



## ARTICLES

### USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

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## JUDICIAL RESPONSES TO AUTOCRATIC LEGALISM: THE EUROPEAN COURT OF JUSTICE IN A CLEFT STICK?

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ABSTRACT: In recent years, the Court of Justice has become one of the most pronounced voices of opposition to illiberal projects in Europe. Its tenacity, however, has turned the Court into the target of national lawmakers who seek to undermine the authority of the Court and Union law more generally. The present investigation suggests that these attacks share recurrent features and may be qualified as “autocratic legalism”. It will be argued that, above all, attacks of this nature are aimed at calling into question the authority of the European Court of Justice among national audiences. For European judges, consequently, this raises the question how to appropriately respond to such efforts. Although there may be no ideal solution in this regard, the present investigation discerns three responses in the jurisprudence of the Court and assesses these approaches in the light of the strategic objectives pursued by autocratic legalists.

KEYWORDS: autocratic legalism – European Court of Justice – rule of law – refugee crisis – Poland – Hungary.

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## I. INTRODUCTION

It is a characteristic feature of modern illiberalism that it seeks to keep intact a façade of lawfulness.<sup>1</sup> “Autocratic legalism” of that kind capitalises on the normative force attributed to the law, allowing lawmakers to disguise their autocratic intentions as regular applications of the law. Scheppele has forcefully argued in this regard that “constitutional democracies are being deliberately hijacked by a set of legally clever autocrats who use constitutionalism and democracy to destroy both”.<sup>2</sup> Whereas autocratic legalism is therefore strategically aimed at the dismantling of safeguards in law, it goes to great lengths to present a mirage of legality in doing so. Unlike strategies of undisguised violence and terror, autocratic legalists secure a firm grip on power by tapping into the law as a source of legitimacy.<sup>3</sup>

Autocratic legalism constitutes a well-rehearsed tactic in national legal systems.<sup>4</sup> Within the European Union, this phenomenon has been described most thoroughly in relation to Poland and Hungary.<sup>5</sup> As the growing body of litigation before the European Court of Justice (ECJ) indicates, such strategies are equally aimed at safeguards in supranational law. In responding to autocratic legalism of that nature, the ECJ walks a tightrope. On the one hand, European judges may be one of the last remaining actors voicing resounding opposition to illiberal policies in national systems.<sup>6</sup> On the other hand, autocratic legalism may call into question the authority of the Court itself. By spelling out autocratic counter-interpretations of Union law, autocratic legalists deliberately attempt to disparage the Court *vis-à-vis* national audiences, to the effect that the ECJ’s authentic interpretation of Union law is no longer viewed as authoritative by national lay persons. How should the ECJ respond to such strategies of autocratic legalism?

<sup>1</sup> See A Lührmann and S Lindberg, ‘A Third Wave of Autocratization Is Here: What Is New about It?’ (2019) *Deocratization* 1104 ff.

<sup>2</sup> KL Scheppele, ‘Autocratic Legalism’ (2018) *The University of Chicago Law Review* 545, 547.

<sup>3</sup> See A Puddington, ‘Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians’ (Freedom House Report 2017).

<sup>4</sup> One of the first accounts on strategies of autocratic legalism considered the situation in Venezuela, see J Corrales, ‘Autocratic Legalism in Venezuela’ (2015) *Journal of Democracy* 37, 38 ff.

<sup>5</sup> On Hungary’s constitutional reforms, see Z Szente, ‘Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them’ in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford University Press 2017) 459 ff.; on Poland’s rule of law crisis, see M Matczak, ‘The Clash of Powers in Poland’s Rule of Law Crisis: Tools of Attack and Self-Defense’ (2020) *Hague Journal on the Rule of Law* 421, 428 ff. This focus should not, however, gloss over the fact that autocratic legalism is by no means limited to these two prominent examples.

<sup>6</sup> For this perspective, 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 Stremmer (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (Asser 2020) 249.

Although there may be no ideal solution in this regard, the Court has several options at its disposal, nonetheless. The following investigation will explore different judicial responses to autocratic legalism in the jurisprudence of the ECJ<sup>7</sup> and their ability to counter strategies of autocratic legalism. In this vein, it will put forward the view that the ECJ is not in a cleft stick when drafting a response to autocratic legalism. Rather, several elements may render its response more (or less) suitable to dispel strategies of autocratic legalism. To underscore this finding, the following investigation combines two logical steps. It will, first, analytically discern different approaches in the jurisprudence of the Court. Throughout the investigation, specific attention will be drawn to the procedure giving rise to the Court's judgments, since its response to autocratic legalism is partially contingent on the question whether it was raised in the context of an indirect or a direct action, particularly a preliminary reference or an infringement procedure.

Second, the following investigation sets out to qualitatively assess these approaches in the light of the strategic objectives of autocratic legalism. With a view to such a benchmark, it should be borne in mind that the strategic objectives of autocratic legalism constitute no precise measurement. Rather, both the label of autocratic legalism as well as its strategic objectives are based on attempts to theorise developments in the respective legal systems and must, as such, remain tentative. This being noted, the following investigation will nonetheless use such theory-informed insights to reveal aspects that may render the ECJ's response more (or less) apt to dispel autocratic legalism's strategic objectives. Accordingly, it will not empirically measure societal implications of illiberal policies or judicial interventions, respectively. Instead, it conducts a multiple case study analysis of ECJ judgments, exploring the suitability thereof in the light of theory-informed presumptions regarding autocratic legalism.

This *Article* proceeds as follows. At the outset, it will reflect on the strategic objectives that illiberal lawmakers pursue by virtue of autocratic legalism (section II). In the light thereof, it will distinguish and discuss three approaches developed by the ECJ in response to such strategies. It will argue, in the first place, that the ECJ's principal (and natural) response to autocratic legalism is constitutional (section III). A crisis of values must be met with profound constitutional reasoning.<sup>8</sup> However, the following investigation will highlight that the ECJ likewise has at its disposal alternative ways of responding to autocratic legalism (section IV). Accordingly, the Court may, in the second place, endorse a decentralised response by putting national courts in a position to counter strategies of autocratic legalism in national legal systems. A third approach adopts a similarly decen-

<sup>7</sup> For a tentative exploration of that phenomenon with regard to the ECtHR, see already B Çali, 'Autocratic Strategies and the European Court of Human Rights' (2021) *European Convention on Human Rights Law Review* 11, 12 ff.

<sup>8</sup> 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' (2020) *EuConst* 8, 31.

tralised solution, but one that centres on individualised decision making of national administrative bodies. By analytically discerning these options, the following investigation examines the benefits of the respective judicial response in relation to the strategic objectives of autocratic legalism, possible ramifications thereof, and areas of application.

