel Kelemen, "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: On Matters Constitutional*, (2018), https://doi.org/10.17176/20181115-215538-0.

17 R. Daniel Kelemen, "Time to Call Hungary and Poland's Bluff," Politico, Opinion, November 19, 2020, https://www.politico.eu/article/time-to-call-hungary-and-polands-bluff/.

18 Marco Fisicaro, "Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation: ECJ Judgments of February 16, 2022, Cases C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council," *European Constitutional Law Review* 18, no. 2 (2022): 334–356, https://doi.org/10.1017/S1574019622000128.

19 C-156/21 - Hungary v Parliament and Council (2022), https://curia.europa.eu/juris/liste.jsf?num=C-156/21.

20 Andi Hoxhaj, "The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget," *Nordic Journal of European Law* 5, no. 1 (2022): 144, https://doi.org/10.36969/njel.v5i1.24501.

21 Hoxhaj, "The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget," 144.

the values of Article 2 of the TEU.[22] The Rule of Law Framework took on the form of a press release and had the objective of creating a non-legally-binding pre-Article 7 procedure that would make the actual suspension procedure of a member state seem less "nuclear" in nature.[23] The Framework emphasizes a structured diplomatic dialog with the member state concerned throughout the whole procedure rather than an automatic recourse to legal consequences.[24] In practice, the Commission has run through the entire procedure of exchanging positions with the Polish government, to no avail, and referred it to the Council, which never voted on any of the sanctioning motions. Therefore, commentators have judged this framework to be a "modest step," at best.[25]

The selected examples illustrate an increased activity of the EU to fight the illiberal reforms in Hungary and Poland. Presenting a common front did not necessarily happen through the political and constitutional channels, but rather by a plethora of indirect and domain-specific measures, which required legal mobilization and clever lawyers to operate within the set limits of EU powers and available majorities.

Scholactivism and the Rule-of-Law Crisis

The developments within the context of the rule-of-law crisis in the EU since 2011 were marked by a high degree of legal mobilization and scholarly activism. Lawyers, judges, and legal scholars have been advocating in defense of the rule of law and liberal democratic values.

Legal mobilization, more broadly, implies translating desires into rights and using the law and courts to press for social change.[26] The actors of legal mobilization are most commonly activists from the non-governmental sector.[27] The means of legal mobilization of EU legal scholars include, among other things, open letters, meetings at EU institutions, reports for think tanks, strategic litigation, hosting events at universities, and social media presence through institutional accounts. Such actions fall outside of the core responsibilities of a scholar or lecturer at a university. At the same time, basically all European universities encourage social relevance and dissemination of scholarly research in the public debate.

In this context, it is relevant to engage with the recent controversial debates about scholactivism in constitutional law. The debates around academic engagement in society oscillate between the idea of neutrality of academic research and fully embracing academic research for a social cause. Some scholars have called for skepticism of academic research pursuing a normative social or political goal. They

22 "Communication from the Commission to the European Parliament and the Council, a New EU Framework to Strengthen the Rule of Law," COM (2014) 158, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2014:0158:FIN:EN:PDF#:~:text=This%20Communication%20sets%20out%20a,European%20Parliament%20and%20the%20Council.

23 Dimitry Kochenov and Laurent Pech, "Better Late Than Never? On the European Commission's Rule of Law Framework and its First Activation," *Journal of Common Market Studies* 54, no. 5 (2016): 1062, https://doi.org/10.1111/jcms.12401.

24 "Communication from the Commission to the European Parliament and the Council," 18.

25 Kochenov and Pech, "Better Late Than Never?" 1062.

26 Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), 18; Virginia Passalacqua, "Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights," *Common Market Law Review* 58, no. 3 (2021): 751–776, https://doi.org/10.54648/cola2021049.

27 Lisa Vanhala and Cecilie Hestbaek, "Framing Climate Change Loss and Damage in UNFCCC Negotiations," *Global Environmental Politics* 16, no. 4 (2016): 111–129, https://doi.org/10.1162/GLEP_a_00379.

highlight the performative role of legal research[28] and the close contacts between legal academia and policy-making circles.[29] They still highlight the need for theoretically-rooted research distinct from the work of policy professionals. They emphasize knowledge, rather than justice, as the main goal of legal research.[30] Other scholars have pushed back against the skepticism towards scholactivism, advocating the possibility of combining knowledge production with the quest for social justice. They claim that academics have epistemic agency and should not obfuscate their responsibility for it.[31] In the end, academic publications compete for acceptance on the basis of some shared perceptions of methodology and professional ethics.[32]

The veracity of the academic debate in the European academic context bears proof of the necessity for an increased attention to method and ethics in legal academia.

