European Law Open (2023), **2**, 302–321
doi:10.1017/elo.2023.34

CAMBRIDGE UNIVERSITY PRESS

CORE ANALYSIS

Of autocratic incrementalism and inadvertent inspirations: the interaction between the European Court of Justice and national lawmakers in the rule of law crisis in Poland

Jonas Bornemann

Centre of Comparative, European and International Law, Université de Lausanne, Lausanne, Switzerland
Email: jonas.bornemann@unil.ch

(Received 6 December 2022; revised 21 July 2023; accepted 30 July 2023)

Abstract
The European Court of Justice (ECJ) is often viewed as a revered champion of opposition to autocratic reforms in the Member States. In the context of the rule of law crisis in Poland, however, its resolute support for judicial independence contrasts notably with the limited improvements for judges on the ground. As the present investigation suggests, this discrepancy can be explained by a mode of incremental adjustments at national level that has allowed Polish lawmakers to repeatedly neutralise the effects of the Court's interventions. Resulting from this strategy are several instances of mutually responsive interaction between the Court of Justice and autocratic national lawmakers that have shaped developments in the rule of law crisis, both at national and supranational level. At national level, lawmakers have incrementally adjusted reforms to comply – at least superficially – with supranational judicial interventions, whereas the Court refined its interpretation of supranational safeguards of judicial independence in response to incremental adjustments in Polish law. Yet, more recently, this interaction of inadvertent mutual inspiration may have come to a halt. Rather than changing national law to superficially respond to supranational judicial interventions, Polish authorities may increasingly deny the Court's authority to adjudicate in matters of judicial independence in the Member States altogether.

Keywords: rule of law crisis; European Court of Justice; illiberalism; incrementalism; autocratic legalism

1. Introduction

Over the last few years, the European Court of Justice (ECJ) has established itself as a firm voice of opposition to the ongoing reconstruction of the Polish judicial system.[1] Despite forceful and repeated judicial interventions, however, this has not been the end of national policies undermining judicial independence, let alone autocratic backsliding in Europe. Quite to the contrary. The ECJ's resolute support for judicial independence contrasts with the limited improvements that it has created for Polish judges on the ground.[2] Accordingly, this raises the question how the startling discrepancy between supranational aspiration and continued autocratic practices at national level may be explained.

[1]For an overview, see for example L Pech, P Wachowiec and D Mazur, 'Polands' Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' 13 (2021) Hague Journal on the Rule of Law 1, at 27ff.

[2]In this sense, see P Bárd and D Kochenov, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening' 27 (2022) European Law Journal 1, at 7.

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https://doi.org/10.1017/elo.2023.34 Published online by Cambridge University Press

The following investigation will explore the mechanisms underlying the Court's limited impact in safeguarding the independence of Polish judges. To this end, it will draw specific attention to the ECJ's interaction with national lawmakers.[3] It suggests that the Court's resolute response to the rule of law crisis in Poland has been met by a mode of incremental reforms at national level. Supranational judicial interventions prompted national lawmakers to readjust both the focus and design of their reforms, without however dispelling the latter's autocratic ambitions more generally. Rather, a strategy of incremental adjustments has allowed national lawmakers to press on with autocratic reforms despite the Court's interventions to the contrary.

This strategy of incremental change at national level, in combination with the Court's firm opposition to threats to judicial independence, gave rise to a series of interactions between the ECJ and Polish lawmakers. As the following investigation will argue, these interactions have shaped developments in the rule of law crisis, both at national and supranational level. Since national lawmakers have adjusted the legal framework to comply – at least superficially – with rulings of the Court, these judicial interventions served as inspiration to design new ways of pressing on with an autocratic agenda. Seeing its interventions repeatedly outmanoeuvred by national lawmakers, the ECJ, in return, had to refine its jurisprudence in response to these new ways of threatening judicial independence in Poland. While this mutually responsive interaction can be detected on several occasions, it may have come to a halt more recently. Owing particularly to the jurisprudence of the Polish Constitutional Tribunal, national authorities may no longer aim to keep intact a smokescreen of conformity with judgements of the Court of Justice, threadbare as it may be, opting for a strategy of plain denial of the ECJ's authority to intervene in support of Polish judges' independence instead.

To substantiate this argumentation, the following investigation will combine deductive and inductive reasoning. Deductively, it applies a theoretical understanding of autocratic reforms to the ECJ's relationship with Polish lawmakers, namely by treating incremental adjustments to national reforms as an embodiment of 'autocratic legalism'.[4] In this vein, the following investigation places developments in Polish law in the broader context of executive-led attacks on democratic institutions.[5] Autocratic legalism forms a specific sub-type to this phenomenon, characterised by the sophisticated employment of law to degrade the power of electorates to change their leaders.[6] Throughout the following investigation, the term 'autocratic' will therefore be used to refer to amendments in law that seek to undo checks to executive power, specifically by undermining the independence of the judiciary. The term 'illiberal', on the contrary, will be employed to signify a more general societal transformation that exceeds legal or political structures in question.[7]

Inductively, the investigation that follows will produce substantive insights into the relationship between national lawmakers who may be said to employ a strategy of 'autocratic incrementalism' and the European Court of Justice. To that end, it explores the inspirational links that occur between these two actors. In this regard, the view will be posited that both the jurisprudence of the ECJ and national reforms in Poland have influenced the substantive evolution of the other. The aim of this investigation is thus twofold. On the one hand, it draws attention to the mechanisms that have allowed national lawmakers to outmanoeuvre supranational

[3]For the purposes of the following investigation, the term 'national lawmakers' will refer to both executive and legislative actors, namely those that follow the objectives of the governing coalition. With a view to the legislature, this applies particularly to the Sejm – the lower house – where the governing parties hold a majority. While, as a corollary of the judicial reforms in Poland, it would not be unreasonable to presume that some judges will act at the will of the governing parties, judicial decisions will not, for the purposes of the following investigation, be treated as acts of 'lawmakers' but referred to instead as 'captured' judicial actors.

[4]KL Scheppele, 'Autocratic Legalism' 85 (2018) The University of Chicago Law Review 545.

[5]See TG Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' 11 (2019) Hague Journal on the Rule of Law 9, at 22.

[6]See Scheppele (n 4), at 560.

[7]This distinction is borrowed from Daly (n 5), at 19.

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interventions. On the other hand, it will highlight the evolution that supranational and national law has undergone as a corollary of this interaction.

The investigation that follows will draw particular attention to the relational and temporal dimensions of the unfolding rule of law crisis. As such, it will not provide a comprehensive account of the various stages and manifestations thereof in Poland.[8] Rather, it will limit itself to instances in which the interaction between Polish lawmakers with the Court had an influence on one another. In temporal terms, the following investigation will particularly illustrate how national law and the jurisprudence of the Court have evolved during that interaction. As will be submitted, these relational developments often evolve in a chronological fashion, with national reforms prompting an intervention by the ECJ, which then – in return – impels incremental reforms at national level. While such a chronological order of events can be detected in the interaction of Polish lawmakers and the Court of Justice on several occasions, the following investigation may punctually depart from portraying events in a strictly chronological order. Empirically, this is justified by the fact that events in the rule of law crisis in Poland, both at national and supranational level, do not unreservedly follow a chronology of sorts. Rather, national reforms may anticipate a negative judgement by the ECJ and adjust the legal framework pre-emptively, or the Court may often be able to pronounce itself on a specific limb of national reform only with significant delay, to the effect that certain changes at national level give rise to a judicial response at supranational level only later in time. Throughout the investigation that follows, these instances of non-chronological interaction will be highlighted.

This investigation proceeds in four steps. It will, first, explore the incremental nature of autocratic projects and the implications that this may create for European courts from a theoretical angle,[9] arguing that it resembles, in essence, a game of whac-a-mole (2.). This effect is exemplified then, in a second step, by the ECJ's interaction with Polish lawmakers in the context of the rule of law crisis. The ECJ's interventions in this regard have been repeatedly neutralised by a series of incremental changes in Polish law (3.). While this has allowed national authorities to pursue an autocratic project, it will be argued in a third step that the Court has gradually developed mechanisms in response to such strategies of incrementalism at national level (4.). Against this backdrop, it will be concluded that the interaction between the ECJ, on the one hand, and Polish lawmakers, on the other hand, has reached a crossroads: while national authorities stick to a strategy of autocratic legalism to deny the authority of the Court, they may depart from a mutually responsive interaction with the ECJ, instead denying the Court's authority to adjudicate in matters of judicial independence in the Member States altogether (5.).

