re:constitution
Working Paper

Angelina Atanasova

Litigating fundamental rights violations before the courts in Europe: The role of civil society in Bulgaria

working papers, Forum Transregionale Studien 18/2023

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe
c/o Forum Transregionale Studien e. V., Wallotstr. 14, 14193 Berlin

Angelina Atanasova
Litigating fundamental rights violations before the courts in Europe: The role of civil society in Bulgaria
Working Papers, Forum Transregionale Studien 18/2023
DOI: https://doi.org/10.25360/01-2023-00027

Design: Plural | Severin Wucher

The Forum Transregionale Studien is an institutional platform for the international cooperation between scholars of different expertise and perspectives on global issues. It is funded by the Berlin Senate Department for Higher Education and Research, Health, Long-term Care and Gender Equality.

Working Papers are available in open access via *perspectivia.net*, the publication platform of the Max Weber Stiftung.

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe is a joint programme of the Forum Transregionale Studien and Democracy Reporting International, funded by Stiftung Mercator.

Abstract

Bridging the gap between legal mobilization and the rule of law literature, with this paper I aim to enhance the understanding whether and when civil society actors resort to legal mobilization beyond the country's borders to address fundamental rights violations, in the context of democratic backsliding. While there is ample literature on legal mobilization, there is little empirical evidence and theoretical understanding on how the erosion of democracy impacts the decisions and strategies of civil society actors to resort to legal mobilization at supranational and international level. The paper focuses on Bulgaria, where there have been significant signs of democracy backsliding over the last decade. On the basis of interviews with civil society, representatives of donor organizations and lawyers, this paper aims to 'peek' into civil society perceptions of and experiences with legal mobilization, to discover their hurdles and possible avenues for mobilizing EU/ international law, as well as the risks and benefits they associate with such strategic tool, especially when the rule of law is under threat.

Keywords: legal mobilization, fundamental rights, democratic backsliding, civil society, Central and Eastern Europe

Suggested Citation:

Angelina Atanasova, "Litigating fundamental rights violations before the courts in Europe: The role of civil society in Bulgaria", re:constitution Working Paper, Forum Transregionale Studien 18/2023, available at https://reconstitution.eu/working-papers.html

Litigating fundamental rights violations before the courts in Europe: The role of civil society in Bulgaria

Angelina Atanasova[1]

Introduction and research scope

In the last decade, the democratic backsliding has manifested in the Central and Eastern European region through jeopardizing the rule of law, and harming considerably judicial and media independence. This tendency has spilled beyond Poland and Hungary – the two most often quoted EU Member States for democracy violations. While Bulgaria has stayed out of the EU-level discussions on the rule of law for a long time, the country has significantly dropped in media freedom rankings (i.e., it took 111th position out of 180 places worldwide in the Reporters Without Borders 2020 ranking for free press)[2] and has faced significant hurdles with its judicial independence. The EU institutions have been almost timidly intervening in favour of democratic values although democracy, the rule of law, equality and respect for human rights have been agreed as a common founding ground, enshrined in the EU primary law (now Article 2 Treaty on European Union (TEU)). In 2018, the European Commission (EC) proposed[3] a new rule of law conditionality mechanism for the upcoming multiannual financial framework (2021-2027). Other recent measures, which the European Commission has adopted include a new rule of law toolbox (including an annual country rule of law report), planned and implemented as a step in to protect democracy and potentially to prevent further erosion among a wider group of EU Member States.

Considering the major contribution that the Court of Justice of the European Union (CJEU) has made in enlarging the scope of protected fundamental rights at EU level, its potential role in upholding democratic principles in the EU has been recurrently emphasized in academic debates.[4] Koen Lenaerts, the President of the CJEU, has characterized the role of the Court as 'conscious of its responsibility for upholding the rule of law within the EU and willing to act to defend that principle when necessary'[5]. Scholarly debates and suggested policy solutions have predominantly focused on top-down institutional mechanisms (e.g., reverse-Solange

[1] re:constitution Fellow 2020-2021. Researcher at the European Social Observatory, Belgium and a Research Associate with the Faculty of Law, KU Leuven, Belgium.

[2] For reference North Korea ranks on the last 180th position, while Hungary is placed on the 89th and Poland on the 62nd position. Source: Reporters Without Borders. 2020 World Press Freedom Index. (2020). Available at: [https://rsf.org/en/index?year=2020]. Last accessed on 24 November 2022.

[3] European Commission. COM(2018) 98 final. Brussels. 14.2.2018.

[4] Tom Ginsburg. (2018). Demographic Backsliding and the Rule of Law Kormendy Lecture. Ohio Northern University Law Review 44, no. 3: 351–70.

[5] Koen Lenaerts. (5 July 2019). Speech at the conference: *Upholding the Rule of Law within the EU. RECONNECT Reconciling Europe with its Citizens through Democracy and Rule of Law.*

doctrine[6]) that could be employed by the EU institutions to pressure the Member States to respect their commitment to fundamental rights, set in Article 2 TEU and the EU Charter of Fundamental Rights.[7] At the same time, the role of civil society actors, including their potential to actively react and to cooperate with domestic and international courts to address on-site consequences of democracy backsliding, has been overlooked. With the increased importance of the judiciary in the wider protection for fundamental rights, legal mobilization has become one of the presumably strongest weapons in the hands of civil society. As a tool, legal mobilization has been used both with agenda-setting purpose, as well as for broadening the scope of rights of underrepresented or disempowered societal groups, and for raising awareness on controversial or politically sensitive problems, among others. Litigation has been widely used also in gaining access to supranational and international institutions, in bargaining with domestic bodies for legal or administrative changes and for the invalidation of domestic national laws.

Weiler, for example, describes the role of EU citizens as 'principle guardians' of EU law, monitoring the compliance with EU law at domestic level, 'usually against state public authorities' while gaining access through the judiciary.[8] Thus, in the current context of democratic backsliding, European citizens and active civil society actors could play not only an important role as watchdogs alarming EU institutions about fundamental rights violations and triggering legal proceedings at domestic at supranational level but also in monitoring the state's compliance with institutional decisions and judgements rendered by supra- and international courts.[9] Moreover, as stated by Blokker, even if 'legal institutions supporting the rule of law are a condition sin qua non', they are not themselves 'sufficient guarantees' for operational rule of law.[10] One could add Zemans' words here: 'courts are essentially reactive institutions, so rules "change as they are applied" in response to claims made'[11].

However, despite the ample literature[12] on legal mobilization as a tool used for agenda-setting and for bottom-up judicialization, little is known about how the process is triggered and

[6]Armin von Bogdandy, A., Antpöhler, C., Dickschen, J., Hentrei, S., Kottmann, M., & Smrkolj, M. (2015, February). A European response to domestic constitutional crisis: advancing the reverse-Solange doctrine. In Constitutional Crisis in the European Constitutional Area (248-267). Nomos Verlagsgesellschaft mbH & Co. KG.

[7] Ramona Coman. (2018). Protecting the rule of law and the state of democracy at the supranational level: Political dilemmas and institutional struggles in strengthening EU's input, output and throughput legitimacy. In Challenges of Democracy in the 21st Century. Routledge, 142-173.