## II. AUTOCRATIC LEGALISM: A THREAT TO THE ECJ'S AUTHORITY

Autocratic legalism enables illiberal lawmakers to dismantle safeguards of law, while benefitting from the legitimacy that lawful conduct implies.<sup>9</sup> Whereas this strategy has been put to a test on several occasions in domestic contexts, it is equally applied in relation to Union law. For illiberal lawmakers, membership in the EU continues to resemble an extremely important legitimacy asset that is not light-heartedly given away.<sup>10</sup> Accordingly, autocratic legalists go to great lengths to present reforms as conforming with Union law, even where their contempt of the latter is rather evident. To do so, autocratic legalism routinely endorses specific interpretations of Union law that tend to the needs of the illiberal project at hand.

It may be argued that, above all, this marks an attack on the ECJ. To be sure, the Court of Justice operates at a relatively safe distance from illiberal efforts in national legal systems. Unlike some national courts, it is not at risk of being institutionally hijacked by national autocrats.<sup>11</sup> Autocratic legalism, however, constitutes a strategy to undermine the authority of the ECJ by other means. By advocating for an interpretation of Union law that diametrically opposes that of the Court, autocratic legalists may seek to strategically call into question the latter's (monopolistic) claim to authentically interpret Union law.

At first glance, autocratic legalism may thus present itself as a specific form of interpretative pluralism. The ECJ is certainly not the only actor interpreting Union law, and there are good reasons to presume that "co-interpretations" by national courts and governments may inspire the Court in several ways.<sup>12</sup> However, autocratic legalism is different from pluralism in as much as it specifically refutes one of its principled normative foundations, namely, the dialectic openness of one actor to another.<sup>13</sup> Autocratic legalists

<sup>9</sup> KL Scheppele, 'Autocratic Legalism' cit. 562.

<sup>10</sup> For Hungary and Poland, this effect has been explored by T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) *German Law Journal* 1140, 1150.

<sup>11</sup> A different conclusion may be warranted with regard to the influence of the Member States collectively, see D Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2022) *ELJ* 262.

<sup>12</sup> See G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) *ELJ* 358, 362 ff.

<sup>13</sup> On this philosophical foundation of pluralism, see M Avbelj, 'Constitutional Pluralism and Authoritarianism' (2020) *German Law Journal* 1023, 1028.

do not further a pluralistic paradigm but, instead, pursue a strategy of “deliberate, systemic and sustained repudiation of [...] supranational standards”.<sup>14</sup> Accordingly, autocratic legalists engage with Union law in a selective fashion. They utilise specific patterns of justification to present national reforms in conformity with supranational law (section II.1) but do so on false pretence. Instead, autocratic legalism may be viewed as a tool to contest the authority of the ECJ with national audiences (section II.2).

## II.1. AUTOCRATIC COUNTER-INTERPRETATIONS OF UNION LAW

Autocratic legalism presumes that national lawmakers try to keep intact a façade of legality while drafting reforms that undermine core guarantees of supranational law. Accordingly, national reforms of that nature are not simply developed in blatant disregard of Union law. Instead, autocratic legalists go to great lengths to present their actions in accordance with the applicable law. In the context of safeguards in Union law, they tend to endorse specific (and frequently: formalistic)<sup>15</sup> interpretations of supranational law that corroborate the conformity of national reforms and safeguards therein. Curiously, these arguments often follow similar patterns, and thus, an “autocrats’ playbook” so to say.<sup>16</sup>

Autocratic legalists routinely resort to one of three justifications in supranational law. First, national governments may bend over backwards to justify illiberal policies through an excessive security rhetoric. As cases in point, the Hungarian government presented the so-called *leges NGO* and *CEU* in the lights of allegedly imminent security threats.<sup>17</sup> The Transparency law, on the one hand, was motivated by the presumption that NGOs receiving funding from foreign sources would intrinsically be liable to undermine public security.<sup>18</sup> The case concerning the Central European University, for its part, was based on the allegation that deceptive practices would be prevalent at the university premises and that only an international agreement concluded between the Hungarian government and the US (as the CEU’s home State) could put a halt thereto.<sup>19</sup> Unsurprisingly, the Court

<sup>14</sup> See M Matczak, ‘The Clash of Powers in Poland’s Rule of Law Crisis’ cit. 429.

<sup>15</sup> Which may constitute a recurrent tradition in post-socialist Member States, see M Matczak, M Bencze and Z Kühn, ‘Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland’ (2010) *Journal of Public Policy* 81, 86 ff.

<sup>16</sup> D Kochenov and P Bárd, ‘The Last Soldier Standing?’ cit. 254 ff., upon which the following distinction is based.

<sup>17</sup> Both policies ended up in the Luxemburg court; case C-78/18 *Commission v Hungary (Transparency of associations)* ECLI:EU:C:2020:476 and case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792 respectively.

<sup>18</sup> *Commission v Hungary (Transparency of associations)* cit. para. 93.

<sup>19</sup> *Commission v Hungary (Enseignement supérieur)* cit. paras 136 ff.

squarely rejected both arguments. As a method of autocratic legalism, however, a security-centred rhetoric allows governments to fall back onto art. 4(2) TEU, which stipulates that “national security remains the sole responsibility of each Member State”.<sup>20</sup>

This links to a second avenue of justifying autocratic legalism in the light of Union law, namely, national sovereignty claims. Legally speaking, these claims take different forms. In defence of reforms of the judicial system, for instance, the Polish government submitted that a dynamic interpretation of Union law<sup>21</sup> would violate the principle of conferral; that the organisation of the national justice system constituted an exclusive competence of Member States;<sup>22</sup> or that these matters would fall within Member States’ procedural autonomy.<sup>23</sup> The ECJ firmly rejected all these arguments, reminding Member States of their duty to comply with obligations deriving from Union law. Accordingly, Union law does not arrogate the competence of Member States to organise their justice systems.<sup>24</sup> Rather, it imposes certain limits on Member States’ faculty to do so, without prescribing the features thereof in positive terms.

A third pattern of justification of autocratic legalism finally revolves around lavish references to Member States’ national identities.<sup>25</sup> Whereas this is a well-known phenomenon in European constitutional law, amid the so-called refugee crisis, the argument was slanted as a “legal fig leaf” to disregard the mandatory EU relocation scheme of asylum seekers.<sup>26</sup> The 2018 Hungarian constitutional amendment, for instance, introduced a passage stipulating that “[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State”.<sup>27</sup> This may be a showcase example of autocratic legalism. By virtue of this constitutional amendment, the Hungarian government has a strong constitutional argument at its disposal to reject supranational law arguably impairing the protection of Hungarian constitutional identity.