2. A game of whac-a-mole – incremental autocratic reforms and the ECJ

The ECJ has been a fervent opponent to autocratic reforms at Member State level for several years. This has not, however, brought to heel autocratic ambitions at the national level. Quite to the contrary, the interaction of the ECJ and autocratic national lawmakers may be viewed as a judicial equivalent to a game of whac-a-mole.[10] Whereas autocratic reforms at national level have prompted judicial reactions at supranational level on several occasions, the Court's interventions did not compel national lawmakers to abandon their autocratic intentions. Rather, national

[8]It excludes, for instance, the re-composition of the Polish Constitutional Tribunal which followed a strategy of autocratic legalism but did not give rise to litigation before the ECJ, that is, until recently, when an infringement case was brought against the Constitutional Tribunal's case law; Case C-488/23, *Commission v. Poland* (pending).

[9]While these abstract considerations apply to the European Court of Human Right and the ECJ at equal measure, the following investigation will specifically explore the role of the latter. For a tentative analysis of the Strasbourg court in this regard, see for example B Çalı, 'Autocratic Strategies and the European Court of Human Rights' 11 (2021) European Convention on Human Rights Law Review 11.

[10]This expression has been prominent in other contexts, see for example S Shapiro, 'Agency Oversight as "Whac-A-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules' 37 (2014) Harvard Journal of Law & Public Policy 523.

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lawmakers have responded to the judgements of the Court through a mode of incremental adjustments, thereby pressing on with autocratic reforms by alternative means. The following sections will argue that this form of incrementalism represents a general feature of autocratic law-making (A.) and one that may bring to a fore some of the limitations to which the ECJ is subjected as an actor in the rule of law crisis (B.).

A. Incrementalism of autocratic reforms

Illiberal projects have a general tendency to proceed incrementally.[11] Incrementalism, in this respect, refers to a relatively subtle and, initially, often intangible mode of change whereby the overhaul of a political system is not brought about at a single blow.[12] In contrast to overt *coups d'état*, such a piecemeal approach allows illiberal policymakers to disguise their systemic intentions underpinning punctual reforms, at least for some time. Whereas the ultimate results are comparable, incrementalism can be singled out as a recurrent hallmark of illiberal projects in Europe and elsewhere.[13]

For policymakers pursuing an illiberal course of action, incrementalism proffers tangible advantages. Most notably, it enables them to keep intact a mirage of lawfulness in pursuing illiberal projects. This resonates with a characteristic of illiberalism that has been referred to in the literature as 'autocratic legalism'.[14] Autocratic legalists endorse a pretentious interpretation of law that plays in their favour, thus exalting autocratic intentions by virtue of a smokescreen of legality.[15] Incrementalism accordingly straddles a sense of plausible deniability. It allows illiberal policymakers to dispel criticism by presenting reforms as mere technicalities or trifle, thus disguising the overt assault waged on the system concerned.

Incrementalism of that nature materialises *inter alia* in perpetual readjustments of national legal frameworks.[16] Such reforms oftentimes give rise to extremely technical legal solutions, aggravating any analytical account of these amendments in the first place. Nevertheless, this may be presumed to constitute a deliberate strategy of autocratic making. The complexity inherently linked to autocratic legalist drafting of laws may buy its proponents time to establish a *fait accompli* on the ground.[17] Constant readjustments of the pertinent legal frameworks moreover aggravate analytical accounts of the current state of play; it may allow autocratic lawmakers to argue that any criticism voiced with respect to reforms carried out is outmoded since the legal framework had been altered in the meantime.[18]

Incrementalism accordingly constitutes a treasured instrument in autocrats' toolboxes across the globe. It may be a uniquely European experience, however, that such incrementalism is gleefully put into practice in opposition to safeguards in regional and supranational law. From the perspective of autocratic legalists, this serves a twofold purpose. On the one hand, it constitutes a

[11] Among the first describing this phenomenon with respect to the Hungarian constitutional reforms, see R Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' 13 (2015) International Journal of Constitutional Law 279, at 294.

[12] In this sense, Daly (n 5), at 17 and, for a comprehensive overview of theoretical accounts in this respect, see D Waldner and E Lust, 'Unwelcome Change: Coming to Terms with Democratic Backsliding' 21 (2018) Annual Review of Political Science 93, at 97ff.

[13] See N Bermeo, 'On Democratic Backsliding' 27 (2016) Journal of Democracy 5, at 14ff.

[14] See Scheppele (n 4), at 571ff.

[15] See M Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defence' 12 (2020) Hague Journal on the Rule of Law 421, at 429ff with further references.

[16] With respect to Hungarian constitutional reforms, see P Bárd and L Pech, 'How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The "Hungarian model"' (2019) Reconnect Working Paper 1, at 8.

[17] See Pech, Wachowiec and Mazur (n 1), at 39.

[18] This line of defence was used by the Polish government, for instance, in Case C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531, para 27.

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viable method to effectively sidestep interventions of European actors, emblematic of a 'principled ideological choice' to disobey European law.[19] On the other hand, incrementalism enables national lawmakers to keep intact a mirage of lawfulness. In this vein, it may be used to effectively circumvent any meaningful opposition to national reforms while purporting, at the same time, conformity with existing legal safeguards, including those at European level. Legal workarounds of that nature should not be mistaken for genuine respect for European law. Rather, they are emblematic of an incremental mode of law-making, permitting national lawmakers to keep intact an impression of conformity with European safeguards – threadbare as this may be. Besides, autocrats may always fall back into a habit of plain disregard for European law once incremental adjustments are no longer deemed feasible or preferable.

B. The ECJ's response: treading water?

For European courts, responding to incremental autocratic reforms is a difficult task.[20] On the one hand, European judges are often one of the last bastions of resounding opposition to ongoing reforms in national legal systems.[21] Accordingly, their interventions may toss an urgently needed lifeline to national actors opposing autocratic reforms in national legal systems. On the other hand, judicial interventions of that nature may rather easily be outmanoeuvred by incrementalism at national level. National lawmakers may decide to adjust the legal framework in compliance with instructions of European courts, only to press on with autocratic reforms by other means.

From the perspective of European judges, this is likely to be a puzzling phenomenon to behold. Judicial interventions prompt readjustments in national law but fail to put an end to autocratic tendencies more generally.[22] In their response to incremental adjustments in national law, European courts may accordingly be treading water. They are tasked with assessing the compatibility of specific legal arrangements in national law with the requirements of European law, and to reprimand incompatibilities if need be. European courts do not, however, prescribe in positive terms how the rule of law may be brought into full swing in national legal systems.[23] It may accordingly be difficult for judges at European level to obviate a mode of incremental adjustments in national law. While European courts have pronounced themselves with unusual continuity and tenacity,[24] they may be genuinely incapable of preventing national lawmakers from utilising alternative ways to pursue an autocratic agenda.

The incrementalism of autocratic reform can be identified as one of the reasons why interventions of European actors did not ultimately dispel autocratic ambitions at national level. This resonates with the finding of Adamski who puts forward the view that interventions of European actors may destabilise but not ultimately undo a social contract premised on democratic

[19]Insightfully, KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' 39 (2020) Yearbook of European Law 3, at 8.

[20]See J Bornemann, 'Judicial Responses to Autocratic Legalism: The European Court of Justice in a Cleft Stick?' 7 (2022) European Papers 651, at 657ff.

[21]See D Kochenov and P Bárd, 'The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU' in EH Ballin, G van der Schyff and M Stremler (eds), *European Yearbook of Constitutional Law 2019* (T.M.C. Asser 2020), at 276.

[22]See D Kochenov, 'De Facto Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times' 40 (2020) Polish Yearbook of International Law 197, at 207ff.

[23]See similarly T Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart 2017), at 161.

