The Jean Monnet Center for International and Regional Economic Law & Justice

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

J.H.H. Weiler, Director
Gráinne de Burca, Director

Jean Monnet Working Paper 2/20

Dimitry Vladimirovich Kochenov & Graham Butler

The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution

Dimitry Vladimirovich Kochenov[1] & *Graham Butler*[2]

Table of Contents

Abstract

A short few days in September 2020 saw an extraordinary turn of events. The Member States of the European Union used the withdrawal of a Member State from the European Union (EU) as a pretext to dismiss a sitting Advocate General (AG) of the Court of Justice of the European Union (CJEU) before the expiration of the duration of her mandate provided for in primary law. The Member States replaced her with another nominee in

[1] Professor of European Constitutional Law and Citizenship, University of Groningen, The Netherlands. This article is part of the RECONNECT project, for which Dimitry Kochenov received funding from the European Union's Horizon 2020 research and innovation program under grant agreement No. 770142.
[2] Associate Professor of Law, Aarhus University, Denmark. The authors are deeply grateful to Gráinne de Búrca and J.H.H. Weiler for speedy and constructive review, as well as to the whole team of the *Verfassungsblog* and, especially, to Max Steinbeis, where the formative, initial reactions to developments were published. It is those remarks that form the basis of this more rounded work. The research assistance of Emma Schulte is gratefully acknowledged.

the absence of a vacancy. This occurred in direct violation of EU primary law, including the cardinal principles of security of tenure and judicial independence. The CJEU had the opportunity to prevent this from occurring; yet did absolutely nothing to prevent it. Instead, the CJEU went out of its way to facilitate the appointment of Mr. Athanasios Rantos in place of AG Eleanor Sharpston. The drama in Three Acts, involving numerous elements – hints of lawlessness; signs of complicity between the Member States and the CJEU; confirmation of the lack of structural independence of the CJEU – has ultimately raised doubts whether the CJEU is legally composed. These September 2020 developments resulted in the dismissal of a member of the Court that the Member States did not want, no matter what the law said. In this article, these cumulative events are analyzed systematically through a legal lens, regrettably confirming a startling omission in the EU legal order – that the EU lacks a structurally independent court of law sitting at its apex, and that the EU legal system is not immune to *ultra vires* Member State interventions. Notwithstanding these developments and a severe pounding to the credibility of the CJEU, there remains a possibility for this deficiency in the EU legal order to be rectified. The CJEU will have to state at some future juncture that decisions within the sphere of Article 253 TFEU are subject to judicial review for procedural irregularities, thus ensuring that the EU is truly a complete system of legal remedies and procedures. In the meantime, questions do linger about the lawful composition of the CJEU with the position of 'AG' Rantos *in situ*, which the CJEU should and must address.

Introduction

By aiding and abetting the Member States to dismiss a sitting Advocate General (AG) from the Court of Justice of the European Union (CJEU, Court) under the pretext of Brexit before the termination of the six-year mandate guaranteed by the EU Treaties – in direct violation of EU primary law[3] – the Court has put itself into a difficult situation. The CJEU has for the first time in its history, openly admitted that it is not structurally independent

[3] Article 253 TFEU. The case law on the structural independence of EU courts is clear: security of tenure is an indispensable criterion here, called by the CJEU a 'cardinal principle' of EU law: e.g. C-619/18, *Commission v Poland* (*Independence of the Supreme Court*), para. 79; C-274/14 *Banco de Santander* ECLI:EU:C:2020:17, [2020] OJ C77/2, para. 59. Graham Butler, *Independence of non-judicial bodies and orders for a preliminary reference to the Court of Justice*, 45 EUROPEAN LAW REVIEW (2020).

from the Member States.[4] In a Union of integration through law, admitting that the *ultra vires* actions of the Member States manhandling the CJEU are *ab initio* outside the purview of judicial review[5] is a very far-reaching finding, translating into consequential harm to the standing and prestige of the EU's judiciary. The fact that this finding was unnecessary makes the situation quite grave.

What happened over the course of just a few short days in September 2020 complicates the message the CJEU is sending to the Member States, especially the 'backsliding' ones.[6] It risks undermining important recent developments in European constitutionalism where the principles of judicial independence and the security of judicial tenure emerged as the crucial elements of the nascent EU-level understanding of the *substance* of the rule of law.[7]

In this article, the events of September 2020 are dissected with regard to the Member State's unlawful dismissal of a member of the CJEU they no longer wanted *in situ* – an unprecedented event for any court of law. Following these events through a detailed legal assessment of the illegal dismissal of AG Eleanor Sharpston, the implications that this will have for the image of the CJEU are critiqued, which naturally, are rather damaging, given that the CJEU is entrusted with serving the project of

[4] The case law on the requirement of structural independence of any judicial authority applicable to the courts and organs of the Member States is voluminous. It is settled case law that bodies lacking structural independence are not only excluded from the dialogue with the CJEU under Article 267 TFEU, but also do not qualify as a 'judicial authority' for the purposes of the EAW system. See, respectively, Case C-274/14 *Banco de Santander* ECLI:EU:C:2020:17, [2020] OJ C77/2 and Joined Cases C-508/18 *OG (Public Prosecutor's office of Lübeck)* and C-82/19 PPU *PI (Public Prosecutor's office of Zwickau)* and Case C-509/18 *PF (Prosecutor General of Lithuania)*. Cf. MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE (Second Edition ed. 2014).

[5] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 26; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 26.

[6] Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 3–47 (2017); Dariusz Adamski, *The social contract of democratic backsliding in the "new EU" countries*, 56 COMMON MARKET LAW REVIEW 623–666 (2019); Dimitry Kochenov, *The EU and the Rule of Law: Naïveté or Grand Design?*, *in* CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 419–444 (Maurice Adams, Ernst Hirsch Ballin, & Anne Meeuwse eds., 2017); Armin von Bogdandy & Michael Ioannidis, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, 51 COMMON MARKET LAW REVIEW 59–96 (2014).