[8] Joseph Weiler. (1991). The Transformation of Europe, 100 Yale L.J.

[9] Bojan Bugaric. (2019). Can Law Protect Democracy? Legal Institutions as "Speed Bumps". Hague Journal on the Rule of Law 11.2-3 (2019), 447-450; Antoine Buyse. (December 20, 2019). Why Attacks on Civic Space Matter in Strasbourg: The European Convention on Human Rights, Civil Society and Civic Space. Deusto Journal of Human Rights, no. 4: 13–37.

[10] Paul Blokker. (October 27, 2015). EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections. Rochester, NY: Social Science Research Network.

[11] Frances Kahn Zemans. (September 1983). Legal Mobilization: The Neglected Role of the Law in the Political System. American Political Science Review 77, no. 3, 690–703; Marie-Pierre Granger. (June 2018). Federalization through Rights in the EU: A Legal Opportunities Approach. European Journal of Law Reform 20, no. 2–3.

[12] Karen Alter and Jeannette Vargas. (2000). Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy. Comparative Political Studies 33, no. 4, 452–482; Rachel Cichowski. (2007). The European court and civil society: litigation, mobilization and governance. Cambridge University Press; Rachel A. Cichowski and Alec Stone Sweet. (2003). Participation, Representative Democracy, and the Courts, 192–217; Lisa Conant. (2006). Individuals, Courts, and the Development of European

implemented in the context of democratic backsliding. The same applies to the question of legal mobilization's effectiveness and impact on the ground. As a strategic tool, the dangers that legal mobilization disguises for civil society actors increase significantly, such as revictimization, political pressure and prosecution, loss of financial resources and/or trust of their constituencies (i.e., membership and wider associated communities). Even partial state capture of the domestic judiciary could decrease civil society chances of successful legal mobilization. In such context, do civil society actors still deem litigation and more specifically supranational and international litigation as an effective tool in defending fundamental rights? Do they perceive courts in Europe as their potential allies, in such a struggle? Are the rulings rendered by powerful courts, such as the CJEU, deemed to have the potential to foster change at domestic level? This process deserves wider attention, further theorization and empirical research, especially considering that democratic backsliding is a comparatively novel phenomenon for the region. In the context of democracy backsliding, some of the main factors influencing legal mobilization, such as legal opportunity structure (LOS) and political opportunity structure (POS)[13], civil society resources[14], or even trust in the judiciary and in the EU institutions[15] are expected to undergo considerable changes.

Considering these factors, in this paper, I posit that the political capture of the domestic judiciary as well as the restrictions on civil society's funding will make the stake that civil society actors take with litigation even higher and hence, less likely to carry out. It is to be explored whether these less favourable conditions disincentivize civil society from taking on legal mobilization before supranational and international courts and if so what other tools they employ (if any). Such hypothesis contradicts the expectation that when political avenues for policy change at domestic level are closing off, civil society actors will turn to the courts, despite the fact that supranational judiciary bodies appear as the most appealing and reliable channels to overturn undemocratic decisions of the executive and legislative powers. The second hypothesis conditions the civil society's eagerness to adopt supranational legal mobilization on the trust which they harbour in supranational governance. The latter is largely predefined by the type of response of the EU institutions to these domestic institutional actors jeopardizing democratic values.

Social Rights. Comparative Political Studies 39, no. 1, 76–100; Lisa Conant et al. (May 30, 2017). Mobilizing European Law. Journal of European Public Policy, 1–14; R. Daniel Kelemen. (2006). Suing for Europe Adversarial Legalism and European Governance. Comparative Political Studies 39, no. 1, 101–127; Lisa Vanhala. (March 1, 2016). Legal Mobilization under Neo-Corporatist Governance: Environmental NGOs before the Conseil d'Etat in France, 1975–2010. Journal of Law and Courts 4, no. 1, 103–30.

[13] Herbert P. Kitschelt. (1986). Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies. British Journal of Political Science 16, no. 1, 57–85; Chris Hilson. (2002). New social movements: the role of legal opportunity. Journal of European Public Policy, 9(2), 238-255; Lisa Vanhala. (March 1, 2016). Legal Mobilization under Neo-Corporatist Governance: Environmental NGOs before the Conseil d'Etat in France, 1975–2010. Journal of Law and Courts 4, no. 1, 103–30.

[14] Marc Galanter. (1974). Why the haves come out ahead: Speculations on the limits of legal change. Law & Soc'y Rev., 9, 95; Carol Harlow, and Richard Rawlings. (2013). Pressure through law. Routledge. Charles Epp. (1998). The rights revolution: Lawyers, activists, and supreme courts in comparative perspective. University of Chicago Press; Karen Alter and Jeannette Vargas. (2000). Explaining variation in the use of European litigation strategies: European Community law and British gender equality policy. Comparative Political Studies, 33(4), 452-482.

[15] Lisa Conant, Andreas Hofmann, Dagmar Soennecken, and Lisa Vanhala. (2018). Mobilizing European law. Journal of European Public Policy, 25(9), 1376-1389; Rachel Cichowski and Alec Stone Sweet. (2003). Participation, Representative Democracy, and the Courts: 192–217.

In this paper, firstly, I discuss the theoretical framework, on which I ground this case study. Secondly, based on national and international reports, I describe the political context in Bulgaria and why this is to be defined as a process of democratic backsliding, as well as some of the major actions undertaken by civil society actors to address fundamental rights. Thirdly, based on conducted interviews with active civil society actors (i.e., broadly defined for the purpose of this research as such as including NGOs, Foundations as well as active legal practitioners and legal professional associations), I highlight some of the opportunities, difficulties and most important the motivations of employing litigation at supranational level as a tool to defend fundamental rights.

Laying out the framework of this paper, I narrow down the specific set of rights into which I dig to judicial independence and the rights stemming from it such as equality before the law, right to fair trial (implying the the right to an independent and impartial judge), presumption of innocence. First, these rights are directly dependent on the independence and the effectiveness of a domestic judiciary system. Second, while they are vital on their own, they further serve as a guarantee for the implementation of the other fundamental rights in a democracy state. Third, their presence largely decreases the threat and the power of Strategic Lawsuits Against Public Participation (SLAPP) against active civil society actors. Fourth, these individual rights are also codified in supranational and international law, i.e. in the EU Charter for Fundamental Rights (Article 6 Right to liberty and security, Article 20 Equality before the law, Article 47 Right to an effective remedy and to a fair trial, Article 48 Presumption of innocence and right of defence, Article 49 Principles of legality and proportionality of criminal offences and penalties), and in the European Convention on Human Rights (Article 5 Right to liberty and security, Article 6 Right to a fair trial, Article 7 No punishment without law, Article 13 Right to an effective remedy). The latter provides for the basis needed for citizens at domestic level to defend their rights both before the CJEU and before the ECtHR. Certainly, one shall keep in mind that the two courts are part of two different legal systems, which come with different internal procedures and limitations. One could address the CJEU only when the question of litigation falls under the realm of EU law and domestic judges agree to pose such a question before the CJEU, while when concerning the ECtHR, a litigant could file an application to it only after all domestic effective remedies have been exhausted.