[24]Among the rich literature in this regard, see P Andrés Sáenz de Santa María, 'Rule of Law and Judicial Independence in the Light of CJEU and ECtHR Case Law' in C Izquierdo-Sans, C Martínez-Capdevila and M Nogueira-Guastavino (eds), *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer 2021), at 169ff. and L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (SIEPS 2021), at 20ff.

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backsliding.[25] The legitimacy structures that illiberal actors seek to instil among national audiences often run deeper than specific amendments or changes to the law may suggest.[26] For that reason, Kochenov and Bárd are right to note that 'autocratic legalism cannot be fought with legalism alone'.[27] While interventions of European actors – judicial or otherwise – may be a constraining factor for autocratic reforms, they appear unfit to singlehandedly neutralise autocratic impulses at national level.

This points to an important caveat in analysing the role of European actors in the context of national autocratic reform. Opposition voiced at European level may be genuinely incapable of dissuading national lawmakers who are intransigent in pursuing an autocratic agenda. Opposition by European actors may occasionally even consolidate support for autocratic projects at national level,[28] and may provide inspiration to strategies of autocratic law-making.[29] Against this backdrop, it can be noted that the interaction between the ECJ and national lawmakers should not be assessed exclusively in terms of each actor's (ill)success in offsetting the actions of the other. Rather, the following sections will zoom in on the substance of that interaction, specifically by looking at the way in which each actor has influenced the actions of the other.

3. Incrementalism as a strategy to neutralise the ECJ's interventions

Autocratic incrementalism has been prominent feature of the rule of law crisis in Poland. Most notably, Polish lawmakers have employed this strategy to neutralise interventions of the ECJ. This is hardly surprising. The Luxembourg court's response to the rule of law crisis constitutes one of the most remarkable developments in defence of Polish judges' independence.[30] On several occasions, its interventions repressed reforms that would otherwise have run the risk of threatening the independence of Polish judges. Despite forceful supranational interventions to reforms threatening judicial independence, however, this did not frustrate the autocratic ambitions of Polish lawmakers. Rather, the latter responded to these interventions by adopting a strategy of incremental adjustments in national law, thereby seeking to neutralise the effects of the Court's interventions through alternative means of exerting pressure on national judges.

This effect may be illustrated by a strain of events that can be structured, for the purposes of this analysis, into four instances of interaction. After Polish lawmakers had initially and unsuccessfully attempted a feint by disguising the premature dismissal of judges as mere changes to the retirement regime (A.), the Court's interventions served as inspiration to national lawmakers to explore alternative ways to undermine judicial independence (B.). In the light of looming follow-up ruling in an infringement case, Polish lawmakers opted for a strategy of pre-emptive adjustments of the national law, thereby seeking to outpace the Court's interventions (C.). After the Court's vice-president ordered Poland to pay a severe daily fine in the context of an interim measure, Polish authorities tried to neutralise the Court's intervention through a pawn sacrifice, ie, by dropping some elements of reform to keep others intact (D.).

[25] See D Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' 56 (2019) Common Market Law Review 623, at 659.

[26] See P Blokker, 'Response to "Public Law and populism"' 20 (2019) German Law Journal 284, at 288, with further references.

[27] Kochenov and Bárd (n 21), at 276.

[28] See Adamski (n 25), at 647ff.

[29] For this phenomenon, see *infra* at 3.A.

[30] See only W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), at 192ff.

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A. Feints

One of the first instances in which judicial reforms in Poland caught the attention of the ECJ arose when national lawmakers adopted measures to effectively change the composition of ordinary courts and the Supreme Court. In this regard, Polish lawmakers emulated a strategy put into practice by Hungary years before.[31] Through adjustments to the retirement regime of judges, national lawmakers created a legal framework whereby the mandates of multiple sitting justices were terminated prematurely. The specific legal design of changed retirement ages constituted a rather obvious strategy of throwing a red herring. By diverting attention from the systemic intention of these measures, Polish lawmakers hoped to get away with the said reforms at the expense of individual compensations.[32] In contrast to the blueprint reforms in Hungary years before, however, both the European Commission and the ECJ saw through the masquerade. Explicitly, they acknowledged the systemic threat thus posed to the rule of law.

In two infringement procedures, the ECJ consequently clarified that such reforms threatened to violate the principle of the irremovability of judges and hence, their independence.[33] National courts tasked with adjudication 'in the fields covered by EU law' must be able to provide for effective judicial protection and, for that matter, be independent. In this respect, the Court read Article 19 (1) TEU in the light of Article 47 of the Charter of Fundamental Rights to spell out several substantive safeguards of judicial independence.[34] Member States are accordingly compelled to have in place rules on the composition of the body concerned, appointment procedures, the length of service, grounds for abstention, rejection, and dismissal of members that 'dispel any reasonable doubts in the minds of individuals as to the imperviousness of that body',[35] which may relate to both direct and more indirect means of exerting influence.[36]

B. Inspirational links between the ECJ and incremental adjustments in national law

The Court's plucky intervention allowed some independent Supreme Court justices to remain in office.[37] This may reasonably qualify as a success from the perspective of the Court. Yet, Polish lawmakers decided to press on with judicial reforms by other means, *inter alia* through a re-design of the disciplinary regime. On an analytical level, this may be viewed as an instance of autocratic incrementalism through which national lawmakers attempt to outmanoeuvre an intervention by the Court of Justice. The new legal framework allowed the Minister of Justice to appoint so-called disciplinary officers and thereby exert direct influence on the appointment of the person tasked with the persecution of disciplinary cases. What is more, the new disciplinary regime equally authorised the Minister to raise a binding objection in substance, namely where he considers that a disciplinary officer had unduly refused to initiate a disciplinary proceeding or had decided to

[31] See P Bárd and A Śledzińska-Simon, 'On the Principle of Irremovability of Judges Beyond Age Discrimination: Commission v. Poland' 57 (2020) Common Market Law Review 1555, at 1570.

[32] See G Halmai, 'The Early Retirement Age of the Hungarian Judges' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017), at 477ff.

[33] Case C-619/18, *Commission v. Poland* (n 18), para 47; Case C-192/18, *Commission v. Poland,* ECLI:EU:C:2019:924, para 98.

[34] See MM Bošković, 'Role of Court of Justice of the European Union in Establishment of EU Standards on Independence of Judiciary' 4 (2020) EU and Comparative Law Issues and Challenges, at 336ff.

[35] Case C-619/18, *Commission v. Poland* (n 18), para 74; Case C-192/18, *Commission v. Poland*, (n 33) para 124; Joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982, para 123.

[36] Case C-619/18, *Commission v. Poland* (n 18), para 112; Case C-192/18, *Commission v. Poland* (n 33), para 120; Joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* (n 35), para 125.

[37] See P Bogdanowicz and M Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience' 16 (2020) European Constitutional Law Review 306.

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discontinue the proceedings.[38] Unquestionably, however, the most tangible element of these reforms concerned the establishment of two new chambers under the auspices of the Supreme Court – the Extraordinary Control and Public Affairs Chamber and the now infamous Disciplinary Chamber.[39]

These chambers can be viewed as exotic appendixes to the Supreme Court, both in institutional as well as in functional terms. Exclusively composed of members elected by the already captured National Council of the Judiciary (NCJ),[40] the chambers assume responsibilities routinely not associated with the Supreme Court. The Disciplinary Chamber, for instance, is primarily tasked with the adjudication of disciplinary cases brought against individual judges, including Supreme Court justices.[41] These novel bodies confronted the remaining independent judges at the Supreme Court with a situation in which they saw themselves outnumbered by colleagues appointed in the absence of safeguards of judicial independence previously in place. To make matters worse, these newly appointed pseudo-judges were tasked with the adjudication in disciplinary proceedings of actual judges, including in cases concerning their colleagues at the Supreme Court. Consequently, this motivated the not yet captured Supreme Court chambers – in an act of desperation – to file a preliminary reference with the ECJ.