<sup>20</sup> This strategy has been insightfully described by R Uitz, ‘The Return of the Sovereign: A Look at the Rule of Law in Hungary - and in Europe’ (5 April 2017) *Verfassungsblog verfassungsblog.de*.

<sup>21</sup> For details, see *infra* section III.1.

<sup>22</sup> Both arguments were raised in case C-619/18 *Commission v Poland (Independence of Supreme Court)* ECLI:EU:C:2019:531 para. 38 and later supported by the Polish Constitutional Tribunal in its judgment of 7 October 2021 in the case K 3/21.

<sup>23</sup> Case C-192/18 *Commission v Poland (Independence of ordinary courts)* ECLI:EU:C:2019:924 para. 93.

<sup>24</sup> *Commission v Poland (Independence of Supreme Court)* cit. para. 52; *Commission v Poland (Independence of ordinary courts)* cit. para. 102.

<sup>25</sup> See T Drinóczi and A Bień-Kacała, ‘Illiberal Constitutionalism: The Case of Hungary and Poland’ cit. 1158.

<sup>26</sup> D Kelemen and L Pech, ‘The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland’ (2019) *Cambridge Yearbook of European Legal Studies* 59, 68.

<sup>27</sup> The unofficial translation of art. R) of the Fundamental Law which entered into force on 29 June 2018. Initially, the Hungarian government failed to reach a majority for constitutional reform to that end; for an overview of events, see R Uitz, ‘National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades’ (11 November 2016) *Verfassungsblog verfassungsblog.de*.

## II.2. AN AUTOCRATIC CONTESTATION OF THE ECJ'S AUTHORITY

The preceding overview suggests that, by and large, arguments in defence of autocratic legalism are of no avail before the ECJ. In all infringement cases mentioned, the Court unequivocally sided with the Commission, holding that national reforms violate Union law.<sup>28</sup> Against this background, it may be reasonable to brush aside national governments' arguments as "boundless imagination".<sup>29</sup> Yet, from the perspective of autocratic legalism, such a view may jump to conclusions. If it is accepted that autocratic legalists seek to strategically undermine safeguards of Union law, it may be presumed that such strategies of defence are not primarily aimed at persuading an unconvinced supranational tribunal of legal experts such as the ECJ. Rather, by creating a mirage of lawfulness, it is first and foremost addressed to laypersons in the wider national audience and press.<sup>30</sup>

This points to a change in perspective. Autocratic legalism allows national governments to put up a smokescreen of lawfulness *vis-à-vis* national electorates. Paradoxically, a smokescreen of such nature may even be upheld where the ECJ explicitly finds national reforms to conflict with Union law. In this vein, autocratic legalists may emphasise a national measure's conformity with supranational law, despite all evidence indicating otherwise. By establishing a counter-interpretation of EU law, autocratic legalists pretend that several "correct" interpretations of Union law exist and that the ECJ's authoritative interpretation thereof merely reflects one view among many.

In this vein, autocratic legalists seek to strategically undermine the authority vested in the Court by national audiences. They do so by making the interpretation of Union law a matter of political contestation. This resonates with an effort to politicise Union law (and law more generally).<sup>31</sup> Autocratic legalism enables national governments to present an alternative standard of interpretation which may diametrically oppose that of the Luxembourg court. Provided autocratic legalists' interpretations resonate with national audi-

<sup>28</sup> In the context of judicial reforms in Poland, *Commission v Poland (Independence of Supreme Court)* cit.; *Commission v Poland (Independence of ordinary courts)* cit.; case C-791/19 *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2021:596. In the context of the Hungarian *leges* enemies, *Commission v Hungary (Enseignement supérieur)* cit.; *Commission v Hungary (Transparency of associations)* cit. Similarly, the Court accepted the legality of the Council's relocation decisions in the annulment procedure in joined cases C-643/15 and C-647/15 *Slovakia v Council* ECLI:EU:C:2017:631.

<sup>29</sup> E Frasca and FL Gatta, 'Court of Justice of the European Union, Judgment of 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257: Rebel Rebel, How Could They Know? The Boundless Imagination of Poland, Hungary and the Czech Republic in Opposing the Relocation Mechanism' (2020) *Cahiers de L'EDEM* 13.

<sup>30</sup> On this perspective, see M Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' cit. 430.

<sup>31</sup> On the populist criticism of the depoliticised nature of law, see P Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) *European Constitutional Law Review* 519, 532.

ences, this strategy may in fact yield success. To that end, national lawmakers have several techniques at their disposal, *inter alia* exploiting opposition to unpopular measures of Union law (sub-section *a*) and presenting the ECJ as biased against the respective national audiences (sub-section *b*).

*a) Exploiting opposition to unpopular measures of Union law*

Autocratic legalism does not just operate at an interpretative level in court rooms. Rather, it aims at reversing the structures of legitimacy in national societies more fundamentally.<sup>32</sup> Such a strategy may be particularly promising where national reforms defiant of safeguards of Union law resonate with electoral preferences. Autocratic legalism permits national governments to endorse an interpretation of Union law that legally buttresses the preferences of national electorates, irrespective of the ECJ's verdicts to the contrary. As a case in point, the Hungarian government went out of its way to couch a plain denial of binding Union law (*in casu* the refugee relocation scheme) into a costly strategy of constitutional reform and, ultimately, successfully so.<sup>33</sup>

Whereas this may be viewed as opportunistic,<sup>34</sup> it equally bears testimony to autocratic legalists' more strategic consideration to exploit public opposition against a measure of Union law for their own purposes. By presenting constitutional reform as a necessity to fend off an unpopular measure in Union law, the Hungarian government created the perfect pretext for future strategies of autocratic legalism. Whenever suitable, the newly introduced constitutional identity clause will allow autocratic legalists to rhetorically couch their disregard for Union law in terms of constitutional necessity.<sup>35</sup>

*b) Presenting the ECJ as a biased court*

The establishment of a counter-interpretation of Union law by autocratic legalists may furthermore be particularly successful where the ECJ can be presented as biased against national audiences. To that end, autocratic legalists have effective techniques up their sleeves. By stitching together some of "the worst practices from liberal democracies to create something illiberal",<sup>36</sup> they may justify their policies by way of reference to other Member States.

<sup>32</sup> On this effect, see P Blokker, 'Response to "Public Law and Populism"' (2019) *German Law Journal* 284, 288, with further references.