For the purpose of this research, I explore the country case study of Bulgaria[16], which could be used as a pilot case in further research on the topic. The selection of the investigated Member State is based on two main criteria. Firstly, fundamental rights have been under threat for a prolonged period and more specifically, the rights associated with judicial independence have been intensely targeted, due to the partial political capture of the judiciary. More specifically, in the case of Bulgaria, it concerns the high levels magistrates and the prosecutor's office. Secondly, this is the low interest expressed by the EU institutions and political key figures as well as lack of sanctions concerning the downturn situation with the judiciary independence in Bulgaria. As stipulated for the purpose of the second hypothesis,

[16] This was aimed as a comparative research project between Bulgaria and Hungary. Since not all interviews planned in Hungary were conducted due to the COVID-19 pandemic, this working paper is focused on Bulgaria. A follow-up paper is expected to be completed with a comparative research between Bulgaria and Hungary, as initially planned.

the different responses of the supranational EU institutions towards the domestic infringements of rights are expected to yield different expectations of the civil society on how 'useful' and successful their collaboration with the supranational institutions could be. In this context, one should note that much less attention has been paid by the EU institutions to the issue of judicial independence in high-level political debates in the case of Bulgaria compared to these in Poland, Hungary and even in Romania. Moreover, the reaction of the EU institutions on fundamental rights violations and the independence of the judicial system have not echoed in the domestic public space and media, unlike the US sanctions. For example, the recently released sanctions concerning influential Bulgarian figures including politicians, presented in the Magnitsky Act (issued by the US Congress) and the mention of the captured domestic judiciary in the report has had a much larger impact on the domestic debate compared to any of the high-level discussions at EU level. In a similar vein, as Kelemen describes the differences in the approaches adopted by the EU institutions towards the different Member States, I expect that a 'half-hearted response'[17] in reaction to the situation in Bulgaria would yield lowered public trust towards the EU at domestic level. The latter is then expected to dissuade civil society actors from active engagement with the supranational level due to expected inutility of their actions. Moreover, the EU institutions might yield considerably different levels of public trust. For example, the perceptions of the powers of the CJEU might largely differ from the level of trust conferred onto the more politically balanced European Commission.

The case is built on secondary data analysis and 15 in-depth semi-structured interviews conducted with a selection of lawyers and representatives of civil society organizations. The interviewees represent key informants in the process of international and supranational litigation. These are both lawyers who have initiated litigation before the CJEU and civil society representatives who have been actively involved in such cases or have taken other effective actions against systematic fundamental rights violations. The small sample of key informants offers only exploratory insights which can be further upscaled with a larger group of interviewees. Nevertheless, it shall be kept in mind that there is only a rather small group of NGOs and lawyers that have undertaken such actions, hence, there has quickly been reached a level of saturation concerning the stories of this group of active civil society stakeholders.

In addition to the primary selected interviewees, I have used snowball sampling as an effective tool to identify further interviewees. Due to COVID-19 pandemic restrictions, all interviews were conducted online – via Zoom or Teams. These lasted between 30 and 60 minutes. The interviews and the follow-up exchanges of communication were conducted in Bulgarian. The main purpose of the interviews was to explore when and how civil society actors (including lawyers) employ litigation, what resources they require as well as to investigate their understanding of the role of the CJEU in addressing fundamental rights violations at domestic level. The latter has also been compared to this of the ECtHR. When the interviewees did not use strategic litigation, further inquiry was made into the type of actions that they have carried on and the reasons why they decided not to resort to litigation.

[17] Daniel Kelemen. (2017). Europe's other democratic deficit: National authoritarianism in Europe's Democratic Union. Government and opposition, 52.2, 211-238.

1. Theoretical discussion

A number of scholars have looked at powerful courts such as the US Supreme Court and the CJEU, and explored the question whether these could be legitimate agents, drivers of change, especially when the political system experiences a deadlock. This paper is grounded on the ample scholarly literature on judicialization and more specifically on the phenomenon of bottom-up judicialization in the work of Charles Epp[18], Gerald Rosenberg[19], Ran Hirschl[20] and Joel Handler[21]. While this strand of literature presents in some regard a well-charted area with a set of external and internal conditions which contribute to bottom-up judicialization, there is lack of empirical evidence on how the capture of domestic courts in the context of democratic backsliding would impact the process of judicialization, especially when arisen from 'the ground'. The scarce investigation of such phenomenon could well be explained by the origins of this strand of socio-legal and political science scholarship, which has its roots in the US soil, a state considered until recently one of the 'apples' of liberal democracy and legal constitutionalism. The same is true for the scholarship having originated in the Western European context, in which experts[22] have explored the process of legal mobilization and bottom-up judicialization with regard to the judicial dialogue between domestic courts and the CJEU. In both cases, until recently, the independence of domestic judiciary has been taken for granted. While some of the main concerns so far have been resources and legal expertise possessed by civil society actors (in terms of access to courts), in the context of democracy backsliding, also the effectiveness of the judicia remedies comes into play. For example, the open disrespect of CJEU rulings by Polish domestic courts[23], the division of the domestic judiciary, as well as the ever-increasing threat of 'over-politicization'[24] pose some of the biggest threats to domestic and supranational judiciary's legitimacy[25]. Moreover, eventually, these might impact civil society actors' perceptions of the effectiveness of the judiciary, which

[18] Charles Epp. (1998). The rights revolution: Lawyers, activists, and supreme courts in comparative perspective. University of Chicago Press.

[19] Gerald Rosenberg. (1992). Judicial independence and the reality of political power. The Review of Politics, 54(3), 369-398.

[20] Ran Hirschl. (2008). The judicialization of politics. In The Oxford handbook of political science; Hirschl, R. (2008). The judicialization of mega-politics and the rise of political courts. Annu. Rev. Polit. Sci., 11, 93-118.

[21] Joel Handler. (1978). Social movements and the legal system: A theory of law reform and social change. Academic press.

[22] Karen Alter and Jeannette Vargas. (2000). Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy. Comparative Political Studies 33, no. 4, 452–482; Rachel Cichowski. (2007). The European court and civil society: litigation, mobilization and governance. Cambridge University Press; Rachel Cichowski and Alec Stone Sweet. (2003). Participation, Representative Democracy, and the Courts, 192–217; Lisa Conant. (2006). Individuals, Courts, and the Development of European Social Rights. Comparative Political Studies 39, no. 1, 76–100; Lisa Conant et al. (May 30, 2017). Mobilizing European Law. Journal of European Public Policy, 1–14; Daniel Kelemen. (2006). Suing for Europe Adversarial Legalism and European Governance. Comparative Political Studies 39, no. 1, 101–127; Lisa Vanhala. (March 1, 2016). Legal Mobilization under Neo-Corporatist Governance: Environmental NGOs before the Conseil d'Etat in France, 1975–2010. Journal of Law and Courts 4, no. 1, 103–30.