The preliminary reference filed by the remaining independent Supreme Court chambers gave rise to the ECJ's seminal judgement in *A.K. et al.*[42] In this case, the Court was given the chance to pronounce itself on several elements of the ongoing reforms. Despite the ECJ's resolute intervention in this regard, however, Polish lawmakers once again did not abandon their autocratic ambitions. Rather, the Court's intervention served as a source of inspiration for national lawmakers that allowed them to neutralise the effects of the judgement. In this vein, the Court's forceful intervention in *A.K. et al.* has been effectively undone by the inadvertent inspirations it provided to autocratic lawmakers, most notably, in the so-called 'muzzle law'.

Empowerment of national judges: A.K. et al.

Above all, the judgement in *A.K. et al.* concerned the independence of the Disciplinary Chamber. By way of reliance on its previous jurisprudence in the context of changes to the retirement ages of Polish judges, it highlighted that judicial independence substantively links to a wide array of aspects, including the appointment and dismissal of judges.[43] In this vein, the ECJ was equally able to revisit the appointment procedure of judges. In the first place, this drew attention to the National Council of the Judiciary, due to its involvement in the appointment of Supreme Court justices. It prompted the ECJ to effectively confer its jurisprudence on judicial independence to this body as well, thereby holding the NCJ to a standard of impartiality otherwise applied to courts proper.[44]

In the second place, the Court focused on the unfettered nature of the President of the Republic's discretion in appointing judges based on the NCJ's resolutions. The amended Polish framework had put into effect a legal arrangement derived directly from the stone-ages of European administrative law, whereby the President would be afforded an unfettered discretionary power with no judicial review whatsoever in deciding whether a person may be

[38]See K Gajda-Roszczynialska and K Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland' 12 (2020) Hague Journal on the Rule of Law 451, at 462ff.

[39]See Pech, Wachowiec and Mazur (n 1), at 9.

[40]A body tasked with the appointment of judges, see Ibid., at 9.

[41]See Gajda-Roszczynialska and Markiewicz (n 38), at 461ff.

[42]Thoroughly explored elsewhere, see M Krajewski and M Ziółkowski, 'EU Judicial Independence Decentralized: A.K.' 57 (2020) Common Market Law Review 1107.

[43]Ibid.

[44]Joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* (n 35), paras. 138ff.

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appointed as a judge or not. In *A.K. et al.*, the ECJ begged to differ, prescribing a minimum intensity of judicial review in this regard.[45] It is only in the third place that the judgement focused on the independence of the Disciplinary Chamber itself.[46] It noted the legislative background of reform which was introduced alongside attempts to prematurely end the terms of offices of sitting judges by meddling with the retirement regime. Moreover, the ECJ agreed with the referring judges that it was highly suspicious that the Disciplinary Chamber was entirely composed of newly appointed judges, thereby excluding those who had been appointed prior to reforms of the NCJ.

The jurisprudence of the ECJ in the case in *A.K. et al.* constitutes a forceful intervention in substance. Most notably, it caters to an empowerment of national judges by virtue of supranational law, namely, to assess whether a national court might meet the standards of judicial independence required under EU law to constitute a court or tribunal. With a view to the relationship between the ECJ and national lawmakers pursuing a strategy of autocratic incrementalism, however, this intervention did not yield the intended effects. Rather, it allowed national lawmakers to adopt reforms that were tailor-made to neutralise the empowering effects that the *A.K. et al.* judgement had created for independent national judges. The produce of this effort is the so-called 'muzzle law'.

Neutralising effects: the muzzle law

In the light of the ECJ's guidance in *A.K. et al.*, it is not surprising that the referring chambers of the Supreme Court consequently found the reforms of the disciplinary regime to be incompatible with EU law. This verdict, however, has been met with a twofold response at national level. First, the already captured Constitutional Tribunal jumped in, annulling the Supreme Court resolution.[47] Second, national lawmakers adopted the muzzle law to effectively neutralise the effects of the *A.K. et al.* judgement.[48] This latter response can be viewed as a textbook example of autocratic incrementalism following the interventions of the ECJ. It allowed Polish lawmakers to devise a legal framework that would superficially appear to adhere to the requirements set out in *A.K. et al.* but does not depart from a strategy of undermining judicial independence by virtue of the disciplinary regime.

Among the various novelties introduced by the new law, Polish lawmakers responded to the ECJ's jurisprudence by attributing the competence to apply the test of judicial independence exclusively to the Extraordinary Control and Public Affairs Chamber – a chamber recently set up by the governing parties at the Supreme Court. Functionally, this may arguably comply with the jurisprudence of the ECJ in *A.K. et al.*, as it accepted, in principle, the fact that national judges may review the independence of their counterparts. Institutionally, however, this crucial task is assigned to a chamber at the Supreme Court that has been established by the government and largely operates at its will. The reform thus tries to present itself as complying with the ECJ's ruling, even though national judges are cut off from its empowering effects. The new law precludes still-impartial judges to review the independence of their colleagues, despite the ECJ's intervention to the contrary.

Moreover, the 'muzzle law' introduces new categories of disciplinary offences that may be read as sanctioning Polish judges for filing a preliminary reference concerning the status of an individual judge.[49] Misconduct, in this sense, carries harsh punishments, ranging from reductions in salary to removal from office. After the ECJ's strong intervention in *A.K. et al.*, Polish

[45]Ibid., para 145.

[46]Ibid., para 146ff.

[47]See Pech, Wachowiec and Mazur (n 1), at 10. For an overview of events that led to the capture of the Constitutional Tribunal, see W Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' 11 (2019) Hague Journal on the Rule of Law 63, at 65ff.

[48]See Pech and Kochenov (n 24), at 97 and E Zelazna, 'The Rule of Law Crisis Deepens in Poland after A.K. v Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy' 4 (2019) European Papers Insight 907, at 911.

[49]For an overview of the various elements of the law, see Pech, Wachowiec and Mazur (n 1), at 17.

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lawmakers thus made sure that other national judges would not simply disregard the new national legal framework by filing a preliminary reference to the ECJ instead. Coupled with the redistribution of competences to the benefit of a partisan body, the Extraordinary Control and Public Affairs Chamber, this may render the Court's judgement in *A.K. et al.* largely ineffective.

This suggests that the Court's intervention in *A.K. et al.* has unwittingly influenced the design of the next steps of incremental reforms of Polish law. Curiously, however, this instance of autocratic incrementalism effectively compelled national lawmakers to duly engage with the jurisprudence of the Court in substance. This is very different from plain disregard for supranational law. National lawmakers may need to successively focus on the nitty-gritty of the Court's jurisprudence to explore avenues that effectively neutralise the effects thereof, while keeping a mirage of compliance intact. Incidentally, this establishes the ECJ's interpretation as one of the central points of inspiration for reforms of the Polish judicial system.

Viewed in such terms, the 'muzzle law' constitutes a remarkable example for the inspirational link that has formed between the ECJ and incremental reforms of autocratic legalists. On the one hand, this legislative amendment constitutes an expression of national lawmakers' creativity in pursuing an autocratic project. By principally accepting the test of judicial independence spelled out by the ECJ in *A.K. et al.* but attributing that competence exclusively to a partisan body, Polish lawmakers would have undone much of the effects of the Court's jurisprudence. On the other hand, such a strategy forces national legislatures to engage with the Court's interpretation of Union law in detail. This effectively repurposes the ECJ's jurisprudence in *A.K. et al.*: unlike its original intention empowering national judges, it inadvertently inspired national lawmakers in their efforts to find legal workarounds to press on with the autocratic project they pursue.

C. Reforms that outpace judicial interventions

It is genuinely hard to keep track of all developments surrounding the rule of law crisis in Poland, given the staggering speed with which they occur. At least the perpetual redesign of national reforms, however, may follow a deliberate strategy of autocratic lawmakers. Amongst others, it can be used to outpace interventions of European courts.[50] By virtue of incremental adjustments in national law, a specific legal arrangement may be abolished, replaced, or altered before the Court is able to pronounce itself on its compatibility with Union law. In this vein, interventions of ECJ may be outmoded by a strategy of incremental adjustments in national law.