[7] For a detailed analysis, see, LAURENT PECH & DIMITRY KOCHENOV, *Respect for the Rule of Law and Judicial Independence in the Member States of the EU: A Case-Book Assessment of the European Court of Justice's Key Judgments since 2018*' (2020); Tomasz Tadeusz Koncewicz, *The Politics of Resentment and First Principles in the European Court of Justice*, *in* EU LAW IN POPULIST TIMES: CRISES AND PROSPECTS 457–476, 457 (Francesca Bignami ed., 2020).

integration through law.[8] With the Court in effect welcoming the *ultra vires* action by the Masters of the Treaties and confirming its own powerlessness in the fact of Member State pressure, the CJEU has opened Pandora's Box as to questions to its own lawful composition: is Mr. Rantos a 'real' AG? Was AG Sharpston a 'real' AG from the Brexit day on?[9] Such questions are now on the table given the circumstances of a dubiously appointed 'AG' – a potential 'usurper',[10] to use the terminology of English law, where the term is used to describe those 'who have sat on a panel of judges in full knowledge that they lacked authority to do so'.[11]

It is difficult for any EU lawyer to have witnessed events happen as they did, given how used they are to observing illegal appointments and problematic court compositions in the Member States, where the most basic elements of the rule of law are under consistent pressure, especially in Poland and Hungary.[12] Not to see the parallels between these events however would be untenable for an honest legal observer, as it would trigger the emergence of double standards in Europe, with the application of stricter standards of judicial independence to the Member States' courts, compared with the standards applicable to the CJEU. We are compelled to dismiss the place of double standard as untenable. The Court could have easily resolved the matter without putting itself in such

[8] See the volumes of INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, (Mauro Cappelletti, Monica Seccombe, & Joseph H. H. Weiler eds.,)., publishing throughout the 1980s.
[9] Cf. Carl Baudenbacher, *Lawful composition – the EFTA Court's approach*, VERFASSUNGSBLOG (2020), https://verfassungsblog.de/lawful-composition-the-efta-courts-approach/ (last visited Oct 14, 2020).
[10] See Opinion of Advocate General Sharpston, Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Simpson v Council and HG v Commission*, EU:C:2019:977, para. 100, referring to a national court case.
[11] *Fawdry & Co (A Firm) v Murfitt (Lord Chancellor's Department intervening)* [2002] EWCA Civ 643, as cited by Opinion of Advocate General Sharpston delivered on 12 September 2019, EU:C:2019:977, para. 100.
[12] Laurent Pech, *Dealing With 'Fake Judges' Under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG*, 8 RECONNECT WORKING PAPER SERIES (2020); Tomasz T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, 43 REVIEW OF CENTRAL AND EAST EUROPEAN LAW 116–173 (2018); Anna Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 19 GERMAN LAW JOURNAL 1839–1870 (2018); WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); Kriszta Kovács & Kim Lane Scheppele, *The fragility of an independent judiciary: Lessons from Hungary and Poland–and the European Union*, 51 COMMUNIST AND POST-COMMUNIST STUDIES 189–200 (2018); László Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, *in* CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 5–32 (Armin von Bogdandy & Pál Sonnevend eds., 2015).

a position, which was unenviable, but not unprecedented, as the EFTA Court has been there earlier,[13] as will be analyzed below.

The timing for the rule of law problems at the CJEU is particularly unfortunate. Just two years prior to these September 2020 developments, the CJEU delivered its landmark decision in the *Association of Portuguese Judges* case,[14] which started a line of case law allowing the CJEU to gradually put the principle of judicial independence and judicial irremovability at the center of the supranational understanding of the rule of law in the EU. A gradual articulation of the substance of judicial irremovability and independence as the crucial essence of the rule of law in the EU, and as a value on which the EU and the Member States[15] are built, grew out of specific infringement proceedings brought by the European Commission against Poland in the *Polish Supreme Court* and of the *Ordinary Courts* cases,[16] as well as the preliminary references such as *A.K. e.a.*,[17] amongst others. Judicial independence has come to be the crown achievement of the Lenaerts Court,[18] moving the understanding of rule of law in the EU a step further in the direction of a well-articulated and forward-looking substantive and enforceable principle of law.[19] This is particularly so given that the articulation of the principle was

[13] Case E-21/16 *Pascal Nobile v DAS Rechtsschutz-Versicherungs AG* (Decision of the Court, 14 February 2017).

[14] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, [2018] OJ C142/2; Laurent Pech & Sébastien Platon, *Judicial independence under threat: The Court of Justice to the rescue in the ASJP case*, 55 COMMON MARKET LAW REVIEW 1827–1854 (2018).

[15] Matteo Bonelli, *From a Community of Law to a Union of Values: Hungary, Poland, and European Constitutionalism*, 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 793–816 (2017); T. Von Danwitz, *Values and the Rule of Law: Foundations of the European Union - An Inside Perspective from the ECJ*, 21 POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD 1–17 (2018); Marcus Klamert & Dimitry Kochenov, *Article 2 TEU*, *in* THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 22–30 (Manuel Kellerbauer, Marcus Klamert, & Jonathan Tomkin eds., 2019); Lucia Serena Rossi, *Legal Value of Values. Article 2 TEU: Interplay With Other EU Primary Law Provisions and Judicial Remedies (La valeur juridique des valeurs. L'article 2 TUE : relations avec d'autres dispositions de droit primaire de l'Union européenne et remèdes juridictionnels)*, 2020 RÉVUE TRIMESTRIELLE DE DROIT EUROPÉEN (2020).

[16] Case C-192/18 *Commission v. Poland (Independence of Ordinary Courts)* EU:C:2019:924, [2019] OJ C432/5; C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, [2019] OJ C280/9;

[17] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others v Sąd Najwyższy* EU:C:2018:977, [2018] OJ C27/6.

[18] Koen Lenaerts has been the President of the CJEU since 2015.