[23] On 7 October 2021, Poland's Constitutional Tribunal declares that Articles 1, 2 and 19 of the Treaty on European Union (TEU) are partially unconstitutional, while these have been previously complied with. For further details, see judgement K 3/21 of 7 October 2021.

[24] Michael Blauberger and Daniel Kelemen. (2017). Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU. Journal of European Public Policy, 24(3), 321-336.

[25] Salvatore Caserta and Pola Cebulak. (2021). Resilience Techniques of International Courts in Times of Resistance to International Law. International and Comparative Law Quarterly, 70(3), 737-768.

will overall impact bottom-up judicialization. One of the objectives of this research paper is to explore the potential importance of these factors to be included among the set of factors investigated by scholars engaged with bottom-up judicialization in the context of democracy backsliding.

Furthermore, the role of the factors highlighted so far by scholars as determinants for judicialization to take place, such as judicial independence and the respect of rule of law[26], might need to be reconsidered. Without those determinants, is bottom-up judicialization or any type of judicialization doomed to fail? As Tate and Vallinder frame it, civil society's perceptions of courts as 'more reputable, impartial, and effective decision-making bodies than other institutions, which are viewed as bureaucracy heavy or biased'[27] is one of the drivers for bottom-up judicialization. Hence, the lack of these factors at domestic level might impact also their organizational choices and strategies. The hypothesis explored here is that the higher civil society's perception of lack of legitimacy and respect for supranational courts judgements, the lower the probability that their efforts and resources are to be addressed towards legal mobilization. The partial state capture of the domestic judiciary in Hungary and in Poland has certainly played a role in forming such perceptions. Similarly, in Bulgaria, the recurrent scandals concerning the prosecution service and more specifically the Chief Public Prosecutor's actions and inactions, often highlighted in international reports and domestic media reportages, have painted a very similar murky picture of the domestic judiciary independence.

At the domestic level, the lack of judicial independence and especially political capture of courts can easily impede the path towards the CJEU via domestic courts. This can be achieved even with regular legal means, since the *acte clair/acte éclairé* doctrines[28] allow for discretion of domestic judges to decide on whether to refer or not to refer a question for interpretation to the CJEU. Furthermore, such capture may constitute a problem in applying and following up on CJEU judgements, since domestic courts are crucial intermediate bodies which apply these judgements. Moreover, the 'lack of powers of implementation'[29] and capacity to follow up of their own judgements, especially in democracy backsliding context, is one of the crucial hurdles on the way of independent domestic courts towards reversal of undemocratic policies and practices.

With regard to the other crucial factor, the rule of law, Hirschl hypothesizes that it is required at least 'at a bare minimum' for judicialization to take place. He further elaborates on the need of 'acceptance of the rule of law, some level of legitimacy of the legal system, and a relatively independent and well-respected apex court armed with some form of judicial-review

[26] Ran Hirschl. (2008). The judicialization of politics. in The Oxford handbook of political science.
[27] Torbjorn Vallinder and Neal Tate. (1997). Global expansion of judicial power. New York University Press.
[28] The *acte clair* and the *acte éclairé* doctrines are the two exceptions from the duty to refer for courts against whose decisions there is no judicial remedy. For further information please see European Parliament, July 2017, Briefing on Preliminary Reference Procedure, accessible at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf]. Last accessed on 28 November 2022.
[29] Rosenberg, G. N. (1991). The Hollow Hope: Can Courts Bring About. Social Change, 369-98.

power'[30]. While in this paper, judicialization is conceptualized as a bottom-up process, a tool for defending fundamental rights part of the rule of law context, such purpose clashes with the determinant – the pre-existence of 'rule of law' and 'legitimacy of the legal system', as conditions for judicialization to take place. Hence, this creates an 'oxymoron' – could fundamental rights part of the rule of law context be reinstated through means of legal mobilization if on the first place, rule of law is required for judicialization to take place. Nevertheless, such matter brings along a question about the homogeneity of the judicial system. Are there existing outcasts in the domestic judiciary which are eager to counteract the system, even with the risk to jeopardize their career and personal well-being? A 'strong grip' of the highest level of the judiciary and internal rules present for disciplining judges, among others, make such a potential threat a reality. Furthermore, the relationship and the pre-existent judiciary dialogue between domestic courts and the CJEU, prior to the start of the democracy backsliding process could further make a difference for trusting and using the preliminary ruling mechanism as a potential powerful legal mobilization tool.

Once again, such questions reflect the current situation in a context, in which judicialization as a phenomenon has not been reflected and studied so far by the scholarship originating in North American and in Western European contexts. Thus, not only has the independence of courts been taken for granted, but also the actions of liberal-minded civil society actors advancing rights through bottom-up mobilization has been taken as the 'normal' and the only direction of fundamental rights development. Having said this, there has been always the pertinent grain of doubt to what extent courts can bring change, as posited in Rosenberg's framing of a 'dynamic' versus a 'restrained' court, and the 'hollow hopes' that civil society harbours with regard to the judiciary's potential to bring about change.[31] A dilemma has been often described between the resistance of the judiciary to expand fundamental rights and their potency to do so, rather than as the judiciary protecting the political *status quo*, and taking part in the eroding democratic processes. Scholars have optimistically stated in the past, '[n]ot a single week passes without a national high court somewhere in the world releasing a major judgment pertaining to the scope of constitutional rights or the limits on legislative or executive powers. The most common are cases dealing with criminal "due process" rights and other aspects of procedural justice. Also common are rulings involving classic civil liberties, the right to privacy, and formal equality'[32]. Such statements confirm the general understanding of courts as allies to human rights defenders, not as foes. To sum up, the political pressure and even state capture over domestic courts in some EU Member States is expected to largely impact the bottom-up judicialization process. First, in terms of interfering with civil society's expectations and perceptions towards the domestic judiciary, and second, in terms of the capacity of domestic courts and their willingness to act against the legislative and executive powers in the context of democracy backsliding.

The next section explores the case of Bulgaria. It describes the political context in the country and presents some of the major actions taken by civil society actors to address fundamental

[30] Ran Hirschl. (2008). The judicialization of mega-politics and the rise of political courts. Annu. Rev. Polit. Sci., 11, 93-118.
[31] Gerald Rosenberg. (1991). The Hollow Hope: Can Courts Bring About. Social Change, 369-98.
[32] Robert Goodin (Ed.). (2009). The Oxford handbook of political science. OUP Oxford. 255.

rights violations. The section below reveals two main different types of actors – 1.) NGOs and 2.) lawyers experienced with procedural EU and/or international law, well suited to take legal actions. Furthermore, it identifies several different types of actions carried on such as open letters and advocacy, as well as litigation activities. While the first part of the case study is aimed as a description of the actions that have been taken by civil society activists; the second part aims to reflect the motivations and perceptions of these actors of the domestic judiciary with reflection on their actions. The further presented analysis digs into the conditions needed to resort to supranational courts, the choice of avenues for litigation as well as the perceived effectiveness of judgements issued by the CJEU, also compared to the ECtHR.