Analytically, this draws attention to the paramount significance of time in the interaction of the ECJ's interventions and autocratic reforms in national law. It may be argued that Polish lawmakers have found ways in which they can use time to play in their favour. While judges in Luxembourg have procedural tools at their disposal to respond to strategies of that nature, such as the imposition of interim measures[51] or case prioritisation,[52] their ability to pronounce themselves in opposition to reforms in Poland in a timely fashion is limited. In the context of the rule of law crisis in Poland, this effect is exacerbated by the initial inaction of the Commission to refer elements of the ongoing reforms to the Court. As Pech et al. correctly note, the Commission's 'procrastination' in this regard has played directly into the hands of autocratic lawmakers pursuing a strategy of incremental adjustments.[53] But even where an infringement procedure

[50]See *supra* at 2. A.

[51]Case C-619/18 R, *Commission v. Poland*, ECLI:EU:C:2018:910; Case C-791/19 R, *Commission v. Poland*, ECLI:EU:C:2020:277.

[52]For this effect, Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, para 35.

[53]Pech, Wachowiec and Mazur (n 1), at 23ff.

https://doi.org/10.1017/elo.2023.34 Published online by Cambridge University Press

ultimately proceeds to its judicial phase, litigation in Luxembourg is lengthy and may – despite accelerated procedures and case prioritisation – span several years.[54]

This leaves autocratic lawmakers plenty of time to devise incremental reforms to effectively neutralise the Court's intervention. One way of doing so is by pre-emptively abolishing a specific element of reform where they expect the Court to declare the incompatibility of such an arrangement with Union law. This effect may be illustrated with a view to events following the Court's judgement in *A.K. et al.*, especially in the light of a looming verdict in an infringement procedure. Moreover, the argument can be put forward that Polish lawmakers have employed a strategy of autocratic legalism that materialises in particularly complex legal designs that may hamper a timely response at European level.

Pre-emptive adjustments

In its seminal judgement in *A.K. et al.*, the ECJ had not ultimately pronounced itself on the compatibility of Polish reforms with the requirements of Union law but rather, this decision was left to the referring Supreme Court justices. As has been highlighted, this left plenty of room for strategies of autocratic incrementalism.[55] In the absence of a declaration of incompatibility by the ECJ, Polish authorities were able to claim the benefit of the doubt that the disciplinary regime would fully comply with Union law. Despite the Supreme Court's judgement to the contrary, national actors were thus able to point to the verdict of the hijacked Constitutional Tribunal to justify both the continued existence of the Disciplinary Chamber as well as other reforms at national level, especially, the 'muzzle law'.[56]

This unsatisfactory situation prompted the European Commission to launch its third infringement procedure against the reforms of the Polish judicial system, coupled with an application for interim measures.[57] Almost two years after its judgement in *A.K. et al.*, this allowed the ECJ to back the conclusions previously drawn by the Polish Supreme Court in a direct action. In this regard, the Court highlighted that the mere prospect of judges being dragged before an adjudicatory body that is not in itself independent 'is likely to affect their own independence'.[58] The combined effects of reforms in Polish law moreover give rise to 'reasonable doubts in the minds of individuals as to the independence and impartiality of [both the National Council of the Judiciary and the Disciplinary Chamber]'.[59] In substance, this infringement procedure therefore eliminated any doubt as to the fact that the changes to the disciplinary regime applicable to Polish judges violated Union law.

In the meantime, however, Polish lawmakers had adopted the 'muzzle law'. This raised the question in how far the Court's intervention may apply to the new legal framework. In its fourth and most recent infringement ruling, in June 2023, the Court explicitly acknowledged that these legislative changes were adopted as a response to its case law, particularly the judgement in *A.K. et al*, and that these are squarely incompatible with EU law.[60] Yet, analytically, this illustrates how autocratic incrementalism may be used as a strategy to outpace judicial interventions of the ECJ. By way of amending the legal framework before the ECJ pronounced itself on the compatibility of the legal arrangement in question, *in casu* by moving the competence to assess the independence of judges from one captured body to another, national authorities may present the Court's verdict as outmoded from the start. This has very practical ramifications. Polish authorities, for instance,

[54]On this effect, see, for example, A Rosas, 'Justice in Haste, Justice Denied: The European Court of Justice and the Area of Freedom, Security and Justice' 11 (2009) Cambridge Yearbook of European Legal Studies 1.

[55]See Section 3.B.

[56]See Pech, Wachowiec and Mazur (n 1), at 10.

[57]Case C-791/19, *Commission v. Poland* (n 52) and Case C-791/19 R, *Commission v. Poland* (n 51).

[58]Case C-791/19, *Commission v. Poland* (n 52), para 82.

[59]Ibid., para 110.

[60]Case C-204/21, *Commission v. Poland*, ECLI:EU:C:2023:442, para 203.

https://doi.org/10.1017/elo.2023.34 Published online by Cambridge University Press

were able to exert pressure on 'renegade' judges in the meantime, *inter alia* by conferring some judges from posts without their consent[61] or by sanctioning them for applying the ECJ's rulings, particularly the test of judicial independence spelled out in *A.K. et al.*[62]

Deliberate complexities of autocratic reforms

Besides pre-emptive adjustments to national law in the light of a looming judgement of the ECJ, autocratic lawmakers may moreover actively attempt to buy themselves some time by adopting legal arrangements that are deliberately complex in nature. This allows them to create a *fait accompli* on the ground, which may be hard or even impossible to reverse once the ECJ finds the legal arrangement in question to violate Union law. By aggravating efforts of European actors to fully understand the effects of such reforms, national lawmakers hamper the ability of European actors to draft a swift response to illiberal reforms in the first place.

In the rule of law crisis in Poland, the complexity that is routinely and deliberately baked into autocratic reforms materialises in at least two respects. First, autocratic legalists habitually adopt laws that rest on several elements and display their autocratic intentions only when applied in combination. It may be difficult, accordingly, for European actors to fully grasp the combined effects of various, formally distinct elements of reform. In the context of the Polish judicial system, for instance, national lawmakers coupled an apparently neutral method of designating judges for the yet to be established 'Professional Liabilities Chamber' with a motion of approval by the President of the Republic, who – for the moment – is a faithful ally to the ruling parties.

This links to a second element aggravating the Court's understanding of the illiberal effects of Polish reforms. Incremental adjustments to the judicial system coincide with a growing role attributed to executive discretion. This may equally constitute a strategic disguise of autocratic legalists' making. Since discretionary decision-making may lead to varying results, the effects of such a mode of deliberation are rather difficult to pin down from an abstract angle. Accordingly, Polish government agents may use the existence of executive discretion as a defence strategy before the Court, arguing *inter alia* that national authorities' discretionary power is not used to undermine judicial independence in practice.

With a view to the appointment of judges, this effect relates particularly to the role of the President of the Republic, approving – in absolute discretion – candidates for Supreme Court. In the context of disciplinary regime, moreover, Polish reforms introduced several vague grounds for disciplinary action. While prosecutors are thereby vested with a vast measure of latitude,[63] Polish government agents went to great lengths to argue that such a legal arrangement would not create any chilling effects for judicial independence, producing more than 2000 pages of documents to show for it.[64] This may be viewed as a deliberate attempt to paper jam the Court. On an intermediate level of abstraction, however, it suggests that vastly discretionary legal arrangements render it difficult for judicial actors at European level to apprehend the effects of national reform in the first place.

[61]Which gave rise to a preliminary reference procedure and, ultimately, the ruling in Case C-487/19, *W.Ż.*, ECLI:EU:C:2021:798.

[62]For an overview of these measures, see Gajda-Roszczynialska and Markiewicz (n 38), at 467; in its most recent judgement in an infringement case, the ECJ seems to be aware of that fact, making reference to the relevant judicial proceedings it was seised at the time the new law was adopted, Case C-204/21, *Commission v. Poland* (n 60), paras. 222ff.

[63]Note that, in Polish administrative law, discretionary power is narrowly conceptualised as the choice of legal consequence and may not, for that matter, be allocated in vague legal notions.

[64]Case C-791/19, *Commission v. Poland* (n 52), para 78.