[19] Case C-791/19 R, *Order of the Court (Grand Chamber) in Commission v. Poland (Disciplinary Chamber of the Supreme Court)* EU:C:2020:277, (8 April 2020). Cf. Laurent Pech, *Protecting Polish Judges from Poland's Disciplinary "Star Chamber"*, 57 COMMON MARKET LAW REVIEW (2020). For more on the newest approach to the interim measures, see Pål Wennerås, *Saving a forest and the rule of law: case C-441/17 R, Commission v. Poland, Order of the Court (Grand Chamber) of 20 November 2017, EU:C:2017:877*, 56 COMMON MARKET LAW REVIEW 541–558 (2019). Cf. Case C-619/18 *Order of the Vice-President of the Court*

accompanied by a significant reinforcement of the interim measures tool at the CJEU's disposal in such cases. With this being asked for by parties before the CJEU, illegal attacks against judicial independence in Member States can now be stopped at their inception, with a clear interim requirement to restore the *status quo ante*.[20] Even if this use of interim measures has not saved the independence of the Polish Supreme Court from a total demolition and collapse, just as the Polish Constitutional Tribunal before it,[21] at the level of principle, the recent developments were of overwhelming significance.[22] It is clear, in other words, that very much has changed in Europe since the CJEU first espoused that the EU is 'based on the rule of law', as it did in its 1986 *Les Verts* judgment.[23] The prior predominantly circular and purely procedural understanding of the rule of law,[24]

---

in Commission v Poland EU:C:2018:852, (19 October 2018); C-619/18 *Order of the Grand Chamber in Commission v Poland* EU:C:2018:1021, (17 December 2018).

[20] The CJEU embarked on the reinvention of interim measures in *Polish Forest* deploying Article 279 TFEU to this end for the first time: Wennerås, *supra* note 19. Cf. Order of the Vice President of the Court of 19 October 2018, *Commission v Poland*, C-619/18; Order of the Grand Chamber of 18 December 2018, *Commission v Poland*, C-619/18. The CJEU interim orders required the Polish authorities to suspend application of relevant provisions of the law on Supreme Court and to ensure that the judges of the Supreme Court concerned by those provisions may continue to perform their duties. The most recent interim measure related to the Rule of Law was issued by CJEU on 8 April 2020 in case C-791/19 R Order of the Court (Grand Chamber) in *Commission v. Poland (Disciplinary Chamber of the Supreme Court)* EU:C:2020:277. Pech, *supra* note 19.

[21] Koncewicz, *supra* note 12; Śledzińska-Simon, *supra* note 12; SADURSKI, *supra* note 12.

[22] Kim Lane Scheppele, Dimitry Kochenov & Barbara Grabowska-Moroz, *EU Values are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39 YEARBOOK OF EUROPEAN LAW (2020).

[23] Case C-294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166, [1986] ECR 1339. Koen Lenaerts, *The Basic Constitutional Charter of a Community Based on the Rule of Law*, *in* THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 295–315 (Miguel Poiares Maduro & Loïc Azoulai eds., 2010); Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union*, JEAN MONNET WORKING PAPER 2009; MARIA LUISA FERNANDEZ ESTEBAN, THE RULE OF LAW IN THE EUROPEAN CONSTITUTION (1999).

[24] Notwithstanding *Opinion 2/13* and other formalistic steps by the CJEU to deploy the principle of the rule of law purely for the sake of the protection of its own supremacy claim: Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:2454, [2014] OJ C65/2. Cf. Bruno De Witte & Šejla Imamović, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court*, 40 ELREV 683–705 (2015); Eleanor Spaventa, *A very fearful Court? The protection of Fundamental Rights in the European Union after Opinion 2/13*, 22 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 35–56 (2015); Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, 38 FORDHAM INTERNATIONAL LAW JOURNAL 955–992 (2015); Dimitry Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34 YEARBOOK OF EUROPEAN LAW 74–96 (2015); Graham Butler, *The Ultimate Stumbling Block? The Common Foreign and Security Policy, and Accession of the European Union to the European Convention on Human Rights*, 39 DUBLIN UNIVERSITY LAW JOURNAL 229–244 (2016).

rightly came to be replaced by a renewed vision,[25] signifying nothing less than a 'constitutional revolution'.[26]

The usual academic criticism of the CJEU's role and mission seemed to be rebated – at least in part – through the forceful recent rule of law case law focusing on the supreme value of judicial independence. The Court is accused of being both activist[27] and not interested in the engagement with the real world, piling stones of poor reasoning and low communicative quality,[28] as well as failing as an independent arbiter with the constant integration goal in mind,[29] if not parading a 'constitutionally unfounded claim to *Kompetenz Kompetenz*',[30] and famous of reasoning from consequences.[31] Yet, the Court has suddenly showed a strong commitment to defending the essential building blocks of classical constitutionalism: judicial independence.

Once the principles that the Court had formulated in such an admirable way, however, was brought closer to home – on itself – the CJEU ducked. In a series of political and judicial steps in September 2020, it ditched one of its own members, while never appearing to remember what it had said so nicely about the 'cardinal' nature of the principle of the security of judicial tenure. Accordingly, the CJEU's handling of its *own* independence and the security of tenure of its *own* members has been a sad story for EU lawyers. The drama in Three Acts, as it unfolded, ticked all the boxes for a respectable

[25] There is already quite some literature on these very recent developments, cf, Tomasz Tadeusz Koncewicz, *The Supranational Rule of Law as First Principle of the European Public Space – On the Journey in Ever Closer Union among the Peoples of Europe in Flux*, 5 PALESTRA 167–216 (2020); Peter Van Elsuwege & Femke Gremmelprez, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, 16 EUROPEAN CONSTITUTIONAL LAW REVIEW 8–32 (2020); Cécilia Rizcallah & Victor Davio, *L'article 19 du Traité sur l'Union européenne : sésame de l'Union de droit - Analyse de la jurisprudence récente de la Cour de justice de l'Union européenne relative à l'indépendance des juges nationaux*, 2019 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 156 (2019); Stanislas Adam & Peter Van Elsuwege, *L'exigence d'indépendance du juge, paradigme de l'Union européenne comme union de droit*, 2018 JOURNAL DEDROIT EUROPÉEN 334–343 (2018); Pech and Platon, *supra* note 14.