Cautionary Tale

The considerations above about the academic conceptual debates about illiberalism, legal mobilization, and scholactivism show that we should avoid binary understanding of ethical questions surrounding the scholarly engagement with illiberalism. Instead, we need to engage in often painstaking discussions about how this engagement should happen.

In the context of engagement of EU scholars with illiberalism in particular, I propose three factors that are relevant: (1) embeddedness of scholars in the affected communities, (2) illiberal backlash against the judiciary, and (3) the rhetorical effects of a legal framing of political and social problems.

Embeddedness in Affected Communities

Strategic litigants against illiberal reforms include individuals, NGOs, and law clinics. These individuals also include scholars, who might want to instigate cases to bring about broader political, legal, and social change. Recent cases brought by scholars include the challenge to the border controls reintroduced by several member states within EU area without internal border controls,[33] or access to documents requests appealed for the sake of transparency at EU institutions.[34] A group of activists and academics has also challenged the surveillance of the opposition by the Polish authorities using Pegasus spyware before the European Court of Human Rights.[35] 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

28 Tarunabh Khaitan, "On Scholactivism in Constitutional Studies: Skeptical Thoughts," *International Journal of Constitutional Law* 20, no. 2 (2022): 547–556, https://doi.org/10.1093/icon/moac039.

29 Hans W. Micklttz, "On the Politics of Legal Methodology," *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014): 589–595, https://doi.org/10.1177/1023263X1402100401.

30 Jan Komárek, "Scholarship Is about Knowledge, Not Justice," *International Journal of Constitutional Law* 20, no. 2 (April, 2022): 558–559: https://doi.org/10.1093/icon/moac043.

31 Alberto Alemanno, "Knowledge Comes with Responsibility: Why Academic Ivory Towerism Can't Be the Answer to Legal Scholactivism," *International Journal of Constitutional Law* 20, no. 2 (September, 2022): 560–561, https://doi.org/10.1093/icon/moac062.

32 Thomas Bustamante, "Reflecting on the Ethical Commitments of Our Role," *International Journal of Constitutional Law* 20, no. 2 (2022): 557–558, https://doi.org/10.1093/icon/moac042.

33 C-368/20 - Landespolizeidirektion Steiermark (2022), https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-368/20.

34 C-761/18 P - Leino-Sandberg v Parliament (2021), https://curia.europa.eu/juris/liste.jsf;jsessionid=093B4DF864A73F1EC5BAE62D9ACA7DCE?num=C-761/18&language=en.

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

created especially to bridge academic expertise with strategic litigation practitioners to promote the rule of law.[36]

In the context of the dual role of judges, as institutional actors and as actors instigating strategic litigation, the judges' associations and bar associations have also played an important role. The Polish judges seem to have been particularly well embedded in the transnational judicial networks that can trigger legal mobilization.[37] The transnational judicial associations have played a significant role in assisting in cases being brought in the name of individual judges. In the case filed August 28, 2022, several professional associations of judges act as applicants in a case meant to draw public attention to the approval of releasing funds from the EU's Recovery and Resilience Plan to Poland.[38]

The coalitions around resisting illiberal reforms did not grow equally across the EU. We can observe a certain center-periphery dynamic, as the civil society movements around 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 depending on which member state their submissions concern substantively. Since the first report issued in 2020, it has been clear that significant attention is devoted to Hungary (30 stakeholder submissions) and Poland (36 stakeholder submissions).[39]

To some extent, it can be viewed as natural that expertise regarding strategic litigation in EU law would be focused in Brussels, which is also the geographical center 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-kilometer radius around the Place du Luxembourg in Brussels. This concentration of expertise has effects on the goals and political campaigns pursued by a large part of the legal mobilization against illiberal reforms in EU law. Legal mobilization and strategic litigation should be framed jointly by civil society organizations and affected communities.[40] The actors involved in strategic litigation decide on the framing of the political movement and determine the goals of strategic litigation.[41] If the actors involved in strategic litigation are based closer to Brussels than Warsaw or Budapest, their goals will tend to revolve more around building the resilience of EU law and institutions than around promoting liberal reforms in Poland or Hungary. In the case that sociopolitical impact in the concerned member states is one of the goals of strategic litigation, the involvement and empowerment of local actors appears crucial.

Involvement of local communities in Hungary or Poland is often ensured through the proxy of local civil society. The author herself has been involved in projects of the

36 See description on the website of Good Lobby Profs, last modified April 26, 2024, https://www.thegoodlobby.eu/profs/.

37 Claudia-Y. Matthes, "Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law," *East European Politics* 28, no. 3 (2022): 468–487, https://doi.org/10.1080/21599165.2022.2092843.