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D. Enforcement and pawn sacrifices

As the preceding sections illustrate, national lawmakers may have several tricks up their sleeve to render supranational judicial interventions ineffective. A strategy of incremental autocratic legalism, for instance, has allowed Polish lawmakers to sidestep the Court's judgements or to actively dismantle its effect. Against this backdrop, it may not come as a surprise that actors at EU level have looked for other options to coerce Poland into compliance. Above all, this has been done through financial pressure. Unless Polish lawmakers drop their efforts to undermine judicial independence, they may consequentially suffer severe penalties or must accept that significant payments are withheld.

From the outset, it may reasonably be presumed that financial pressure of that nature constitutes an effective tool to frustrate any further steps of autocratic reform. From the perspective of autocratic incrementalism, however, some second thoughts are warranted in this regard. Financial pressures need not be the end of autocratic projects in national legal systems. Rather, Polish lawmakers may decide to drop some elements of reform to superficially meet the demands of supranational actors but keep others intact. Pawn sacrifices of that nature may be a recurrent feature of autocratic incrementalism.

This can be illustrated by reactions at national level following the order of the Court's vice president imposing a one million Euros daily fine to enforce its interim measure during the infringement procedure concerning the 'muzzle law'.[65] This unprecedented step certainly constitutes a severe sanction for Poland. Yet, it may not have coerced Polish lawmakers into full compliance. Rather, as Sadurski has insightfully noted, these fines (in combination with the looming new conditionality regime established in the context of the Next Generation EU program) have encouraged Polish lawmakers to adopt a *pars pro toto* strategy.[66] On the one hand, Polish lawmakers have finally decided to abolish the Disciplinary Chamber which had been a 'dead body walking' for some time.[67] On the other hand, multiple elements of the disciplinary regime would remain entirely intact in this regard. The reaction of Polish lawmakers to severe penalties may therefore equally be described in terms of autocratic incrementalism.[68] Not unlike changes to the retirement regime years earlier, Polish lawmakers may be willing to sacrifice some elements of their judicial reforms to keep another intact.

4. A gradual development of tools to discourage autocratic incrementalism

The ECJ has come a long way in its response to incremental adjustments in Polish law. Despite repeated drawbacks, the Court has gradually developed mechanisms to react to strategies of autocratic incrementalism at national level. First, the flexibility inherent in the Court's constitutional interpretation, coupled with significant procedural developments, permits judges in Luxembourg to successively respond to incremental adjustments in national law (A.). Moreover, new epistemological tools have enabled it to come to terms with the complexity that is strategically baked into autocratic legalist reforms (B.). Through these tools, the options available to autocratic lawmakers to incrementally change national laws and thereby benefit from a smokescreen of conformity with the jurisprudence of the Court may have been significantly reduced. Still, this need not be the end of autocratic legalism (C.). Rather, Polish authorities may have recently put into practice a strategy of autocratic incrementalism with a view to the Commission's milestones

[65]Respectively, Case C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:593 and Case C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:878.

[66]Wojciech Sadurski, 'The Disciplinary Chamber May Go – but the Rotten System will Stay' (2021) <https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/> accessed 30 November 2021.

[67]Pech and Kochenov (n 24), at 98.

[68]This strategy, however, may have been vindicated by the Commission's 'milestone approach' under the Next Generation EU program, see infra at 4. C.

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approach. Moreover, the Polish Constitutional Tribunal's jurisprudence permits them to disregard the jurisprudence of the ECJ altogether. While this may reasonably qualify as a strategy of autocratic legalism, it has the potential of putting an end to a mode of mutually responsive interaction between national lawmakers and the ECJ.

A. Flexibility of the Court's response

The ECJ's effort to safeguard the independence of Polish judges constitutes a remarkable development in and of itself.[69] By tying together some of the most foundational provisions of EU law, the Court has opted for a constitutional response to autocratic reforms.[70] With a view to a strategy of autocratic incrementalism, this has significant advantages.[71] Such a doctrinal foothold vests the ECJ with a workable standard to counter incremental adjustments in national laws. To some degree, it allows the Court to adjust its interpretation to the creativity of autocratic lawmakers.

In the context of amendments to the applicable retirement regime, for instance, this enables the Court to affirm the paramount significance of the principle of irremovability of judges.[72] Subsequently, the combined reading of Article 19 (1) TEU and Article 47 of the Charter allowed it to extend this reasoning to the appointment of judges, especially with a view to the National Council of the Judiciary.[73] More recently, the flexibility that this line of interpretation proffers has been exemplified in relation to changes in the composition of judicial panels by virtue of secondment of judges by a minister,[74] including in the absence of the judges' consent.[75] Against this backdrop, it may safely be concluded that the combined reading of some of the most foundational provisions of EU law vests the ECJ with sufficient flexibility to capsize successive adjustments in national law.

This substantive evolution is complemented by remarkable developments in procedural terms. In fact, supranational actors may have learned the hard way that their interventions are outperformed by steps of incremental autocratic change at national level. In the light of this experience, they have increasingly made use of procedural instruments, such as interim measures under Article 279 TFEU and the imposition of financial penalties. After initial reluctance on the side of the European Commission, interim measures have formed an important element of their approach to the Polish rule of law crisis. This strengthens the Court's ability to draft a timely and resolute response to strategies of autocratic incrementalism.[76] For instance, this allows the Court to express itself on ongoing reforms, and to avoid the impression of delay in the face of incremental adjustments at national level.

In the context of changes to the retirement age of Supreme Court justices, the ECJ acknowledged that the new legal framework would be 'likely to cause serious damage to the EU legal order', as the Polish Supreme Court's sentences assume the authority of *res judicata*.[77] Against this backdrop, the grand chamber saw that changes to the composition of the Court would likely have irreversible effects, impairing the proper function of the EU legal order.[78] The Court

[69]See Kochenov (n 22), at 205ff.

[70]See P van Elsuwege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' 16 (2020) European Constitutional Law Review 8.

[71]See Bornemann (n 20), at 659ff.

[72]See Section 3.A.

[73]Case C-791/19, *Commission v. Poland* (n 52), para 98.

[74]Joined cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, ECLI:EU:C:2021:931, paras. 73ff.

[75]Case C-487/19, *W.Ż.* (n 61), at para 161.

[76]See G Gentile and D Sartori, 'Interim Measures as 'Weapons of Democracy' in the European Legal Space' 1 (2023) European Human Rights Law Review 18, at 24ff.

[77]Case C-619/18 R, *Commission v. Poland* (n 51), paras. 68, 71.

[78]Ibid., paras. 70ff.

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drew a similar conclusion with regard to the Disciplinary Chamber, whose continued operation would likewise risk irreparable damage to the rights that individuals derive from EU law.[79] Most recently, interim measures have been imposed in relation to the changes introduced by the muzzle law. While the vice-president of the Court had ordered Polish authorities to suspend the introduced reforms,[80] Poland challenged this order, arguing that the judgement of the Constitutional Tribunal in P 7/20 would have altered the situation in national law. This argument, however, was rejected by the vice-president of the Court, holding that such a verdict by a national constitutional court could 'in no way' constitute a change in circumstances.[81]

Notably, this litigation equally saw the emergence of a new type of interim measure in the context of the rule of law crisis, namely the ordering of a periodic penalty payment of one million Euros.[82] This constitutes a remarkable development. An order of such a fine by the Court's vice president would have been almost unthinkable a few years ago. Curiously, however, a new law introduced by Polish authorities in response to the Commission's milestones approach led Poland to apply for an interim measure itself, demanding the cancellation of the daily fine.[83] In April 2023, the Court's vice-president considered the matter and found that Poland had indeed partially complied with the Court's previous orders, especially with regard to the abolition of the Disciplinary Chamber and by introducing some changes to the disciplinary regime. Therefore, the amount of the daily fine was reduced, from 1 million to 500 thousand Euros.