<sup>33</sup> See B Bakó, 'Hungary's Latest Experiences with Article 2 TEU: The Need for 'Informed' EU Sanctions' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 35, 46 ff.

<sup>34</sup> See KL Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism' (2019) *German Law Journal* 314, 331.

<sup>35</sup> Whereas the Constitutional Court of Hungary's recent judgment in *X/477/2021* accepted, in principle, the primacy of Union law, it did not unequivocally refute an overly far-fledged interpretation of the newly introduced constitutional identity clause, which constitutes, according to the Constitutional Court, a mirror-provision of art. 4(2) TEU; Constitutional Court of Hungary, judgment in *X/477/2021*, 31.

<sup>36</sup> See Scheppele, 'Autocratic Legalism' cit. 567.



Where the ECJ rejects these national policies, a “shrewd exploitation of comparative reasoning”<sup>37</sup> allows national governments to accuse the Court of adopting a double standard.<sup>38</sup> As a case in point, the ECJ rejected a Polish legal arrangement that afforded the President of the Republic a discretionary power to decide whether judges may continue their duties beyond a certain age threshold.<sup>39</sup> Despite the fact that similar legal arrangements exist in other Member States, the Court’s refusal in the context of Polish reforms buttresses the sentiment that the ECJ would deny Poles what is acceptable for other nations.<sup>40</sup>

Underlying that view is the populist contestation of the neutrality of law.<sup>41</sup> In this regard, interventions of foreign actors concerned with the rule of law are discredited as desperate attempts of jumping to the aid of domestic opposition. Whereas this criticism has been prominently levelled at the Venice Commission, it may apply at equal measure to the ECJ’s interventions to the benefit of Polish judges. In the view of this populist narrative, the Luxemburg court takes sides with domestic opposition, be it left-liberal parties or alleged post-communist forces seeking to undermine national unity.<sup>42</sup> In adopting a strong response to the restructuring of national judicial systems, the Court may thus be accused of complicity with domestic opposition groups.

### III. A CONSTITUTIONAL RESPONSE TO A CRISIS OF VALUES

In many respects, the ECJ does not have to fend off autocratic legalism empty-handed. It has tools at its disposal to forestall at least some of the impulses of illiberal law-making. An effective strategy in this regard centres on procedural measures. As a case in point, the Court utilised art. 279 TFEU to impose interim measures putting a halt to the ongoing reform of the judicial system in Poland,<sup>43</sup> the continuous lignite mining in Turów,<sup>44</sup> or the logging of trees in Białowieża forest –including by imposing severe pecuniary penalties to that end.<sup>45</sup> Whereas it is not yet entirely clear whether such measures are capable of

<sup>37</sup> A Vincze, ‘Talking Past Each Other: On Common Misperceptions in the Rule of Law Debate’ in A Lorenz and L Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Palgrave 2021) 218.

<sup>38</sup> Explicitly, in this regard, *Commission v Poland (Régime disciplinaire des juges)* cit. para. 69.

<sup>39</sup> *Commission v Poland (Independence of Supreme Court)* cit. para. 119.

<sup>40</sup> The same argument can be made with a view to 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’ (2015) *International Journal of Constitutional Law* 279, 280.

<sup>41</sup> For an insightful account of this critique, see P Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’ cit. 532 ff.

<sup>42</sup> *Ibid.* 534.

<sup>43</sup> Case C-619/18 R *Commission v Poland (Independence of Supreme Court)* ECLI:EU:C:2018:910; case C-791/19 R, *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2020:277.

<sup>44</sup> Case C-121/21 R *Czech Republic v Poland (Mine de Turów)* ECLI:EU:C:2021:752.

<sup>45</sup> Case C-441/17 R *Commission v Poland (Białowieża Forest)* ECLI:EU:C:2017:887 para. 118; case C-204/21 R *Commission v Poland and vie privée des juges* ECLI:EU:C:2021:878 para. 64.

resolving a constitutional crisis such as the one in Poland, it signals a growing willingness on the side of the Court to explore avenues to put a halt to national reforms.

Besides procedural manoeuvres, the Court has undertaken significant efforts to develop strategies that seek to debunk arguments of autocratic legalism in substance. In doing so, however, it has come a long way. In 2012, it pronounced itself on the Hungarian judicial reforms which foresaw the lowering of the retirement age of judges, to the effect that multiple judges' terms were ended prematurely. Despite AG Kokott's indications to the systemic threat thus posed to judicial independence,<sup>46</sup> the ECJ considered Hungary's reforms merely in the light of equal treatment law, aside from a vague reference to its "legislative background" and the hardship suffered by the persons concerned thereby.<sup>47</sup> In the fairway of this judicial intervention, neither did a general climate of harassment subside, nor did the ruling re-establish a *status quo ante*. Instead, it prompted national lawmakers to introduce a new method for calculating term limits of undesired judges and stripped judges requesting reinstatement from the leading positions they previously held.<sup>48</sup>

In contrast, the ECJ's more recent response to the ongoing judicial reforms in Poland is marked by full recognition of the severe attack that is waged thereby at some of the foundational safeguards of Union law. Unlike half-hearted actions taken against Hungary years earlier, the Court has spelled out a resolute response to threats to the Polish judiciary's independence. This suggests that, in the view of the Court, a crisis of values such as the unfolding rule of law crisis in Poland warrants a firm judicial intervention. By firmly tying together some of the most foundational safeguards in Union law, it developed a set of standards that Member States must respect when designing their national judicial systems.

In this vein, the ECJ's role resembles that of a federal constitutional court, safeguarding the rule of law in its component sub-systems as a matter of common interest.<sup>49</sup> Interventions to the Polish judicial reform therefore resonate with some of the Union's core constitutional guarantees, specifically, the values upon which it is founded. Rhetoric of that sort is particularly pronounced in the Court's assertion that Member States "freely and voluntarily committed themselves to the common values referred to in Article 2 TEU", as previously explicated in the context of the United Kingdom's withdrawal from the EU.<sup>50</sup>

<sup>46</sup> Case C-286/12 *Commission v. Hungary* ECLI:EU:C:2012:602, opinion of AG Kokott, paras 54 ff.

<sup>47</sup> Case C-286/12 *Commission v. Hungary* ECLI:EU:C:2012:687 para. 66.

<sup>48</sup> See P Sonnevend, 'The Responsibility of Courts in Maintaining the Rule of Law: Two Tales of Consequential Judicial Self-Restraint' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit. 164; see equally G Halmá, '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) 471.