[26] PECH AND KOCHENOV, *supra* note 7.

[27] Cf. HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING (1986).

[28] Joseph H. H. Weiler, *Epilogue: Judging the Judges – Apology and Critique*, *in* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 235–254 (Maurice Adams et al. eds., 2013).

[29] Cf. Gareth Davies, *Legislative control of the European Court of Justice*, 51 COMMON MARKET LAW REVIEW 1579–1607 (2014).

[30] Gareth Davies, *Interpretative Pluralism within EU Law*, *in* RESEARCH HANDBOOK ON LEGAL PLURALISM AND EU LAW 323–334 (Gareth Davies & Matej Avbelj eds., 2018).

[31] Joxerramon Bengoetxea, *Reasoning from Consequences from Luxembourg*, *in* EUROPE. THE NEW LEGAL REALISM: ESSAYS IN HONOUR OF HJALTE RASMUSSEN (Henning Koch et al. eds., 2010).

court of law to avoid. What is observed is closer, in all respects, is linked to the scandalous story of the CJEU's own reform, described *con brio* by Alberto Alemanno and Laurent Pech,[32] but goes much further than that.

In what follows, the questionable dismissal of AG Sharpston is delved into by analyzing the events, one Act at a time. The analysis commences with a Brexit prelude, explaining the context in which the challenge to the independence of the CJEU arose, before moving onto the analysis of all the three Acts of the play: the appointment by the Member States of an AG in the absence of any vacancy (Act I). The suspension of all the effects of the questionable appointment by an Interim Measures Order of GCEU Judge Collins in the General Court of the European Union (GCEU), whom acted in line with the recent substantive rule of law case law of the CJEU, is then analyzed as the correct means appropriately resolve the issues at stake (Act II). Finally, the *ex parte* appeal brought by the Member States against the suspensory Interim Measures Order, which was not final, is critiqued (Act III). This includes the coordination between the CJEU and Mr. Rantos, who was immediately sworn into office as a new 'AG' in the height of secrecy, immediately after CJEU Vice-President Silva de Lapuerta set aside the Interim Measures Order of GCEU Judge Collins, which was not final, without notifying AG Sharpston and her legal team of the fact that appeals were brought against the Interim Measures Order of GCEU Judge Collins. Evidently, given the speed in which the new 'AG' was sworn into office, Mr. Rantos, an outsider, appeared to be much better informed about what was going on at the CJEU than AG Sharpston – a sitting, long-standing, and respected member of the CJEU. Given the Orders of the CJEU Vice-President, the GCEU then dismissed all AG Sharpston's actions in substance.[33]

---

[32] Alberto Alemanno & Laurent Pech, *Thinking justice outside the docket: A critical assessment of the reform of the EU's court system*, 54 COMMON MARKET LAW REVIEW 129–175 (2017); Graham Butler, *An Interim Post-Mortem: Specialised Courts in the EU Judicial Architecture after the Civil Service Tribunal*, INTERNATIONAL ORGANIZATIONS LAW REVIEW (2019). For prior reforms, cf. Joseph H. H. Weiler, *The Judicial Après Nice*, *in* THE EUROPEAN COURT OF JUSTICE 215–226 (Gráinne De Búrca & Joseph H. H. Weiler eds., 2001).

[33] Case T-180/20 *Sharpston v Council and Representatives of the Governments of the Member States* (Order of the General Court, 6 October 2020) ECLI:EU:T:2020:473; Case T-184/20 *Sharpston v Court of Justice of the European Union* (Order of the General Court 6 October 2020) ECLI:EU:T:2020:474; Case T-550/20 *Sharpston v Council and Representatives of the Governments of the Member States* (Order of the General Court, 6 October 2020) ECLI:EU:T:2020:475.

We conclude that the implications of the story are truly far-reaching and going beyond a simple loss of face for the Court of Justice, potentially throwing a shadow on the substantive rule of law principles the Court has been working on so hard. As is clear from AG Sharpston's dismissal, the CJEU was working on a set of crucially important principles, but without any intention to be bound by them. The damage done could still be repaired, however, and we suggest some options to get out of the current impasse, where, for the first time, the CJEU could be legitimately suspected of not being lawfully composed. This can be done by the Court, at a given opportunity, making it clear to all that actions by the Member States pursuant to the powers conferred upon them through a common accord in Article 253 TFEU is subject to judicial review for procedural irregularities.

The Brexit Prelude: EU primary law, the Statute of the CJEU, and the rule of law

June 2016 saw a non-binding referendum in the United Kingdom (UK) that carried the majority of the voting public whom decided to 'leave' the EU. The conditions of a potential departure on which a withdrawal would take place were entirely unclear, and not part of the political debate. After domestic legal processes, culminating in the *Miller* case before the UK Supreme Court,[34] the British Parliament voted to give the government the authority to formally notify the Union that it intended to withdraw. Given the existence of a specific withdrawal provision in the EU Treaties – Article 50 TEU – that process initiated the drawn-out disentanglement that commenced in March 2017.[35] This culminated, with legal twists and turns along the way, and a number of delays, in the conclusion of a withdrawal agreement between the UK and the EU in January 2020.[36] This in turn meant that from 1 February 2020, the UK was no longer a Member State. Yet

[34] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Paul Craig, *Miller, EU Law and the UK*, *in* THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND 109–130 (Mark Elliott, Jack Williams, & Alison L. Young eds., 2018).

[35] For initial assessments, KENNETH A. ARMSTRONG, BREXIT TIME: LEAVING THE EU – WHY, HOW AND WHEN? (2017); THE UK AFTER BREXIT: LEGAL AND POLICY CHALLENGES, (Michael Dougan ed., 2017); THE LAW AND POLITICS OF BREXIT, (Federico Fabbrini ed., 2017); CARLOS CLOSA MONTERO, SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EUROPEAN UNION: TROUBLED MEMBERSHIP (2017).