B. Unravelling autocratic complexities

As has been highlighted, autocratic incrementalism often gives rise to legal arrangements of a particularly complex nature.[84] From the outset, this hampers the drafting of a prompt response at supranational level. The interplay of different elements of reform as well as the growing role of executive discretion aggravate a clear assessment of the autocratic effects of such amendments. While this may have bought Polish lawmakers considerable time, the ECJ has ultimately found ways to unravel the deliberate complexities of autocratic legalist law-making. This development in the Court's jurisprudence can be illustrated in two constellations:

First, the complexity that is deliberately baked into autocratic reforms has inspired the Court to adopt a contextual reading of national reforms. In this vein, judges in Luxembourg acknowledge that threats to judicial independence may arise from the combined effects of several, formally distinct measures of reform.[85] This growing awareness for contextuality followed attempts of autocratic lawmakers to disguise their intentions by adopting several, formally neutral elements of reforms whose interplay, however, would undermine the principle of judicial independence. Accordingly, the Court is not fooled by autocratic legalists' argument that certain elements of reform should be viewed in isolation. Rather, it acknowledged that 'although one or another of the factors [.. .] may be such as to escape criticism per se [.. .], when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body [.. .].'[86] This allowed the Court to thoroughly explore the illiberal effects of measures adopted.

[79]Case C-791/19 R, *Commission v. Poland* (n 51), para 93.

[80]Case C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:593.

[81]Case C-204/21 R-RAP, *Poland v. Commission*, ECLI:EU:C:2021:834, para 23.

[82]See Gentile and Sartori (n 76), at 26; the order in ECJ, C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:878 was only preceded by Case C-121/21 R, *Czech Republic v. Poland*, ECLI:EU:C:2021:752.

[83]Case C-204/21 R-RAP, *Poland v. Commission*, ECLI:EU:C:2023:334.

[84]See *supra* at 3. C.

[85]See Pech and Kochenov (n 24), at 89.

[86]Case C-625/18, *A.K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982, para 142.

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Second, the Court's interpretation of the principle of judicial independence, as derived from Article 19 (1) TEU in conjunction with Article 47 of the Charter, establishes a standard of recognition that assesses judicial independence through its appearance *vis-á-vis* an informed observer. Member States are accordingly obliged to provide for rules in national law capable of dispelling 'any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.[87] This reproduces, in essence, the jurisprudence of the ECtHR, which links judicial independence to both subjective and objective considerations.[88] Yet, references to reasonable doubts should not be misread as a capricious standard. Rather, an assessment of judicial independence must be duly informed, resting on an analysis of the applicable legal framework as well as, potentially, factual developments.[89]

Epistemologically, such an approach departs from the almost impossible-to-meet standard of objectively verifying that a judge had been subjected to outside pressures. Instead, it draws the focus of attention to the impression that the respective legal framework gives to individuals concerned. With a view to autocratic incrementalism, however, violations of judicial independence are still difficult to establish on that basis. Perpetual adjustments as well as deliberately vaguely termed norms in national law aggravate such an investigation. Against this backdrop, the Court inferred from its appearance-test a two-pronged standard of clarity and precision.[90] In the context of vague (if not, practically boundless) disciplinary offences, for instance, it concluded that such a legal design is incapable of dispelling reasonable doubts of individuals in the independence of judges. Accordingly, this epistemological tool to assess national reforms enabled the ECJ to find a highly discretionary legal arrangement to conflict with Union law, without chasing down the rabbit hole of autocratic legalists' strategies of defence, inviting the Court to revisit the use of the disciplinary regime empirically by going through a 2000 pages paper trail to substantiate a threat to judicial independence.

C. Lifting the smokescreen of autocratic legalism?

As the preceding sections suggest, the Court's track-record in safeguarding judicial independence in Poland is mixed. On the one hand, its interventions have been neutralised, on several occasions, by a mode of incremental adjustments in national law. On the other hand, the range of options that national lawmakers have at their disposal to put into practice a strategy of autocratic incrementalism has significantly diminished following the Court's repeated interventions. There seems to be a growing awareness among judges in Luxembourg that their jurisprudence is met, at national level, with a mode of autocratic incrementalism that aims to undo the effects of supranational interventions and even draws inspiration therefrom. This acknowledgement, coupled with procedural developments such as the increasing use of interim measures and – most notably – the Court's vice president's order imposing of a severe financial fine, may limit the ability of autocratic lawmakers to keep intact a smokescreen of conformity with the jurisprudence of the Court.

Yet, this need not be the end of autocratic legalism in Poland. Rather, national lawmakers have decided to use the tried and tested strategy of incremental adjustments in the light of the Commission's milestones approach and, possibly, quite successfully so. Moreover, Polish authorities increasingly call into question the Court's authority to adjudicate in matters of national judges' independence. To be sure, this is equally done in an autocratic legalist fashion, namely by

[87]As the Court has highlighted, this nowadays constitutes settled case law, Case C-487/19, *W.Ż.* (n 61), para 109.

[88]See F Sudre, '*Apparences et Convention Européenne des Droits de l'Homme*' in N Jacquinot (ed), *Juge et Apparence(s): Actes du colloque des 4 et 5 Mai 2009* (Presses de l'Université Toulouse 1 Capitole 2010), at 176ff.

[89]See Krajewski and Ziółkowski (n 42), at 1124ff.

[90]Case C-791/19, *Commission v. Poland* (n 52), para 141.

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way of reference to the jurisprudence of the captured Constitutional Tribunal. This reasoning, however, has the potential to alter the interaction between national lawmakers and the Court of Justice. Unlike previous instances of mutual responsiveness, this would culminate in Polish lawmakers' plain denial of interventions by the Luxembourg court.

The Commission's milestones approach: vindicating autocratic incrementalism

The evolution of the Court's jurisprudence refutes the impression that its role in the rule of law crisis would be ambitious but – owing to a strategy of autocratic incrementalism at national level – entirely futile. As the preceding overview of supranational interventions to the ongoing rule of law crisis in Poland suggests, judges in Luxembourg have significantly reduced the ability of national lawmakers to exploit a mirage of conformity with Union law through incremental reforms. This is not to say, however, that autocratic lawmakers would not try to employ such a strategy in relation to other supranational actors. While the Court has been clear in highlighting the incompatibility of multiple elements of autocratic reform in Poland, national lawmakers have put a strategy of autocratic incrementalism to the test in the context of the Commission's so-called milestone approach regarding payments under the Next Generation EU program. In this regard, the Sejm passed into law an amendment to the judicial system that bears all the hallmarks of this strategy.

While the law finally abolished the Disciplinary Chamber, it foresaw the establishment of a new 'Professional Liability Chamber' instead – a body that has been dubbed in the literature the Disciplinary Chamber 2.0.[91] Two aspects are noteworthy regarding this new body: first, its composition is made up of Supreme Court Justices, drawn at random from all the remaining court chambers and approved by the President of the Republic exercising discretion to this end. Notably, this may 'recycle' some of the pseudo-judges previously sitting at the Disciplinary Chamber.[92] Under the new law, this group of individuals would have the choice either to retire immediately or to be dispersed to other chambers. Once they opt to stay in office, previous Disciplinary Chamber judges may therefore end up sitting in the new 'Professional Liability Chamber' adjudicating disciplinary cases.[93]

Second, the re-design of the disciplinary regime does little to shield judicial decision-making from political interferences in substance. While the new law gets rid of a disciplinary offence sanctioning the use of the preliminary reference procedure, it does not abandon the long list of other offences and the system of prosecutors that may activate a disciplinary case. In fact, the bill even expands this list, introducing an additional ground for disciplinary action against judges 'refusing to implement justice', which apparently is targeted at those judges who refuse to sit on a panel with unduly appointed colleagues.[94] Accordingly, the establishment of a new 'Professional Liability Chamber' by no means neutralises the harm that the current disciplinary regime inflicts upon judicial independence. Non-conforming judges may have to live through further harassment and may reasonably fear disciplinary sanctions once they adjudicate in a way that is to the disliking of the government.

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[91] L Pech, 'Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time' (2022) <https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/> accessed 27 July 2022.

[92] For an insightful analysis, see J Jaraczewski, 'Just a Feint?: President Duda's Bill on the Polish Supreme Court and the Brussels-Warsaw Deal on the Rule of Law' (2022) <https://verfassungsblog.de/just-a-feint/> accessed 27 July 2022.

[93] It has been reported that approximately half of the members of the Chamber will retire and will benefit from an extremely generous pension, see 'Six judges from the Disciplinary Chamber are retiring, they will receive pensions. JM Laskowski comments' *Polish News* (28 July 2022) <https://polishnews.co.uk/six-judges-from-the-disciplinary-chamber-are-retiring-they-will-receive-pensions-judge-michal-laskowski-comments-2/> accessed 28 July 2022.