<sup>49</sup> See P Van Elsuwege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order' cit. 10; referring to the works of M Claes and M de Visser, 'The Court of Justice as a Federal Constitutional Court: A Comparative Perspective' in E Cloots and others (eds), *Federalism in the European Union* (Hart 2012), 98 ff.

<sup>50</sup> *Commission v Poland (Independence of Supreme Court)* cit. para. 42, with a reference to case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999 para. 63; *Commission v Poland (Régime disciplinaire des juges)* cit. para. 50.

By reproducing this reasoning *vis-à-vis* the Polish judicial reforms, the Court indicates that it is fully aware of the underpinning crisis of values. It recognises the systemic implications of the judicial reform, thus exposing autocratic legalism for what it is – a strategic effort to effectively set aside any limits to national law-making power by virtue of “legal” reforms. The measures adopted by Poland therefore teeter on the brink of the abyss of shared values. By emphasising the voluntary commitment of Member States to safeguard these values, including the rule of law, the Court rhetorically highlights the fact that the Polish judiciary reform threatens to undermine one of the core commitments upon which membership in the EU rests.

The Court’s reasoning in this regard centres on a substantive interpretation of the second sub-paragraph of art. 19(1) TEU, stipulating that Member States must ensure effective legal protection in the fields covered by Union law. Based on the doctrinal groundwork in a previous case,<sup>51</sup> the ECJ stresses that art. 19(1) TEU “gives concrete expression to the value of rule of law affirmed in Article 2 TEU”.<sup>52</sup> Effective legal protection – read in the light of art. 47 of the Charter – presupposes the independence of national courts.<sup>53</sup> This interpretation has two significant repercussions. It allowed the ECJ, first, to assert jurisdiction on matters of judicial independence in Member States’ legal orders, which may not have been evident from the outset. That competence, second, coincided with the power to flesh out the substance of the requirement of judicial independence, thus allowing the Court to develop standards that Member States must follow in this regard.<sup>54</sup>

The interplay of constitutional norms in the Court’s response to the Polish judicial reforms therefore firmly rebutted sovereignty arguments put forward by national governments.<sup>55</sup> In contrast to its previous case-law concerning Hungary, the Commission’s stepped-up efforts against Poland allowed the Court to spell out a resolute constitutional response. This, in itself, may not suffice to counter the strategic efforts of autocratic legalism. As will be argued in the following, however, the ECJ’s response to the unfolding rule of law crisis is marked by two characteristics that may be particularly suitable to discourage autocratic legalism in the context of the Polish judicial reform. The Court’s response essentially rests on EU law’s *effet utile* – a method of interpretation diametrically opposed to the formalism inherent in autocratic counter-interpretations of Union law (section III.1). In addition, it provides the flexibility needed to put a halt to incremental readjustments of the national legal framework; a tactic recently employed by Polish lawmakers (section III.2).

<sup>51</sup> See M Bonelli and M Claes, ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary.’ ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses* (2018) *European Constitutional Law Review* 622, 636 ff.

<sup>52</sup> Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* ECLI:EU:C:2018:586 paras 50 ff.

<sup>53</sup> *Ibid.* para. 53.

<sup>54</sup> See P Van Elsuwege and F Gremmelprez, ‘Protecting the Rule of Law in the EU Legal Order’ cit. 24.

<sup>55</sup> See equally *supra* at II.1.

### III.1. A DYNAMIC RESPONSE TO THE FORMALISM OF AUTOCRATIC LEGALISM

The Court's response to judicial reforms in Poland illustrates that it adopts an interpretation of Union law that diametrically opposes that of autocratic legalism. In the literature, two rationales have been proposed to explain the Court's interpretation in this regard. On the one hand, it is evident that its reasoning is strongly motivated by the *effet utile* of Union law. By highlighting judicial independence as an essential prerequisite for the smooth operation of the EU's decentralised judicial system, including the preliminary reference procedure, the Court utilises one of the most characteristic interpretative yardsticks of Union law.<sup>56</sup> A second rationale presents the Court's response as a value-based reasoning, borne out by various references to art. 2 TEU.<sup>57</sup> Both modes of interpretation, however, contrast starkly with interpretations endorsed by autocratic legalists.

Autocratic legalists engage with Union law in a selective fashion, routinely relying on a formalistic reading of derogations or limitations playing to their advantage. Accordingly, it is not surprising that the Polish and Hungarian governments opposed the Court's interpretation on the grounds that it would upset the division of competences between the Union and Member States.<sup>58</sup> On this point, commentators need not unequivocally agree with the Court to accept that its reasoning signals a significant step forward in putting a halt to the Polish judicial reforms.<sup>59</sup> As a response to autocratic legalism, however, this reasoning yields two advantages. In the first place, it sends a clear sign to national audiences, indicating that the illiberal policies in question threaten the very foundation of values underlying EU membership. Accordingly, the Court removes the legal façade set up by autocratic legalism that reforms would merely concern some technicalities in the running of the national justice system. In the second place, the ECJ's response showcases the specificities of the legal tradition developed in the EU legal order. By rejecting autocratic legalism's counter-interpretations of Union law, the Court reminds national governments of the autonomy of the EU legal order and the legal traditions established thereby, including prominently its *effet utile*.<sup>60</sup>

<sup>56</sup> See already M Bonelli and M Claes, 'Judicial Serendipity' cit. 631; the *effet utile* of Union law may be viewed as a meta-rule of interpretation that notably diverges from traditional notions of interpretation in Member States' legal orders, see S Mayr, 'Putting a Leash on the Court of Justice: Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule' (2012) *European Journal of Legal Studies* 3, 15 ff.

<sup>57</sup> Distinguishing these rationales and favouring the latter, see LD Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit. 249 ff.

<sup>58</sup> *Commission v Poland (Independence of Supreme Court)* cit. para. 52.

<sup>59</sup> For a discussion of possible points of criticism, see LD Spieker, 'Defending Union Values in Judicial Proceedings' cit. 254 ff.

<sup>60</sup> *Commission v Poland (Independence of Supreme Court)* cit. para. 44.

### III.2. A FLEXIBLE RESPONSE TO A CRISIS OF VALUES

There is no denying that autocratic legalists are skilful masters of their trade. Accordingly, the ECJ may occasionally see its interventions outmanoeuvred by national lawmakers. Autocratic legalists may take pride in finding clever legal workarounds that formally accommodate requirements inferred from the ECJ's judgments, without abandoning an illiberal project altogether. This phenomenon features pronouncedly in the context of reforms threatening national judges' independence. In recent years, Polish lawmakers have adopted several measures to effectively sidestep the interventions of the Court, including the infamous "muzzle law".<sup>61</sup> This points to an unsettling truth. Analyses centred primarily on the jurisprudence of the ECJ may easily overlook the wide array of tools that autocratic legalists have at their disposal to undermine EU values.