[36] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7. Cf. Paul Craig, *Brexit a drama: the endgame - Part I*, 45 EUROPEAN LAW REVIEW 163–182 (2020).

that did not mean the *de facto* termination of AG Sharpston's membership of the CJEU. On the contrary, the EU Treaties are crystal clear on the distinction between different types of officeholders at the CJEU.

There are two types of officeholders that are members of the CJEU – judges and AGs – that are, and have always, been treated differently by EU primary law. Whilst Article 19(2) TEU states that the CJEU 'shall consist of one judge from each Member State',[37] that stipulation does not apply to AGs. Rather, the EU Treaties make clear, in the same article, that the CJEU is 'assisted by [AGs]', for which no link to Member States is made. Nor are any nationality requirements made as to the initial appointment or continuing membership of any member of the CJEU. Notwithstanding this, there appears to have been a view from within the CJEU, shared by the Member States that the formal withdrawal of the UK could result in an AG's early termination. The urge to purge a British-Luxembourgish AG whose tenure at the CJEU, by law, is *not* connected to a Member State, nor her nationality. The Member States, dismissing an AG before the expiration of her term of office on the CJEU in September 2020, demonstrated that they are ready to humiliate the CJEU by allowing post-Brexit frustrations take the place of EU primary law. Thus, the rule of law stands replaced with the political whims of the Member States, with the consent of the CJEU.

The following question can therefore be asked, what is the worth of the core aspects of EU rule of law and judicial independence, when the Member States are willing to alter the composition of the CJEU and subsequent use of the EU Treaties by a political declaration, to try and terminate the appointment of a member? As Somek has famously claimed, one of the key principles of EU law is that the law is never clear,[38] as exemplified, for instance, in the preliminary ruling procedure. This might indeed be true of many sub-fields of EU law, but has not until now applied to the appointment and dismissal of members of the CJEU. The EU Treaties and the Statute of the CJEU are abundantly clear on the matter, yet, the Member States were ready to mingle in this clarity, allowing

[37] Resulting in Judges Vajda and Forrester vacating their offices from the CJEU and GCEU in January 2020.
[38] Alexander Somek, *Is Legality a Principle of EU Law?*, *in* GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES 53–76 (Stefan Vogenauer & Stephen Weatherill eds., 2016).

political declarations – like in the times of the Luxembourg Compromise – to take the place of the EU Treaties and requiring *contra legem* interpretation of the latter.[39]

The facts of the matter were straightforward, as analyzed in a clear and convincing way by both Halberstam and Pech in the pages of the *Verfassungsblog* before the eventful days in September 2020.[40] AG Sharpston should have remained a member of the CJEU until the expiration of her six-year mandate, until October 2021, no matter what the Member States proclaimed. Moves to the contrary would be in breach of the EU primary law, and would constitute a most worrisome example of outright dismissal of one of the crucial elements of the rule of law, a core value of the Union: security of tenure of the members of courts. Any authoritative analysis of the rule of law's core elements, from Lord Bingham's much-quoted book,[41] to the Venice Commission's Rule of Law Checklist,[42] make this simple fact undisputable. Worse still, the CJEU's own fundamental recent rule of law jurisprudence honors security of tenure and the prevention of undue dismissals of the members of the judicial branch.[43] The principle of irremovability has been elevated to a principle of 'cardinal importance'.[44] In line with academic doctrine and global good practice, the CJEU previously found that 'the principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that

[39] Council of the European Union, 'Declaration by the Conference of the Representatives of the Governments of the Member States on the Consequences of the Withdrawal of the United Kingdom from the European Union for the Advocates-General of the Court of Justice of the European Union', XT 21018/20 (29 January 2020).

[40] Daniel Halberstam, *Could there be a Rule of Law Problem at the EU Court of Justice? The Puzzling Plan to let U.K. Advocate General Sharpston Go After Brexit*, VERFASSUNGSBLOG (2020), https://verfassungsblog.de/could-there-be-a-rule-of-law-problem-at-the-eu-court-of-justice/ (last visited Oct 15, 2020); Laurent Pech, *The Schrödinger's Advocate General*, VERFASSUNGSBLOG (2020), https://verfassungsblog.de/the-schroedingers-advocate-general/ (last visited Oct 15, 2020). Cf. also Tobias Crone, *That Depends: On Eleanor Sharpston's Position as AG, Legal Complexities and Effective Interim Proceedings*, VERFASSUNGSBLOG (2020), https://verfassungsblog.de/that-depends/ (last visited Oct 15, 2020).

[41] TOM BINGHAM, THE RULE OF LAW (2010). This book is where Lord Bingham expanded on his highly referenced work in: Lord Bingham, 'The Rule of Law' (2007) 66(1) CLJ 67. Tom Bingham, *The Rule of Law*, 66 THE CAMBRIDGE LAW JOURNAL 67–85 (2007).

[42] VENICE COMMISSION OF THE COUNCIL OF EUROPE, *Rule of Law Checklist* (2016).

[43] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, [2018] OJ C328/22, para 64; C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, (24 June 2019), para 75.

[44] Case C-192/18 *Commission v. Poland (Independence of Ordinary Courts)* EU:C:2019:924, [2019] OJ C432/5, para 115.

mandate is for a fixed term'.[45] *A fortiori*, this principle applies to all the courts in the EU, including the CJEU, which is fully bound by the rule of law. This principle fully determines the position of all the members of the CJEU, including the Advocates General, who are full members of the CJEU, and have the same guarantees of independence as those of its members.

A healthy system of the separation of powers presupposes conflicts about how far the influence of one branch over the others would stretch. In the EU, with its long-established principle of institutional balance, safeguarding the independence of the CJEU – the possible arbiter in case of any inter-institutional conflict – is of particular importance.[46] The rule of law, a constitutional principle of the Union,[47] has long been understood to imperatively demand that all the decisions of the institutions and organs of the Union (as well as the Member States) should be grounded in the law. These basics have not been observed in the case of the appointment by the Member States of Mr. Rantos to replace AG Sharpston, whose term of office mandated in the EU Treaties had not expired.