[94] See W Sadurski, 'The European Commission Cedes its Crucial Leverage vis-á-vis the Rule of Law in Poland' (2022) <https://verfassungsblog.de/the-european-commission-cedes-its-crucial-leverage-vis-a-vis-the-rule-of-law-in-poland/> accessed 27 July 2022.

https://doi.org/10.1017/elo.2023.34 Published online by Cambridge University Press

By dropping some elements of a judicial system that operates at their will, Polish lawmakers may signal goodwill to respond to requirements in Union law to anyone willing to listen. Such an impression, however, would be based on a false premise. In its jurisprudence, the ECJ had not just taken issue with the infamous Disciplinary Chamber but rather addressed various aspects of the governing parties' re-design of the disciplinary regime as well.[95] Accordingly, there can be little to no doubt that the latest step of incremental reforms in Polish law are incompatible with the jurisprudence of the Court. Against this backdrop, it would be particularly puzzling if the Commission effectively approved of Polish lawmakers' *pars pro toto* strategy in the context of the Next Generation EU conditionality.[96] On the one hand, this could speak to a changed political situation in the Commission according to which the conflict with Poland should be put to rest.[97] Following Russia's invasion of Ukraine, the Commission may have come to conclude that Poland, as a key-actor in the EU's stance towards Russia, best be appeased. Such an approach, on the other hand, would directly undermine several elements of the ECJ's jurisprudence, and thereby its efforts of putting an end to strategies of autocratic incrementalism.

From inadvertent inspiration to culminating conflicts of ultimate authority

As the preceding sections suggest, the interaction between the ECJ and Polish lawmakers in the rule of law crisis has intensified notably over the last years. The strategy of Polish lawmakers to respond to interventions of the ECJ through incremental adjustments materialised in changes that were tailor-made to maintain a smokescreen of conformity with the jurisprudence of the Court. In this sense, an inadvertent inspirational link has emerged between the two. The Court, on the one hand, was compelled by developments in Polish law to clarify the ramifications that followed from its interpretation of safeguards of judicial independence in supranational law. Polish lawmakers, on the other hand, had to find legal workarounds that would keep intact an impression of conformity with the jurisprudence of the Court, albeit superficially so. In the context of the muzzle law, for instance, this effort materialised in reforms that accepted, in principle, the ability of national judges to review the independence of their counterparts spelled out by the ECJ in *A.K. et al.* but assigned that competence exclusively to a body that lacks independence from the executive.

More recent developments in the interaction between the ECJ and Polish lawmakers, however, may indicate the departure from such a mode of inadvertent inspiration. Unlike reforms that engage – at least superficially – with the specificities of the ECJ's rulings, national actors increasingly call into question the authority of the Court as such.[98] To be sure, arguments of that nature have been raised by governmental actors in defence of national reforms ever since the ECJ started to apply safeguards of judicial independence to them.[99] Yet, the fact that national actors openly deny the ECJ's authority instead of searching for intricate legal workarounds that give at least a threadbare impression of conforming with judgements of the Court may be viewed as a turning point in the interaction between the ECJ and Polish lawmakers. Unlike a mutually responsive, incremental development, such arguments plainly disregard interventions by the Court.

Arguments denying the ECJ's authority to rule on judicial independence in national contexts gained traction after the infamous judgements of the Polish Constitutional Tribunal in P 7/20 and K3/21.[100] In this regard, the Constitutional Tribunal held that, by ordering interim measures pertaining to the organisational structure of the Polish judiciary, the ECJ was acting *ultra vires* and

[95]See Section 3. C.

[96]See Sadurski (n 94).

[97]For such an impression, see Bárd and Kochenov (n 2), at 46ff.

[98]See Bornemann (n 20), at 657ff.

[99]For instance, Case C-619/18, *Commission v. Poland*, (n 18), para 38 and Case C-192/18, *Commission v. Poland* (n 33), para 93.

[100]See A Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts' 19 (2023) European Constitutional Law Review 25, at 42ff.

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that the ECJ's interpretation of Article 19 (1), second subparagraph of TEU would be inconsistent with the Polish constitution, at least insofar as it empowers national courts to review the legality of the appointment of judges. These rulings vest national authorities with a splendid constitutional argument to disregard interventions by the ECJ. In a recent challenge to an interim measure, for instance, government agents tried to invoke the Constitutional Tribunal's finding in this regard but, in the eyes of the Court's vice president, to no avail.[101]

By establishing the national Constitutional Tribunal as a prime source of authority – as an 'enabler' of autocratic actions so to speak[102] – national actors paradoxically contradict their own criticism of the Polish judiciary as being too powerful.[103] For the purposes of this investigation, however, it is worth noticing that such a reasoning equally changes the nature the ECJ's and Polish lawmakers' interaction. While Polish authorities thereby stick to a method of autocratic legalism, viewing a (captured) national constitutional court as an actor to authoritatively interpret the limits of the EU's competence,[104] they outright deny ECJ's authority to do so.[105] This would mark the departure from a mutually responsive interaction between the ECJ and national lawmakers that has characterised earlier instances of their interrelationship. Instead of incremental adjustments in response to the ECJ's interventions, the jurisprudence of the Constitutional Tribunal can serve as a *carte blanche* to disregard interventions of the ECJ altogether.

5. The ECJ and national lawmakers at a crossroads

Over the last few years, the ECJ has expressed its firm opposition to the ongoing reconstruction of the Polish judicial system. The Court's active role in this regard, however, contrasts with its 'questionable track-record of real-life change',[106] as Bárd and Kochenov had put it. As the preceding investigation suggests, the limited sway of the Court's interventions in defence of judicial independence in Poland can be explained through a strategy of autocratic incrementalism on the side of national lawmakers. Polish authorities have learned to neutralise the effects of the Court's interventions by adopting incremental adjustments to national law.

This strategy of incremental adjustments to national law has given rise to several instances of mutually responsive interaction between Polish authorities and the ECJ. As national lawmakers employed this strategy to keep up a smokescreen of conformity with the jurisprudence of the ECJ, they had to engage – at least superficially – with the substance of the Court's interventions. The ECJ, for its part, had to further develop its jurisprudence to meet the challenge of putting a halt to these incremental changes to the Polish judicial reforms. In this sense, the interaction between the two may be characterised as mutually responsive: the ECJ's interventions have shaped judicial reforms in Poland, whereas incremental adjustments at national level impelled the Court to clarify the requirements that flow from a supranational safeguard of judicial independence in the light of these reforms.

More recently, this mutually responsive interaction between Polish lawmakers and the ECJ may have come to a halt. Following the jurisprudence of the captured Polish Constitutional Tribunal, national authorities no longer need to present a mirage of conformity with jurisprudence of the Court of Justice. Instead, they can co-sign on the Constitutional Tribunal's argument that the ECJ

[101]Case C-204/21 R-RAP, *Poland v. Commission*, ECLI:EU:C:2021:834, para 9.

[102]Sadurski, (n 47).

[103]See Kustra-Rogatka (n 100), at 26.

[104]Allocating the foundation of the validity of EU law in national constitutions is not, of course, an autocratic claim but corresponds with the pluralist legal structure of European integration, see M Avbelj, 'Constitutional Pluralism and Authoritarianism' 21 (2020) German Law Journal 1023, at 1028ff.

[105]See Bornemann (n 20), at 657ff.

[106]Bárd and Kochenov (n 2), at 7.

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would lack competence to adjudicate on the independence of national judiciaries altogether. Such a reasoning sticks to a mode of autocratic legalism, rhetorically couching disregard for the ECJ's interventions in terms of a constitutional obligation. With a view to the interaction between national lawmakers and the ECJ, however, it would mark the departure from a mode of mutual responsiveness and incremental adjustments, permitting national lawmakers to disregard supranational judicial interventions altogether.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: Bornemann J (2023). Of autocratic incrementalism and inadvertent inspirations: the interaction between the European Court of Justice and national lawmakers in the rule of law crisis in Poland. *European Law Open* **2**, 302–321. https://doi.org/10.1017/elo.2023.34

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