The ECJ's constitutional response, however, may make some amends for this incapability. It affords the Court significant flexibility to finetune its interventions in the light of readjustments in national law. In the light of a supranational safeguard of judicial independence of national courts, the Court found that Member States must 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".<sup>62</sup> By virtue of this encompassing safeguard, the Court found both the involvement of the Polish Council of the Judiciary in the appointment of judges and the establishment of an additional Disciplinary Chamber as part of the Supreme Court to conflict with Union law.<sup>63</sup>

## IV. ALTERNATIVE RESPONSES TO AUTOCRATIC LEGALISM

Autocratic legalism compels the Court of Justice to engage with arguments intended to undermine the authority of Union law.<sup>64</sup> There are, however, different ways of doing so. In the context of its firm response to the Polish judicial reform, the Court came close to calling a spade a spade, highlighting its doubts "surrounding the true aims of the [judicial] reform".<sup>65</sup> On other occasions, the ECJ responded differently. Notably, in the context of

<sup>61</sup> See L Pech and others, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) *Hague Journal on the Rule of Law* 16 ff.

<sup>62</sup> *Commission v Poland (Independence of Supreme Court)* cit. para. 74; *Commission v Poland (Independence of ordinary courts)* cit. para. 124; joined cases C-585/18, C-624/18 and C-625/18 A.K. (*Independence of the Disciplinary Chamber of the Supreme Court*) ECLI:EU:C:2019:982 para. 123; see M Krajewski and M Ziółkowski, 'EU Judicial Independence Decentralized: A.K.' (2020) *CMLR* 1107, 1114 ff.

<sup>63</sup> *Commission v Poland (Régime disciplinaire des juges)* cit.

<sup>64</sup> See *supra* section II.

<sup>65</sup> *Commission v Poland (Independence of Supreme Court)* cit. para. 87; for an empirical investigation regarding Hungary, see L Anders and S Priebe, 'Does It Help to Call a Spade a Spade? Examining the Legal Bases and Effects of Rule of Law-Related Infringement Procedures Against Hungary' in A Lorenz and L Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* cit. 235.

the preliminary reference procedure, the Court reverberated the substance of its constitutional reasoning, but left the final implications thereof to national judicial authorities (section IV.1). By way of contrast, the following exploration will highlight that the Court may equally adopt a decentralised solution of that kind with a view to national administrative authorities, which may be capable of rebutting some of the strategic efforts of autocratic legalism (section IV.2).

#### IV.1. DECENTRALISED SOLUTIONS TO A CRISIS OF VALUES

Unlike the firm constitutional response to the Polish judicial reforms in direct actions, the Court has adopted a more deferential stance in the context of preliminary references. In this regard, the ECJ emphasised that it is for the national court to take the final decision on the matter. This need not compromise the resounding criticism levelled at national reforms. However, the degree of guidance instructing national authorities in this regard is subject to judicial finetuning and follows a conscious choice by the ECJ.<sup>66</sup> With a view to that strategy of response to autocratic legalism, two instances may be discerned: first, the judicial reminder that national courts are empowered by virtue of Union law to set aside any national provision conflicting with the former (sub-section *a*) and, in the second place, the ramification of a crisis of values relating to the smooth operation of systems of transnational cooperation, *in casu* the system of extradition established under the European Arrest Warrant (EAW) Framework Decision (sub-section *b*)).

##### *a) Empowering national courts*

In the context of the preliminary reference procedure, the ECJ reverberates the firm constitutional response in opposition to national measures inflicting a crisis of values. As its response to the Polish Supreme Court's Labour and Social Insurance Chamber in *A.K. et al.* illustrates,<sup>67</sup> however, it may refuse to apply the standard of judicial independence to national bodies itself. Instead, the ECJ almost apologetically explains that the preliminary reference procedure does not empower it to apply rules of EU to a particular case and that it was therefore for the referring court to draw the relevant conclusions from its guidance.<sup>68</sup>

In spelling out that guidance in substance, the Court's demonstrates its increased vigilance to strategies of autocratic legalism. On the one hand, it highlights that Union law does not, in principle, preclude a national system whereby a specialised body is involved in the appointment of judges. On the other hand, this holds true only insofar as that body

<sup>66</sup> On this phenomenon, see T Tridimas, 'Constitutional Review Of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) *International Journal of Constitutional Law* 737, 749.

<sup>67</sup> *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* cit. paras 114 ff.

<sup>68</sup> *Ibid.* paras 131 ff.

itself is sufficiently independent.<sup>69</sup> In this vein, the ECJ reproduces its jurisprudence on judicial independence with a view to bodies involved in the appointment of judges. Against this background, it recognised and dismantled one of the characteristic features of autocratic legalism. Whereas individual elements of the Polish reform may be acceptable under Union law, “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 involved in the procedure for the appointment of judges”.<sup>70</sup> In essence, this reflects a method of autocratic legalism, stitching together various elements borrowed from other contexts to pursue an illiberal objective.<sup>71</sup>

Such a strategy of deference, however, it is not risk free. Admittedly, the explicit affirmation that national courts may disapply any provision of national law in conflict with Union law is of vital importance given the dire straits of independent Polish judges. Yet, in drafting a response to autocratic legalism, the ECJ must be cautious of the relative distance at which it operates to national legal systems. In the case at hand, the referring court’s conclusion that the body involved in appointing judges lacked sufficient guarantees of independence was simply ignored by Polish authorities, until the (already-captured) Constitutional Tribunal vindicated that practice<sup>72</sup> and Polish lawmakers adopted the muzzle law to neutralise some of the most tangible effects of the Court’s ruling in *A.K. et al.*<sup>73</sup>

Whereas the ECJ subsequently jumped to the aid of the referring judges in the context of an infringement procedure,<sup>74</sup> this warrants two conclusions: first, supranational judicial interventions may dismantle strategies of autocratic legalism without forcing national authorities to abandon the illiberal efforts in practice.<sup>75</sup> Second, the empowerment of national courts by virtue of primacy and direct effect may only cater to the effective enforcement of Union law where judges are independent and willing to use that power. By institutionally hijacking national courts, autocratic legalists ensure that this is only the case where they intend it to be.