2. The case of Bulgaria: The civil society's resistance tactics[33]

After the accession of Bulgaria to the EU in 2007, the country is still committed to rectify shortcomings in its judiciary in order to fulfil its commitments as an EU Member State. Hence, the country's development in this domain continues to be monitored via the Cooperation and Verification Mechanism (CVM), alongside with the progress of another EU Member State, this of Romania. As a part of this framework, several benchmarks are set regarding Bulgaria, among which ensuring the independence and the accountability of the judicial system; as well as guaranteeing transparency of the judicial procedures, alongside the appointment and promotion of magistrates.[34] The latest CVM report on Bulgaria was issued in 2019. And it seems to be the last one as far as Bulgaria is concerned, since it is stated that 'the Commission considers that the progress made by Bulgaria under the CVM is sufficient to meet Bulgaria's commitments made at the time of its accession to the EU.'[35] In 2020 and 2021, further CVM reports on Bulgaria were not issued. While through this statement, the European Commission asserts that the systematic problems, including these of the Bulgarian judiciary are resolved, and the government shall continue with its commitment to uphold the already accomplished achievements, only a year later, in July 2020, the streets of the Bulgarian capital and other major cities were filled with demonstrators demanding the resignation of the Chief Public Prosecutor and the Prime Minister.

Bulgaria has been going through a democratic crisis with deteriorating judicial independence, fundamental rights violations, such as infringements of the principles of equality before the law and the presumption of innocence. These developments have been reflected not only in domestic civil society reports, international reports and in the opinions of the Venice Commission on the needs for structural reforms of the domestic judiciary[36] but also in abrupt

[33] Please consider that this paper section describes the sequences of the events that have taken place until the first draft of the paper was completed in August 2021.

[34] Report from the Commission to the European Parliament and the Council on Bulgaria's progress on accompanying measures following Accession /* COM/2007/0377 final */.

[35] Report from The Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism /SWD(2019) 392 final/.

[36] Council of Europe, Venice Commission. Bulgaria - Opinion on the Judicial System Act, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017). CDL-AD(2017)018-e.; Council of Europe, Venice Commission. Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates adopted by the Venice Commission at its 121st Plenary Session, Venice, 6-7 December 2019. CDL-AD(2019)031-e.

decrease of Bulgaria in international rankings on human rights. In its 2021 report, the Freedom House rates Bulgaria as a semi-consolidated democracy. The country is ranked lower compared to Poland in relation to the citizens' access to political rights and civil liberties.[37] According to the 2020 annual report of the Bulgarian Helsinki Committee, the state of human rights in Bulgaria during 2019 had been stagnated and even regressed (i.e. the right to the freedom of assembly; the prohibition of discrimination; political pressure exercised on the 'pro-European non-governmental' sector).[38] The situation with regard to the judicial independence and associated rights such as equality before the law, presumption of innocence and the right to a fair trial have all quickly deteriorated.

The Chief Public Prosecutor position and political figure has been the source of the major tension in the judicial system. The disputes around his figure had started since the beginning of his appointment. In 2019, when a public competition for the position was announced, he turned out to be the only candidate for the public selection procedure.[39] Similar scenario had taken place three years earlier when after the only other candidate Andrey Andreev has officially withdrawn from the competition, Ivan Geshev was left as the only candidate for the position of the Chief of the Specialized Prosecutor's Office in Bulgaria.[40] Magistrates publicly expressed their disagreement with the selection procedure for the position of the Chief Public Prosecutor under such conditions. Above all, the ethical profile of the candidate was questioned.[41] The tension within civil society – including in the professional societies of lawyers – developed further after the appointment.

A series of scandals rattled the Bulgarian public space, which have brought even a stronger wave of protests starting on 9 July, demanding the resignation of the Chief Public Prosecutor and the Prime Minister. In June 2020, the Anti-Corruption Fund Foundation released an investigative issue[42], telling a story about the magnitude of corruption capturing the

[37] In 2021, Bulgaria is assigned 78 (out of 100) global freedom scores (33 out of 40 on political rights and 45 out of 60 on civil liberties), while Poland is ranked with 82 points (34 out of 40 on political rights, and 48 out of 60 on civil liberties). For comparison, most of the EU Member States are assigned on average 90 or more points (e.g., Spain, France, Germany, the United Kingdom, Slovakia, Slovenia). Source: Freedom House online report on Bulgaria, 2021. Available at: [https://freedomhouse.org/country/bulgaria/freedom-world/2021]. Freedom House online report on Poland, 2021. Available at: [https://freedomhouse.org/country/poland/freedom-world/2021]. Last accessed on 26 February 2023.

[38] The human rights in Bulgaria in 2020, Annual report of the Bulgarian Helsinki Committee, published on 29 June 2020. Available at: [https://www.bghelsinki.org/web/files/reports/123/files/BHC-Human-Rights-in-Bulgaria-in-2019-bg_issn-2367-6930.pdf]. Last accessed on 26 February 2023.

[39] Georgi Gotev in Euractiv, *Bulgaria appoints new chief prosecutor amid protests,* 25 October 2019. Available at: [https://www.euractiv.com/section/justice-home-affairs/news/bulgaria-appoints-new-chief-prosecutor-amid-protests/]. Last accessed on 26 February 2023.

[40] News.bg, *Иван Гешев е единствен кандидат за шеф на Специализираната прокуратура,* 11 July 2016. Available at: [https://news.bg/crime/ivan-geshev-e-edinstven-kandidat-za-shef-na-spetsializiranata-prokuratura.html]. Last accessed on 26 February 2023.

[41] Ivan Demerdgiev, Chairman of the Plovdiv Bar Association, Вижданията на кандидата за главен прокурор противоречат на конституцията [The views of the candidate for chief prosecutor contradict the constitution] in dnevnik.bg, 09 August 2019. Available at: [https://www.dnevnik.bg/analizi/2019/08/09/3949234_vijdaniiata_na_kandidata_za_glaven_prokuror/]. Last accessed on 26 February 2023.

[42] The AntiCorruption Fund, Investigative reportage 'Осемте джуджета' [https://www.youtube.com/watch?v=BuldtnVxkaY&t=13s], published on 24 June, 2020. Last accessed on 28 November 2022.

Specialized Prosecutor's Office, the Ministry of Interior and the National Revenue Agency and their close interlinks with criminal circles. Within a week, the video reached approximately 1 million views altogether on Facebook[43] and on Youtube[44].

Around the same time, in June, photos of 'drawers full of bundles of 500-euro notes and a few gold ingots from the official state residence in Boyana of the Bulgarian Prime Minister were sent to several national media.[45] The scandal was greatly reflected in the public sphere.

The last drop that triggered the wave of protests was a raid at the beginning of July 2020 of the Presidency of Bulgaria by the police and prosecutors.[46] This was largely perceived as an attack against President Rumen Radev, who had been a vocal opponent of the government at that time and had attempted to block the appointment of the Chief Public Prosecutor in 2019.