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

39 As compared to 20 stakeholder submissions for Germany and 24 contributions for France, see European Commission, "Summary of the targeted stakeholder consultation for the 2020 Rule of Law Report," last modified December 10, 2020, https://commission.europa.eu/system/files/2020-10/2020_rule_of_law_report_-_summary_of_the_stakeholder_consultation_en.pdf.

40 Open Society Justice Initiative, "Strategic Litigation Impacts: Torture in Custody," Report (2017), https://www.justiceinitiative.org/publications/strategic-litigation-impacts-torture-custody.

41 Lisa Vanhala and Cecilie Hestbaek, "Framing Climate Change Loss and Damage in UNFCCC Negotiations," *Global Environmental Politics* 16, no. 4 (2016): 111–129, https://doi.org/10.1162/GLEP_a_00379.

Rule of Law Impact Lab at Stanford Law School, which have been involving Polish civil society to frame the legal mobilization and consider strategic litigation. While civil society appears a relevant proxy for the affected communities in the case of democratic states, the scholar-activists should do their homework in the context of such engagements. Compared to international organizations or international NGOs, they have less experience and often also less knowledge of the local context.

Backlash against the Judiciary

When mobilizing against illiberal reforms beyond the state, we have to take into account that depoliticizing certain issues and turning them into legal questions to be solved by judges through the application of legal syllogisms can trigger illiberal backlash.

In many European countries, we are witnessing debates about judicial activism, juristocracy[42] or, in the Netherlands, *dikastocratie* (derived from *dikastes*, meaning "judge" in ancient Greek). Judges overstepping their mandate is framed as a threat to the ideals of a majoritarian democracy, advanced especially by populist arguments.[43] In Hungary, George Soros, among the founders of the Open Society Foundations, has been put on public billboards as part 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 for environmental NGOs brining climate-change litigation, such as Urgenda.[44] These examples illustrate how strategic litigation is perceived as a means of counter maneuvering actions taken by parliaments and executives representing the democratic majority.

International courts in particular have been subject to backlash from illiberal regimes. We have many examples internationally of illiberal backlash.[45] Backlash goes beyond pushing back against the contents of the judicial decisions in question: it challenges the authority of a court as an international institution is a more principled way.[46] Backlash implies a certain degree of resentment, wanting to reverse a social development.[47] It is often framed as a reactionary critique of what its opponents call progress.

In the EU context, there have been attempts at framing the defense of social progress in terms of rights. Due to a lack of common standards and enforcement mechanisms for liberal democracy and the rule of law in the EU, it seems often more practicable to measure countries by their own standards. The idea non-regression means is

42 Governance of the judges as defined by Hirschl in Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2009).

43 Marijke Malsch, "Hoezo dikastocratie? Weghalen taken bij rechter leidt tot afkalven rechtsbescherming burger," *Nederlands Juristenblad* 18 (2020): 1325–1327, https://www.inview.nl/document/id8505b6cff67f4c1aabea809bd995fb89/nederlands-juristenblad-hoezo-dikastocratie?ctx=WKNL_CSL_85&tab=tekst&cpid=WKNL-LTR-Nav2&cip=hybrid.

44 NOS Niews, "Kamer wil onderzoek: namens wie spreken milieuclubs bij de rechter?," Nederlandse Omroep Stichting Nieuws, last modified February 22, 2023, https://nos.nl/artikel/2464752-kamer-wil-onderzoek-namens-wie-spreken-milieuclubs-bij-de-rechter.

45 Nicole De Silva and Misha Plagis, "NGOs, International Courts, and State Backlash against Human Rights Accountability: Evidence from NGO Mobilization against Tanzania at the African Court on Human and Peoples' Rights," *Law & Society Review* 57, no. 1 (2023): 38, https://doi.org/10.1111/lasr.12639.

46 Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," *International Journal of Law in Context* 14, no. 2 (2018): 197–220, https://doi.org/10.1017/S1744552318000034.

47 Madsen, Cebulak, and Wiebusch, "Backlash against International Courts," 200.

that democracies should not go back on their own democratic standards, whether regarding individual rights or separation of powers. This approach seems to also recently be adopted by the CJEU itself with regard to judicial independence in the European Union. The EU does not have the competence to establish a common standard of judicial independence, but the Court can instead enforce the rule that a member state 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."[48] In the academic context, the concepts of democratic backsliding[49] or democratic decay[50] propose a framing of protection of social progress.

Including strategies to mitigate backlash seems another important factor in academic legal mobilization for the rule of law. EU institutions, including the Court of Justice of the EU, should not be shielded from social and political criticism. At the same time, it is easy to call for a brave, principled stance from the safety of the ivory tower. International research shows that the mobilization of compliance constituencies (private actors, civil society, and academics) around an international court is crucial for building and maintaining judicial authority. In that light, it is important for academic activism for the rule of law to include bringing cases to the courts and following up on their implementation.