#### *b) Transnational judicial cooperation*

The ECJ has moreover opted for a decentralised response to autocratic legalism in the context of the European Arrest Warrant system. Autocratic legalists seek to keep this system of extradition intact while pulling through with national judicial reforms. To that end,

<sup>69</sup> *Ibid.* paras 136 ff.; this contextual interpretation may be viewed as a significant evolution in the ECJ’s case law, see 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 report 2021), 89.

<sup>70</sup> *Ibid.* paras 142 and 152.

<sup>71</sup> See KL Scheppele, ‘Autocratic Legalism’ cit. 567.

<sup>72</sup> See L Pech and others ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ cit. 10.

<sup>73</sup> See *Ibid.* 16 ff.

<sup>74</sup> *Commission v Poland (Régime disciplinaire des juges)* cit. paras 85 ff.

<sup>75</sup> See on this phenomenon, *supra* section III.2.

they may have compelling arguments in Union law at their disposal; above all the principle of mutual trust, establishing a presumption that all Member States respect Union law, including its values. What is more, the EAW Framework Decision explicitly highlights that only a decision adopted by the European Council under art. 7(2) TEU could lead to an automatic suspension of the execution of an EAW based on a persistent breach of values.<sup>76</sup> In the absence thereof, the Court of Justice performs a balancing act: on the one hand, it must respect the letter of the Framework Decision; on the other hand, it cannot let autocratic legalists get away. As a result, the Court adopted a response that invested in a decentralised solution in *LM*.<sup>77</sup>

This case was the first to apply the value-based constitutional reasoning to a situation relating to the judicial reforms in Poland. Since the case concerned the European Arrest Warrant system, the Court reproduced the two-pronged test developed elsewhere,<sup>78</sup> accordingly compelling the executing authority, first, to establish whether there are systemic or generalised deficiencies in the issuing Member State, for the purpose of which it may rely on the Commission's reasoned opinion adopted pursuant to art. 7(1) TEU.<sup>79</sup> In a second step, the executing authority must establish "specifically and precisely" that surrender would result in a violation of the fundamental rights of the person concerned.<sup>80</sup> In practice, this decentralised solution renders suspension of extradition extremely unlikely (even though not impossible).<sup>81</sup> Viewed in isolation, the Court's decentralised solution in this case fails to establish an effective mode of opposition to autocratic legalism. The Court clearly does not forfeit the transnational system of extradition established by the EAW Framework Decision by precluding Polish courts *tout court*.<sup>82</sup> As a milestone in the Court's response to a crisis of values, however, its reasoning is of paramount importance.

In this context, it should be noted that the two-pronged test reproduced in *LM* equally entails a procedural dimension. It compels national courts to engage in an inter-judicial dialogue by virtue of which the executing court requests information from the issuing court on the latter's independence. As a response to autocratic legalism, this solution is

<sup>76</sup> *Minister for Justice and Equality (Deficiencies in the system of justice)* cit. para. 72; as is well-known, Hungary and Poland politically block the adoption of such a decision in the European Council.

<sup>77</sup> *Ibid.*

<sup>78</sup> Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 para. 88.

<sup>79</sup> *Minister for Justice and Equality (Deficiencies in the system of justice)* cit.

<sup>80</sup> *Ibid.* para. 68.

<sup>81</sup> See D Kochenov and P Bárd, 'The Last Soldier Standing?' cit., 274; this threshold appears to be deliberately strict, thus keeping the risk of impunity to a minimum; joined cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033 para. 64. However, it need not be insurmountable in practice, see L Mancano, 'You'll Never Work Alone: A Systemic Assessment of The European Arrest Warrant and Judicial Independence' (2021) CMLR 683, 701 ff.

<sup>82</sup> On this effect, see M Bonelli, 'Intermezzo in the Rule of Law Play: The Court of Justice's LM Case' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit., 470 ff, with further references.



not ideal. It exposes Polish judges struggling to maintain their independence to harassment once they negatively assess their own independence. At the same time, the Court's decentralised solution is unlikely to convince hijacked courts to discuss their own partisanship with actual judges in other Member States.<sup>83</sup> In fact, the Polish "muzzle law" was intended to precisely neutralise the Court's intervention in this regard, attributing exclusive jurisprudence on whether a Polish court may fail to meet the supranational standard of independence to a hijacked chamber of the Supreme Court.<sup>84</sup>

#### IV.2. ADMINISTRATIVE REASONING AS A RESPONSE TO AUTOCRATIC LEGALISM

In the context of the Polish judicial reforms, the Court invested in a response that resembles that of a federal constitutional court.<sup>85</sup> Whereas this strategy may be vital to counter an unfolding crisis of values, it does not necessarily thwart the strategic objective of autocratic legalism, namely, to undermine the authority of Union law altogether. Unlike the role of (federal) constitutional courts in national legal systems, however, the Court of Justice is not limited to constitutional interpretations. Rather, as the case in *LM* illustrates, the Court equally interprets secondary Union law, which may allow for adjustments to its response to autocratic legalism in some instance. This effect may be illustrated with a view to the Court's response to strategies of autocratic legalism justifying the disregard of the EU relocation mechanism for asylum seekers.

In the field of migration law, the ECJ developed an alternative response to autocratic legalism, namely one that is reflective of an "administrative mindset". Such a mindset manifests in statutory (instead of constitutional) interpretation, seeking to ascertain the position of the political authors of the measure.<sup>86</sup> As a response to autocratic legalism, the Court of Justice put this approach to the test in the context of the mandatory asylum seeker relocation schemes.

After the Court upheld the validity of the Council Relocation Decisions in an initial judgment,<sup>87</sup> the Polish and Hungarian governments employed strategies of autocratic legalism to justify the persistent disregard for binding Union law in this respect.<sup>88</sup> In the subsequent infringement procedure, the Court squarely rejected these arguments. Instead of engaging with the selective constitutional interpretations of arts 72 TFEU and

<sup>83</sup> See S Biernat and P Filipiek, 'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* cit., 423 ff.

<sup>84</sup> See L Pech and others 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' cit. 17.

<sup>85</sup> See *supra* section III.

<sup>86</sup> For this notion, D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) *European Law Review* 139, 148 ff.

<sup>87</sup> *Slovakia v Council* cit.

<sup>88</sup> See *supra* section II.2.1.