The breach of the rule of law was evident here. This was so because there was no vacancy on the CJEU. A new AG can, obviously, only be appointed if there is a vacancy. Since no vacancy has arisen under Article 5 and 6 of the Statute of the CJEU, it is difficult to see on what ground Greece (with the support of all Member States) sought a candidate to become an AG to replace AG Sharpston. Nonetheless, the replacement procedure had already started in January 2020 through the instigation of the President of the CJEU.[48] For why, this is puzzling, as the Statute was unambiguous, and very explicit on how a vacancy arises at the CJEU. It states that a 'vacancy shall arise on the bench' where there is a 'normal replacement' (end of term of office), 'death', or a member of the CJEU

[45] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, (24 June 2019), para 76.
[46] Koen Lenaerts, *On Judicial Independence and the Quest for National, Supranational and Transnational Justice*, *in* THE ART OF JUDICIAL REASONING: FESTSCHRIFT IN HONOUR OF CARL BAUDENBACHER 155–174 (Gunnar Selvik et al. eds., 2019).
[47] Pech, *supra* note 23.
[48] Decision of the President of the Court of Justice of 31 January 2020 as mentioned in Case T-184/20 *Sharpston v Court of Justice of the European Union* (Application lodged 9 April 2020).

'resigns'.[49] These clearly enumerated grounds provide an exhaustive list of reasons for a vacancy to arise and prohibit the deprivation of an AG of the office without a unanimous vote of all the judges and other AGs stating that the person concerned 'no longer fulfils the requisite conditions or meets the obligations arising from the office'.[50] The Statute combines the principle of irremovability with the safeguard of judicial self-governance at the supranational level. None of these events has occurred with respect to AG Sharpston.

In the absence of any reference to a 'UK AG' in Article 19(2) TEU, no Declaration connecting AG Sharpston's position to a particular (former) Member State, let alone Article 101 of the Withdrawal Agreement (WA),[51] including the AG among 'Members of the Institutions' merely for the purposes of Title XII of the Agreement,[52] could be read in such a way as to alter Article 19(2) TEU and the Statute of the CJEU. Claiming the contrary would amount to suspending key aspects of the rule of law by way of interpretation aids – an unlikely move in any properly functioning constitutional system. None of the EU primary law grounds for the duties of the AG to end applied to AG Sharpston.

Filling the illegally created vacancy with a new AG has thus amounted to a direct violation on the rules of filling vacancies on the CJEU. The Member States thereby undermined the rule of law and, in particular, the principles of security of tenure and irremovability, the importance of which is constantly underlined in the recent CJEU case law. The setting aside of primary law happened with no legal basis or even a reference to a legal basis, besides an allusion to AG Sharpston in the Withdrawal Agreement as a 'member of institutions' 'nominated, appointed, or elected in relation to the UK's membership of the Union'.[53] The clear problem in this regard – and Halberstam has rightly seen it too[54] – is that unlike with the judges, once again, nowhere do the EU Treaties or the Statute of the CJEU, beyond mere informal understandings declarations, connect positions of AGs with specific Member State. The informal understandings and

[49] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Protocol No 3 on the statute of the Court of Justice of the European Union (Protocol No 3 on the statute of the Court of Justice of the European Union) [2008] OJ C 115/210.
[50] Protocol No 3 on the statute of the Court of Justice of the European Union [2008] OJ C 115/210, art 6.
[51] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/6.
[52] Halberstam, *supra* note 40.
[53] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/6, art 50(3).
[54] Halberstam, *supra* note 40.

declarations cannot possibly alter the EU primary law in force, let alone add an additional ground of removing a sitting AG from the bench before a six-year term-of-office expires.

Act I: Member States move to dismiss AG Sharpston, and replace her with Mr. Rantos (Brussels, Sept 2, 2020)

Dismissing an AG without a legal basis based on a *contra legem* interpretation of the law triggered by a political declaration is not at all in accordance with the law, since *all* the relevant black letter rules, which are very clear and straightforward, were violated. In a remarkable move, on 2 September 2020, the Member States appointed an AG put forward by Greece,[55] who was to enter into office on 7 September 2020 if Member States got their way. This was done, in the ordinary way, by 'common accord of the governments of the Member States' ('the 2 September 2020 activity'), as set out in both Article 19 TEU and Article 253 TFEU – provisions that permit the Member State to act within the EU legal order.[56] But this was no ordinary appointment. In their decision, the Member States stated that Mr. Athanasios Rantos was appointed AG 'following the withdrawal of the United Kingdom from the EU'. Therefore, the decision was, like Janus, a two-faced one: to appoint a new member, by dismissing a sitting member. The problem was that the office to which Mr. Rantos was being appointed was not vacant. AG Sharpston was still *in situ*, and would remain there until October 2021. In effect, what the Member States were doing was an attempt to sack a member of the CJEU. Urgent measures were therefore necessary to attempt to save the legitimacy and integrity of the CJEU.

With the 2 September 2020 activity, the Member States *acted* and *pretended* as if there was a vacancy, when there was none. To attempt to rid the CJEU of one of its AGs was a profound misreading; or worse, a deliberate obfuscation of the EU Treaties and the Statute of the CJEU – a wholly unacceptable occurrence. Whilst nationality and citizenship was officially *irrelevant*, by law, for the dismissal and thus *not* leading to the dismissal right away on the date of the withdrawal of the UK from the EU, it was *de facto*

---

[55] Council of the European Union, *EU Court of Justice: three judges and an advocate-general appointed* (2020), http://www.consilium.europa.eu/en/press/press-releases/2020/09/02/eu-court-of-justice-three-judges-and-an-advocate-general-appointed/ (last visited Sep 19, 2020).