The peaceful protests continued until November 2020. Tension was built against the unlimited power of the Chief Public Prosecutor, which was an inheritance from oppressive communist system before 1989. On the one hand, the unchecked power of the Chief Public Prosecutor and more specifically its consequences had been reflected in the Venice Commission's opinions, clearly stating the need for institutional changes within the domestic judiciary.[47] On the other hand, the European Commission signals on the matter have been ambiguous. While the 2020 EC rule of law report on Bulgaria reflects the political nature of the Bulgarian protests and recommends that the Bulgarian government follows the Venice Commission opinion on restructuring the judiciary, the report remains silent on the main reason for the civil protests, namely the demand for the resignation of the Chief Public Prosecutor. These were solely attributed to the 'fight against corruption': '..protests that erupted in summer 2020 show discontent in society with the lack of progress in effectively fighting corruption. The protests led to the resignations of five ministers in July and September 2020'.[48]

In this period, civil society actors in the country engaged with each other actively through network building, common advocacy campaigning and shared open letters addressed to supranational and domestic political and institutional actors to tackle the political appointments and most of all, the violations of fundamental rights. The professional civil society groups such as Lawyers Associations were particularly active. This might be well

[43] The video in Facebook is available here: [https://www.facebook.com/AnticorruptionFund/videos/267478791189596/] with 790K views. Last accessed on 26 February 2023.

[44] The video in Youtube is available here: [https://www.youtube.com/watch?v=fvM9HIGnJI4&t=20s] with 358K views. Last accessed on 26 February 2023.

[45] Georgi Gotev and Krassen Nikolov in Euractiv, *Borissov fends off 'kompromats', says will sleep with a gun,* 18 June 2020. Available at: [euractiv.com/section/justice-home-affairs/news/borissov-fends-off-kompromats-says-will-sleep-with-a-gun/]. Last accessed on 26 February 2023.

[46] *Prosecutor raids on Bulgarian president's offices draw public anger in* Reuters.com, 9 July 2020. Available at: [https://www.reuters.com/article/uk-bulgaria-protests-justice-idUKKBN24A2ZX]. Last accessed on 26 February 2023.

[47] Council of Europe, Venice Commission. Bulgaria - Opinion on the Judicial System Act, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017). CDL-AD(2017)018-e.; Council of Europe, Venice Commission. Bulgaria - Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates adopted by the Venice Commission at its 121st Plenary Session, Venice, 6-7 December 2019. CDL-AD(2019)031-e.

[48] European Commission, 2020 Rule of Law Report Country Chapter on the rule of law situation in Bulgaria, 30.09.2020, Brussels. SWD(2020) 301 final.

explained by their expert in-house knowledge on the subject as well as by the direct impact that such institutional set-up had on their work.

In December 2019, some of the most reputed Bulgarian NGOs, whose focus of work goes beyond the protection of fundamental rights, sent an Open letter to the EU institutions addressing the Bulgarian government's non-compliance with the recommendations made by the Venice Commission for introducing the required judiciary reforms for an independent judiciary and more specifically such to secure the independent investigation of the Prosecutor General. This letter[49] was sent to address a hastily proposed draft bill[50] by the Bulgarian Government, intended to conduct reforms, envisioned for complying with the Venice Commission Recommendations and the ECtHR judgment in the case of *Kolevi v. Bulgaria*[51]. The NGOs manage to expose in the letter not only the dubious quality of the suggested reforms but also the speedy procedure, which did not allow for public discussions of the suggested reforms at national level: 'On the eve of the Venice Commission announcing its opinion, the Bulgarian Council of Ministers adopted urgently a new draft bill, which we as above find to be not only legally unsustained but in sharp dissonance with the negative opinion of the Venice Commission on the initially presented other draft bill.'[52]

The non-compliance with the ECtHR judgment *Kolevi v. Bulgaria* has so far triggered serious concerns among the civil society organizations and the general public at large. The judgment concerns the case of forceful retirement of a high ranking prosecutor and a member of the Supreme Judicial Council, followed by an attempt to ruin his personal and professional reputation through false criminal charges against him and members of his family for alleged crimes. This was followed by his detention, release and later assassination at the entrance of his home.[53] As believed, the reason behind Mr. Kolev's assassination was his efforts to raise attention on the unlimited powers of the Chief Public Prosecutor and moreover, to illuminate the incumbent's unlawful orders to other prosecutors as well as exerted pressure on the whole prosecution office. Thus, going back in the history of the Bulgarian judicial system, one could rightly assess the importance of restructuring the Bulgarian judiciary and introducing the necessary checks and balances against the position of the Chief Prosecutor.

In July 2020, an Open letter – signed by some of the biggest Bulgarian legal offices – was sent to the European Commission and more specifically to the attention of the Directorate-General Justice and Consumers (DG JUST) to highlight the violations of rights, caused by the partial implementation of the Directive (EU) 2016/343 on the presumption of innocence in Bulgaria. They stated: '[w]e address you to inform you that the Directive: 1) is not transposed in the

[49] Open letter regarding the Bulgarian government's commitment to comply with the recommendations made by the Venice Commission, published on 12 December 2019. Accessible at: [http://www.aip-bg.org/en/news/Open_letter_regarding_the_Bulgarian_government_s_commitment/20191213002903/]. Last accessed on 28 November 2022.

[50] Draft bill dated 7 December 2019 for amendments and supplements to the Criminal Procedure Code and Judicial System Act, only partially adopted the Venice Commission's recommendation. It was a subject of a severe criticism both at national and international level.

[51] *Kolevi v. Bulgaria*, no. 1108/02, ECHR, 5 November 2009. ECLI:CE:ECHR:2009:1105JUD000110802.

[52] Open letter regarding the Bulgarian government's commitment to comply with the recommendations made by the Venice Commission, published on 12 December 2019.

[53] Ibid.

Bulgarian legislation and 2) is subject to rude trampling and outrageous interpretations on the part of the Prosecutor's Office of the Republic of Bulgaria, mainly under the tone and the practice imposed by the present Chief Prosecutor – Ivan Geshev.'[54]

In October 2020, once again, the society of lawyers took up the issue with the practices of the Chief Public Prosecutor. An Open letter was sent by the Bulgarian Supreme Bar Council to the Deputy-Chairwoman of the Supreme Cassation Court addressing a question concerning the practice of the Chief Public Prosecutor on publicly revealing details from pre-trial proceedings.