4(2) TEU, it focused its response on the Relocation Decisions specifically.<sup>89</sup> To that end, the Court revisited the wording and recitals thereof to conclude that the Council, by adopting the Relocation Decisions, intended to leave “wide discretion” to national authorities to determine whether a person may be considered a threat to national security or public order or not.<sup>90</sup> This wide discretion, however, notably applies “in respect of each applicant”, and accordingly, in relation to the individual case concerned.<sup>91</sup>

In this vein, the Court may have stumbled upon a strategy to effectively dispel some of the strategic objectives of autocratic legalism. By recognising, to some extent, the possibility to refuse relocation on a case-by-case basis, the administrative mindset of judges in Luxembourg resonates with fears of national audiences.<sup>92</sup> Whereas this reasoning resolutely opposes arguments of autocratic legalism, namely the disapplication of a measure of binding Union law altogether, the Court’s affirmation of wide discretion afforded to national decision makers rhetorically emphasises the fact that Member States may very well refuse the relocation of third country nationals. Unlike the excessive security-rhetoric endorsed by autocratic legalists, however, the Court effectively recognises that reasonable security concerns are legitimate under Union law, provided they relate to persons individually.

In addition, the Court’s reasoning shifts focus away from principled dissent of national governments to administrative decision-making *vis-à-vis* individuals. In this vein, the Court depoliticises the litigation (albeit by catering to the politicisation of national administrations’ discretionary powers). This will be to the detriment of autocratic legalists, who have a keen interest in politicising Union law.<sup>93</sup> By adopting an administrative reasoning in this regard, the ECJ thus proposes a solution that may resonate with national audiences – at the same time ascertaining its uncompromised authority to authentically interpret Union law, including secondary law. In a Union “based on the rule of law”, the Court highlighted, Member States cannot rely on their responsibilities to safeguard national security or public order to justify their refusal to implement the provisions in the Council Relocation Decisions.<sup>94</sup>

Despite this strategy’s advantages in relation to autocratic legalism, it is no silver bullet solution. The Court’s response is highly contingent on the applicable legal framework, including the existence of pertinent secondary law, and requires a thorough understanding of political preferences among national electorates. In the context of mandatory relocation of asylum seekers, far-fledged opposition among national electorates was rather

<sup>89</sup> Joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2020:257 paras 148 ff.

<sup>90</sup> *Ibid.* para. 158.

<sup>91</sup> *Ibid.* para. 159.

<sup>92</sup> See inter alia E Goździak and P Márton, ‘Where the Wild Things Are: Fear of Islam and the Anti-Refugee Rhetoric in Hungary and in Poland’ (2018) *Central and Eastern European Migration Review* 125, 133 ff.

<sup>93</sup> On this effect, see *supra* section II.2. and the literature mentioned.

<sup>94</sup> *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. paras 139 and 169.

evident. On a more principled note, however, the ECJ has good reason to refuse adjusting its jurisprudence to the whim of national audiences. Judgments of courtesy run the risk of falling into the trap of autocratic legalism once again, namely by showcasing the subjectivity of the ECJ's interpretation of Union law.

## V. CONCLUSION

Autocratic legalism constitutes a method of drafting illiberal policies while benefitting from a mirage of lawfulness in doing so. In the context of safeguards in supranational law, this strategy advocates for specific counter-interpretations of Union law that seek to justify national reform measures in the light thereof. Whereas such strategies have, by and large, failed to convince the Court of Justice, it may be argued that autocratic legalism is not genuinely aimed at resonating with European judges but with wider national audiences of laypersons instead.<sup>95</sup> In this vein, autocratic counter-interpretations may be seen as a strategic effort to undermine the authority of the Court of Justice to authentically interpret safeguards of supranational law with national audiences.

Against this background, it may be reasonable to conclude that there is no ideal judicial response to such tactics. Nonetheless, as the previous investigation has indicated, the ECJ can employ different strategies to tackle autocratic legalism. On the one hand, the Court has taken on the role of a federal constitutional court, resolutely opposing reforms in national systems that would threaten the very foundation of the Union, in particular the value of the rule of law. On the other hand, it has equally endorsed decentralised responses to autocratic legalism. In this regard, the Court effectively left to national authorities the decision as to which consequences should follow from the incompatibility of national autocratic reforms with Union law. In the context of the EAW system, the Court directed this strategy of deference to national courts. In the field of migration law, in contrast, it focussed on the "wide discretion" of administrative bodies. In the latter instance, the Court's response adopts an administrative reasoning whereby its focus lies with the national public officials' decision-making *vis-à-vis* individuals.

This illustrates that the Court may respond in different ways to autocratic legalism. Whereas no approach may be preferable from the outset, some characteristics render certain judicial responses more suitable than others for dispelling the strategic objectives of autocratic legalism. First, it is crucial for the Court to acknowledge the existential threat that reforms pose to safeguards in law, including Union law.<sup>96</sup> In this regard, the Court has come a long way from initial rulings plainly disregarding the systemic implications in the context of the Hungarian judicial reform.<sup>97</sup> Nowadays, the Court appears more than aware of the

<sup>95</sup> For this change of perspective, see M Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis' cit. 430.

<sup>96</sup> See L Pech and others 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' cit. 38 ff.

<sup>97</sup> See equally D Kochenov and P Bárd, 'The Last Soldier Standing?' cit. 262.

systemic implications of autocratic legalism for national legal systems. Where it acknowledges the risk thus posed, second, its interpretation of Union law may provide for standards to flexibly adjust interventions to successive amendments in national law. As the Court's constitutional response to the Polish judicial reforms illustrates, Union law equips judges in Luxemburg with strong arguments to jump to the aid of their national counterparts' independence, even in the light of repeated readjustments in national reforms.

Third, the Court may adjust the temperament of its response to autocratic legalism. In this regard, it may opt for one of two options. It may either counter the formalism of interpretative autocratic legalism by adopting a notably dynamic interpretation. This was the case in the context the Court's acknowledgment of a supranational safeguard of national courts' independence. Such a confrontational judicial response directly opposes the formalism habitually characterising autocratic legalist' counter-interpretations of law. It elucidates the specificities that follow from the autonomy of Union law and the Court's interpretation thereof. Nonetheless, such an approach may fail to dispel autocratic legalism's more strategic efforts, namely, to estrange the ECJ and national audiences.

Alternatively, as the preceding investigation suggests, the ECJ may occasionally acknowledge concerns of national audiences and try to accommodate these interests in its own authentic interpretations of Union law. Its jurisprudence concerning the Relocation Decisions may illustrate that approach. Whereas the Court rejected the excessive security rhetoric promoted by national governments' autocratic legalism, the Court nonetheless acknowledged that reasonable security concerns may be accommodated by virtue of exceptions in Union law. Provided refusal of relocation is justified by virtue of a case-by-case assessment, national authorities may, by virtue of Union law, act in accordance with the presumed preferences of national audiences.