Rhetorical Effects of a Legal Framing of Political and Social Problems

There is a particular risk linked to pursuing legal and judicial routes to counter illiberal reforms. If we understand illiberalism as an ideological universe opposing the liberal scripts, then it argues that majoritarian solutions are better suited to obtain the public good.[51] It rejects the liberal idea of checks and balances, where expertise-based independent institutions decide, without a democratic legitimacy to back up their decision-making power. According to the illiberal scripts, what legal mobilization does is to put decisions about change in society in the hands of lawyers and judges, who do not have the legitimacy to make them. Legal mobilization against illiberal reforms runs the risk of playing into the hands of those illiberal scripts.

If we perceive the liberal system of checks and balances as meant to provide a discursive exchange between different perspectives, then the essential juxtaposition in a democratic community is that between the majority and the minority. The majoritarian view can be expressed in popular votes or via the people's representatives in the parliament. The role of constitutional lawyers and judges is then to guarantee respect for the rights of the minorities.[52] The views of the minorities, outvoted in a majoritarian democratic process, can be part of a deliberative process, when presented in a rational and inter-subjective way.[53] This predicament of the courts

48 CJEU, C-896/19, April 29, 2021, *Repubblika v. Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 63.

49 Nancy Bermeo, "On Democratic Backsliding," *Journal of Democracy* 27, no. 1 (2016): 5–19, https://doi.org/10.1353/jod.2016.0012; Daniel Kelemen and Michael Blauberger, "Introducing the Debate: European Union Safeguards against Member States' Democratic Backsliding," *Journal of European Public Policy* 24, no. 3 (2017): 317–320, https://doi.org/10.1080/13501763.2016.1229356.

50 Tom Daly, "Democratic Decay: Conceptualising an Emerging Research Field," *The Hague Journal on the Rule of Law* 11 (2019): 9–36, https://doi.org/10.1007/s40803-019-00086-2.

51 Marlene Laruelle, "Illiberalism: A Conceptual Introduction," *East European Politics* 38, no. 2 (June 2022): 312, https://doi.org/10.1080/21599165.2022.2037079.

52 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980), 136.

53 Jürgen Habermas, "Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy," trans. William Rehg (Cambridge, Mass.: MIT Press, 1998), 293 *et seq*.

having to guarantee democracy in an essentially non-democratic way has been referred to in the US scholarship as the "counter-majoritarian difficulty."[54]

The interaction with illiberal discourse is not necessarily dependent on the success of a particular campaign. As an example of backfiring legal mobilization, in April 2022 the CJEU judgement ruled that the Schengen Borders Code only allows for a reintroduction of border controls inside the Schengen Zone for a maximum period of six months. This meant that countries such as Austria, which had had border controls continuously since 2015, were in violation of EU law. Migration policy and controls over its own borders have, since the migration crisis, been linked to sovereigntist and illiberal narratives. While member states were not eager to implement the 2022 ruling, the Council of the EU proceeded to act on a long-dormant legislative procedure regarding the reforms of the Schengen Borders Code. It proposed to introduce practically unlimited exceptions for member states to reinstate border controls based on national security.[55] It might seem that the Court's judgement, obtained through strategic litigation, has fostered the political consensus for more national discretion to close borders within the EU and to limit the free movement of EU citizens.

Conclusions

The power dynamics surrounding the engagement of academics in legal mobilization for the rule of law using EU law are complex. In this paper, as a personal reflection, I focus on three aspects of this engagement, namely embeddedness of scholars in the affected communities, illiberal backlash against the judiciary, and the rhetorical effects of a legal framing of political and social problems.

The professional ethics of scholars studying illiberalism should not be understood as a constraint against engaging with these issues altogether, and should not prevent us from exiting the ivory tower of the university. Ethics is instead about a constant strive to live up to certain values, such as truth and objectivity. Objectivity relates to relaying different sides of a debate, without necessarily staying neutral with regard to the challenges that our society faces. The repeated self-reflection can serve as a helpful tool for maintaining professional ethics.

This paper has tried to highlight certain questions that we should be asking ourselves when doing research on law and democratic backsliding in the EU. We should be aware of our positionality with regard to objects of the activists, the affected communities, and colleagues within universities. We should choose our words with care to avoid the traps of simple binaries and social polarization. We should be careful with our words and their representation.

54 Kenneth D. Ward and Cecilia R. Castillo, *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory* (Albany: SUNY Press, 2012), 150.

55 Pola Cebulak and Marta Morvillo, "Backtracking or Defending Free Movement within the Schengen Area? *NW v. Landespolizei Steiermark*," *Common Market Law Review* 60, no. 4 (2023): 1075–1100, https://doi.org/10.54648/cola2023075.