These represent some of the examples of actions taken by civil society actors to address the pertinent need for restructuring the domestic judiciary and the position of the Chief Prosecutor, as well as the fundamental rights violations resulting from structural system deficiencies. In this overall context, the trust in the Bulgarian judiciary had been greatly undermined. Already a year before the protests, the trust in the Bulgarian judiciary had turned out to be one of the lowest among all the EU Member States. In a Eurobarometer survey, devoted to the topic of perceived independence of national justice systems, 58% of the Bulgarians (compared to 33% of the EU citizens) rated the independence of courts and judges either as fairly bad or as very bad. The two main highlighted reasons were the political pressure and the interference from economic or other specific interests.[55]

Alongside with these civil society actions, Bulgarian judges have referred one of the highest number of preliminary references sent to the CJEU concerning Article 6 (Right to liberty and security)[56], Article 20 (Equality before the law)[57], Article 47 (Right to an effective remedy and to a fair trial)[58], Article 48 (Presumption of innocence and right of defence)[59], and Article 49 (Principles of legality and proportionality of criminal offences and penalties)[60] of the EU Charter. High referral activity is registered for Directive (EU) 2016/343 of the European

[54] Complaint on the Transposition of Directive (EU) 2016/343 of the European Parliament and of the Council as of 09.03.2016 on the strengthening of certain aspects of the presumption of innocence and of the right to present at the trial in criminal proceedings, dated as 23 July 2020.
[55] Flash Eurobarometer 474. Perceived independence of the national justice systems in the EU among the general public. Field work: January 2019.
[56] Five preliminary references (PRs) out of 31 PRs for all EU Member States, approximating 16%. Curia search criteria: Period or date = "Date of delivery"; period= "from 01/01/2007 to 30/08/2021"; Procedure and result = "Reference for a preliminary ruling", "Preliminary reference - urgent procedure"; References to case-law or legislation = [Search in = "Grounds of judgment"; Category = "Treaty"; Treaty = "Charter of Fundamental Rights of the EU (2007)"; Article = "6";] Source of a question referred for a preliminary ruling = "Bulgaria".
[57] Six PRs out of 81 PRs for all EU Member States, approximating 7%. See search criteria above, Grounds of judgement amended accordingly.
[58] Twenty-four PRs out of 317 PRs for all EU Member States., approximating 8% See search criteria above, Grounds of judgement amended accordingly.
[59] Eight PRs out of 41 PRs for all EU Member States, approximating 20%. See search criteria above, Grounds of judgement amended accordingly.
[60] Three PRs out of 32 PRs for all EU Member States, approximating 10%. See search criteria above, Grounds of judgement amended accordingly.

Parliament and of the Council of 9 March 2016 on strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[61].[62]

The number of preliminary referrals, however, cannot tell us more about the question whether the violations of these rights in Bulgaria happen more often than they do so in other EU Member States. Nor the numbers inform us whether Bulgarian civil society actors, including individual lawyers and lawyers bar associations, are more active and have better access to courts; or whether domestic judges are more inclined to refer such questions to the CJEU compared to judges in other EU Member States. Once again, I highlight the importance of these rights, which not only characterize the judiciary process in a democratic state but also could have a reinforcing or undermining role for inquiring and enforcing other fundamental rights. When one does not believe that they will be granted a fair trial or the principle of equality before the law will be abided, it is much less likely that claimants will proceed to fight for their fundamental rights in court. This refers us back to the theoretical discussion in this paper and more specifically to Hirschl's statement that the rule of law is to be seen as the 'bare minimum', which would allow for judicialization to take place.

In this case, as already mentioned earlier, among the most active civil society actors that have taken actions to address fundamental rights violations, two groups could be differentiated. These are 1.) the lawyers or associations of lawyers; and 2.) NGOs working on the protection of fundamental rights.

The following section continues with the analysis when and why these civil society actors have considered to resort or resorted to supranational litigation. This analysis is based on a set of interviews with key informants, identified as such during the field work in Bulgaria. One of the main questions which has been explored throughout the interviews with civil society actors and lawyers in Bulgaria is whether the distrust towards the prosecution office had spilled over to the whole judicial system and interfered with their choice of a strategy. In addition, I have aimed to explore how actions taken by the EU institutions in the Bulgarian case have formed and impacted the civil society resistance strategies.

3. Resorting to litigation: when and why

NGOs, lawyers as well as lawyers' bar associations appear to be the main actors that have played a crucial role in addressing fundamental rights violations, largely resulting from the independence of the judicial system. Similarly to other scholars researching the subject[63], one of the main determinants for legal mobilization in such context appear to be the existence of specialized expertise and previous professional experiences of litigation with the CJEU or the

[61] Nine PRs out of 12 PRs for all EU Member States, approximating 75%. See search criteria above, Grounds of judgement amended accordingly.

[62] Please note that the number of PRs is not exclusive and PRs could repeat in the different searches, as the search is based on the Grounds of judgement, where more than one ground could be indicated. Nevertheless, this does not affect the proportion of country-related PRs to the overall number of PRs on the same ground originating from all EU Member States.

[63] Salvatore Caserta and Pola Cebulak. (2021). Resilience Techniques of International Courts in Times of Resistance to International Law. International and Comparative Law Quarterly, 70(3), 737-768.

ECtHR. Caserta and Cebulak, for example, highlight the 'importance of epistemic communities of lawyers (NGOs and other progressive legal elites). These communities provide support with the international courts' involvement in these politically and socially sensitive issues.'[64]

In the case of Bulgaria, the procedural expertise with EU law and prior experiences with preliminary requests at domestic courts appear as a crucial factor which defines the self-esteem of these legal activists to resort to supranational litigation, especially in such politically sensitive context. While this has seen to be the overall case, some controversy has surfaced within the statement of one of the interviewed lawyers. The latter, a lawyer with extensive experience[65] with referrals before the CJEU[66], shared their belief that EU law was well taught at the university and moreover, the rules of the preliminary reference procedure were clear and so, there should be no reason why a well-trained lawyer would not consider submitting a request for such in a domestic procedure. However, the same interviewee gave examples of cases in which the expertise of their office has been sought, including by peer lawyers, to take up cases which were aimed at supranational level. This was specifically the case, as the interviewee shared, due to their knowledge and prior experience with the preliminary references. Hence, one could summarize that while in practice there is not any reason for a well-trained lawyer not to seek for a preliminary question to be posed while they see the need for such, in reality, such choice is restrained by many factors, dominated by the expertise in EU law and previous experience with the preliminary ruling mechanism.

While the work of the ECtHR in the domain of human rights protection is better known in Bulgaria, this avenue is not necessarily considered as the better option for supranational litigation. Several of the interviewed lawyers and an NGO representative, whose organisation has supported litigation mainly before the ECtHR, argued that the effectiveness of the ECtHR judgements at domestic level have been questioned more and more in the recent years. The main reason behind this, which surfaced during the interviews with NGO representatives, were the instances of non-implementation of ECtHR judgments, largely undermining the promises in the eyes of civil society. One of the NGO representatives[67] stated that some colleagues of theirs strongly doubted the practical use of litigation before the ECtHR and for that reason they would reject to participate in preparation of such cases. Furthermore, a lawyer[68] shared his concern that while the EU law is well developed in the university curriculum, the European Convention of Human Rights and the understanding of its application at domestic level is still largely overlooked. Moreover, the interviewee claimed that judges, especially the young ones, were better prepared with EU law compared to the application of the Convention in practice.