[56] Consolidated Version of the Treaty on European Union (TEU) [2016] OJ C202/1, Article 19(2) TFEU, para 3; Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47, Article 253 TFEU.

been deployed at the political whim of the Member States that was connected to Brexit. AG Sharpston's last reappointment to the Court was in 2015. Yet according to the Member States on foot of their 2 September 2020 activity, Brexit must mean Brexit. Yet, from a legal perspective, political catchphrases and slogans cannot commandeer and override EU primary law, which is the basic constitutional charter of the Union.[57]

The 2 September 2020 activity of the Member States demonstrated a clear breach of the principles of independence and irremovability, failing to meet the 'cardinal' (in the CJEU's own formulation) principles of the judiciary, in breach of Article 19 TEU. In recent years, the CJEU has built up rich case law on judicial independence from *Association of Portuguese Judges* through to *Commission v Poland (Ordinary Courts)*, *Commission v Poland (Supreme Court)*, *A.K. and others*, and *Banco de Santander*.[58] This solid line of case law, fully vindicated in light of the apparent rule of law challenges that are presently seen across Europe, made clear that the dismissal of a member of national judiciary or quasi-judicial body in the middle of the term is a violation of the law. In the CJEU's own recent case law, breaching the irremovability of members of judicial bodies was an explicit violation, and could not be compatible with EU law.

The erratic and nihilistic behavior of the Member States on 2 September 2020 demonstrated that the painfully elaborated principles of judicial independence and irremovability were beneath them, and sent a *carte blanche* message to the backsliding Member States of the Union, effectively implying that the EU Treaties do not matter. In Hungary and Poland, such behavior of hallowing-out courts is already a reality. There has been ample evidence of judges being dismissed, threatened, and reprimanded for acting independently and following the law. Illegal appointments consequently flourished. In an unusual way, this 2 September 2020 activity was the Member States ordering the CJEU to follow some national courts down this slippery path, casting doubt on the legitimacy of the whole fight for the rule of law in the EU – let alone the noble promises of Article 2

[57] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166, [1986] ECR 1339, para 23.
[58] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, [2018] OJ C142/2; C-192/18 *Commission v. Poland (Independence of Ordinary Courts)* EU:C:2019:924, [2019] OJ C432/5; C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, [2019] OJ C280/9; Joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others v Sąd Najwyższy* EU:C:2018:977, [2018] OJ C27/6; C-274/14 *Banco de Santander* ECLI:EU:C:2020:17, [2020] OJ C77/2.

TEU. The law matters, and the essence of the rule of law consists precisely in a crude reality when the almighty powerful – the Monarchs, the Member States, the 'people' – encounter a legal obstacle preventing them from acting as they please.

Moreover, the 2 September 2020 activity opened up the grim Pandora's Box of outright bullying of a member of the Court by the Member States in the midst of her tenure guaranteed by the EU Treaties. All the attempts of AG Sharpston to find a reasonable and *legal* solution to the situation were ignored by the Member States.[59] By openly defying the law and proceeding with an illegal appointment to the CJEU when no vacancy was to be filled, the Member States demonstrated how much their collective action could be removed from the most basic principles of law in its functioning. If the Member States were to get their way, on 7 September 2020, on the bench of the CJEU stood a legally questionable member, whose right to act as belonging to the institution as a lawfully appointed member of the CJEU was not beyond doubt.

In the years immediately past, the EFTA Court had experienced embarrassing incidents of EFTA states meddling, namely Norway, in the reappointment of a judge put forward by another EFTA state who was the sitting President.[60] The EFTA state ultimately capitulated and consented to the reappointment. Years later, having not learnt its lesson, Norway again attempted to meddle with the rules governing the judicial appointments to the EFTA Court by only putting forward a candidate for reappointment for a curtailed term of just three years, rather than the usual six years term required by law. EEA law prohibited such curtailed terms, and judges could only be appointed for full terms only.[61] This action rightly backfired again. During ongoing proceedings at the EFTA Court during the latter controversy, the EFTA Court had to formally declare, at the request of the referring body, that it was legally constituted, albeit only one judge and two *ad hoc* judges, to continue deliberating on a case whilst political developments attempted to

[59] For this, see the reporting of Joshua Rozenberg, *Gross Injustice at the Court of Justice*, THE CRITIC MAGAZINE (2020), https://thecritic.co.uk/issues/september-2020/gross-injustice-at-the-court-of-justice/ (last visited Sep 19, 2020).
[60] CARL BAUDENBACHER, JUDICIAL INDEPENDENCE: MEMOIRS OF A EUROPEAN JUDGE 318–321 (2019). On the independence of the EFTA Court, and the carry-over effect of independence in the EFTA pillar, cf. Graham Butler, *Mind the (homogeneity) gap: Independence of referring bodies requesting advisory opinions from the EFTA Court*, 44 FORDHAM INTERNATIONAL LAW JOURNAL (2020).
[61] BAUDENBACHER, *supra* note 60 at 393–410.

hamper its functioning.[62] In a similar vein in September 2020, the CJEU dealt with comparable issues of attempted meddling by Member States in the constitutional framework of the CJEU's membership, trying to fire and hire a member as they pleased, pretending not to be bound by law.

In trying to resolve the EU constitutional conundrum, thinking quickly turned to how a gross violation of the rule of law could be averted – to stop the firing of AG Sharpston – and to prevent Mr. Rantos from becoming an unnecessary and illegal replacement AG – in such a short space of time. In recent years, the CJEU had built up extensive case law on interim measures in rule of law matters, in particular, the abuse of power in Poland, where appointments and dismissals were made with no regard to the principles going to the very essence of Article 19 TEU. On a procedural level, for an interim measures request to be made before the GCEU, there had to be a substantive case to be heard so that an interim measures application could even be considered. AG Sharpston and her legal representatives had the possibility to challenge the legality of the 2 September 2020, coupled with an accompanying interim measures application[63] to temporarily suspend the effects of the 2 September 2020 activity as far as it concerned Mr. Rantos (thus leaving intact unquestionably lawful appointments of the other members, two judges, to the CJEU, given the existence of two vacancies for two judgeships). At the time, the current authors advocated precisely for this type of approach to safeguard the rule of law in the EU.[64]

The highest bar to reach in order for an interim measures application to be given consideration by the GCEU, even temporarily, is that of 'urgency'. Given that the appointment was to take effect the following week on 7 September 2020, time was of the essence. Not only would AG Sharpston lodging an interim measures application be for the saving of her own office, but also her potential actions would be ensuring that Member States must follow the rules, which they were less than diligent at following.