Nevertheless, despite the belief that EU law was well taught to the future legal professionals at the Bulgarian universities, it appeared from the interviewees' accounts that there is only a handful of lawyers who felt well prepared to advocate a request for a preliminary ruling procedure. One of the NGO representatives shared their negative experience of having several

[64] Ibid.
[65] Interviewee 10.
[66] Interviewee 1.
[67] Interviewee 3.
[68] Interviewee 6.

of their requests for referrals to the CJEU rejected by domestic courts. Not having even one successful request for a reference for a preliminary ruling disheartened them to a certain extent to proceed with such practice, before gaining more expertise on the procedure. At the same time, the same interviewee shared that their organizational discussions revolve around shifting, at least some of their litigation strategies concerning fundamental rights violations from the ECtHR to the CJEU in the near future. The main trigger point has been the expectation for better effectiveness and higher leverage of the CJEU judgements at domestic level. Moreover, the preference of the CJEU over the ECtHR in such cases was described by one of the interviewed lawyers along the following lines: litigation before the ECtHR was possible only *post factum*, while the litigation before the CJEU entailed cooperation and joint work.

In line with some scholarly dispositions on legal mobilization that recurrent claims increase the cost of non-compliance[69], a representative of an NGO, active in the domain of fundamental rights protection, shared that their strategy often resorted to bringing follow-up claims on the same matter when the infringement constituted a systematic problem. Even when they obtained a judgement favouring their position, they would continue with such claims in order to expose the systematic deficiencies. Nevertheless, the interviewed NGO representatives reported that the lack of funding for litigation activities often hindered their choices for such. Donors often did not allocate assets for litigation activities in their funding programmes. Moreover, one NGO representative stated that in addition to all other factors taken into account whether or not to continue with litigation at supranational level, their decision was also dependent on whether their costs could be covered by a programme in which funding was allocated for such activities. Conversely, the interviewed lawyers did not mention lack of finances as a hinderance for taking on litigation at supranational or international level, even when those cases were *pro bono*. Several of the interviewed lawyers assured that their offices would take *pro bono* cases concerning fundamental rights no matter whether the request came from a lawyer from public institutions with little or no experience with EU law or upon the request of a litigant.

While both lawyers and NGO representatives were positive about the leverage that the CJEU judgements have at domestic level, surprisingly, some interviewees were not aware of the salient CJEU judgements issued upon Polish[70] preliminary requests on the independence of their domestic judiciary. One lawyer assumed that such judgements would be more prominent among judges who would analyse and discuss these cases in their professional circles.

The overall impression conveyed by the interviewees is that the Bulgarian NGOs and lawyers, despite all that have been said, kept their trust in the domestic judiciary of the country. Unlike the Bulgarian prosecutors, judges appear to be mostly well trusted and respected. Nevertheless, they are often being criticized for not providing clear arguments on their denials of motions for preliminary ruling requests to the CJEU, made by domestic lawyers, and especially when supreme courts remain silent when they are obliged to refer as a last instance

[69] Karen Alter and Jeannette Vargas. (2000). Explaining variation in the use of European litigation strategies: European Community law and British gender equality policy. Comparative Political Studies, 33(4), 452-482.
[70] Joined Cases C-585/18, C-624/18 and C-625/18.

under EU law[71]. However, such aptitudes do not appear to be related to the rule of law crisis in Bulgaria rather to the magistrates' educational qualification and the established hierarchical norms of the judiciary. One of the lawyers added to this the problem of different understanding of legal principles by the Bulgarian legal practitioners. According to the interviewee, during the legal education, the hierarchy of norms is well explained and the significance of the legal principles is well known in the application of domestic law but still, they did not appear in practice. This is presumably where the expectation of Bulgarian judges arises that a lawyer shall highlight contradiction of Bulgarian domestic law with a specific norm. However, when this instead is a legal principle, judges tend to reject such argumentation.

Overall, litigation is considered as able to bring about change, especially by bringing recurrent cases before domestic, supranational and international courts. The conclusion is that in the case of Bulgaria, despite the overall concerns of civil society actors (as more broadly defined for this research project as NGOs and lawyers) for the threats posed to the domestic judicial independence – due to lack of transparency and the pressure from the prosecution services beyond the domain of criminal cases – these developments did not prevent the former from access to the judiciary and did not significantly impact their trust conferred to the domestic judges.

With regard to the trust that civil society confer to the EU institutions, when asked whether they consider the EU interfered too much or too less with the sovereignty of the EU Member States concerning fundamental rights protection, most interviewees differentiated between the approaches of the European Commission and the CJEU. While the majority were satisfied with the CJEU's judgements, they called for more direct actions by the European Commission in order to protect the rule of law and democracy in Bulgaria, but also overall in the EU.

In conclusion, while the factors uncovered as hinderance to resort to supranational and international litigation refer to the professional expertise and previous experiences with litigation at supranational and international level, as well as with the lack of financial resources and time (the latter is most often mentioned by NGOs), one key factor which could be directly linked to the erosion of democracy in the Bulgarian context resurfaces. This is the lack of legitimacy and implementation of international judgements and recommendations at domestic level. Such could be rather disheartening both for legal practitioners and NGOs to undertake further legal actions with high financial and reputational costs, when faced with little reassurance about the implementation of international judgements at the domestic context.

Nevertheless, during the interviews process and the background research, it has proven difficult to disentangle between the factors that made a difference for civil society actors in the period before the start of the democracy erosion and after that. No such borderline could be drawn straightforward. The deficiencies of the Bulgarian judiciary have been in place already during the democracy transition in the 1990s, during the accession period of Bulgaria

[71] See Article 267 (b) TFEU, ‚Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.'

to the EU in the 2000s and they have remained there after that. Hence, such a borderline is not only difficult to be drawn during the interviews process with lawyers and NGOs because such does not exist in the interviewees' minds and practice, but furthermore, because such cannot be drawn in reality. While judiciary independence has become a recurrent point for discussion in high-level political talks and negotiations at EU level after 2009, it had presented an underlying problem in the Bulgarian judiciary long ago before that time. Hence, it is difficult to differentiate between the impediments before civil society actors to litigate at supranational and international level overall (as defined in the socio-legal scholarly literature on the topic of judicial dialogue between domestic courts and the CJEU) and these factors that have become pertinent with the further erosion of democracy in the latest political context.

Nevertheless, on the basis of this research, four main conclusions could be drawn in this context. First, even legal practitioners do not resort solely to strategic litigation as a strategy to defend fundamental rights in democracy backsliding context but prefer to combine this with political resistance actions aimed at supranational level. Second, the trust that supranational and international judgements will be respected at domestic level and policy amendments will be adopted, play an important role in the choice of litigation as a strategy and could be one of the main dissuading factors for litigation. Third, litigation before the CJEU has been regarded more and more as a preferred litigation practice compared to such before the ECtHR due to multiple reasons, including higher trust that the CJEU's judgements will be implemented at domestic level and the overall better efficiency of the process. And fourth, lastly, the knowledge and previous experience with litigation before the CJEU or respectively the ECtHR have surfaced as one of the main arguments both for legal practitioners and for NGOs to decide in favour of attempting litigation at supranational level before domestic courts, to defend fundamental rights in the context of democracy backsliding.

Forum Transregionale Studien e.V.
Wallotstraße 14
14193 Berlin
T: +49 (0) 30 89001-430
office@trafo-berlin.de
www.forum-transregionale-studien.de