---

[62] Case E-21/16 *Pascal Nobile v DAS Rechtsschutz-Versicherungs AG* (Decision of the Court, 14 February 2017).
[63] Consolidated Version of the Rules of Procedure of the General Court [2015] OJ L105/1.
[64] Dimitry Kochenov & Graham Butler, *It's Urgent: The Illegal Appointment of a New Advocate General and What Can be Done to Uphold the Rule of Law in the EU*, VERFASSUNGSBLOG (2020), https://verfassungsblog.de/its-urgent/ (last visited Oct 15, 2020).

Act II: Proceedings by AG Sharpston, and the Interim Measures Order of GCEU Judge Collins (Luxembourg, Sept 4, 2020)

Lodging an action for annulment against the 2 September 2020 activity of the Member States, with a coupling interim measures request for suspensory effects of the activity as far as it concerned Mr. Rantos, is exactly what AG Sharpston did. For the first time ever, a sitting member of the CJEU sought judicial protection from the GCEU, in light of an illegal attempt to replace her as a member of the CJEU. That same day as her application was lodged, on Friday 4 September 2020, Judge Anthony Collins of the GCEU, the judge hearing the application for interim measures, as per Article 157(4) of the Rule of Procedure of the GCEU,[65] ordered the suspension of operation and all consequential effects of the 2 September 2020 activity, in so far as it purported to appoint Mr. Rantos to the office of AG.[66] The Order of GCEU Judge Collins temporarily suspended the 2 September 2020 activity by the Member States misguidedly impinging on the independence of the CJEU.

The significance of this development was difficult to overestimate. The interim measures procedure had, prior to this, never been used before to suspend, with immediate effect, an undermining effort by the representatives of the governments of Member States against the principle of the irremovability of a sitting member of the CJEU whose mandate has not expired. Judge Collins confirmed in his Order of 4 September 2020 that in the case, '[a]s of the date of the making of this order[,] each of these eleven posts are occupied'.[67] In this context, reasoned Judge Collins, the appointment, should it go ahead, would effectively 'terminate [AG Sharpston's] mandate' before the term she was appointed to had expired.[68]

The consequences of having a member of the CJEU whose appointment was questionable, if Mr. Rantos proceeded to be appointed to the Court, also played a role in the Order of GCEU Judge Collins. In explaining his Order, which lasted until he could

[65] Ordinarily, it is the GCEU President that hears interim measures applications, or where necessary, the GCEU Vice-President. Where neither are available, it then turns to a President of one of the chambers. At the time, Judge Collins was President of the Third Chamber of the GCEU.
[66] Case T-550/20 *Order of the Judge Hearing Applications for Interim Measures in Sharpston v Council and Representatives of the Governments of the Member States* EU:T:2020:416, (4 September 2020).
[67] ibid, para 4.
[68] ibid, para 7.

determine the interim measures application itself,[69] he laid special emphasis on the criterion of the proper administration of justice. Specifically, he stated that '[a]s for the criterion of the proper administration of justice, the negative consequences of replacing a lawfully appointed office holder by someone whom may ultimately be deemed to have been appointed unlawfully, are self-evident. Such a scenario is not in the interests of the applicant nor in those of her possible successor. Nor, since such a result would generate challenges as to the composition of the [CJEU], thereby impugning the validity of its judgments, is it in the interests of the application of the rule of law in the European Union not to accede to this application'.[70]

The Order of GCEU Judge Collins fitted within the growing practice of the necessity at the EU courts to use the interim measures tools at its disposal to safeguard the rule of law. The CJEU has previously effectively deployed and constantly perfected the interim measures with respect to Poland, as detailed above, which resulted in the curtailment in their mandates established by law with a backfiring force.[71] The CJEU also made a direct connection between the cardinal principle of irremovability of judges as an essential part of guaranteeing the independence of the judicial branch and the values of Article 2 TEU on which the Union is built.[72]

The connection being made between this attempt at the Member States sacking a member of the CJEU on the one hand; and rule of law challenges in Member States on the other hand, is indeed fully legitimate. There is no room for double standards as far as the requirements of the Articles 2 and 19 TEU as well as Article 47 CFR go. The EU itself is unquestionably bound by such requirements as much as any national bodies in Member States. In this context, cutting the mandate of a member of the CJEU without any legal basis in the EU primary law is a violation as significant as the one the CJEU prevented in

[69] Which, as will become apparent with Act III, he never had the opportunity to do.
[70] Case T-550/20 *Order of the Judge Hearing Applications for Interim Measures in Sharpston v Council and Representatives of the Governments of the Member States* EU:T:2020:416, (4 September 2020), para 13.
[71] Referring to the 'serious damage' to the EU's judiciary, which is 'also likely to be irreparable' (para 70), should the legally established mandates of the judges of the Supreme Court be reduced. Case C-619/18 R *Order of the Court in Commission v Poland (Independence of the Supreme Court)* EU:C:2018:1021 (17 December 2018).
[72] Klamert and Kochenov, *supra* note 15.

the *Commission v. Poland (Independence of the Supreme Court)*.[73] The EU Treaties and the Statute of the CJEU protected AG Sharpston's mandate against illegal actions by the representatives of the governments of the Member States in the same way as it does for members of national courts. The *illegalities* are very clearly analogized, in that such actions are threats to independence, whatever the motivation. A 'cardinal' principle cannot have two meanings, protecting judicial independence and irremovability at the national level, while protecting none at EU level.

Why Member States forcefully acted in such a manner like their 2 September 2020 activity is uncertain. In the Order of GCEU Judge Collins of, it was alluded to the fact that Article 50(3) TEU is of disputed interpretation.[74] Notwithstanding the lodging of this new case with a request for interim measures, the prior actions of the Council and the Conference of the Representatives of the Governments of the Member States were too subject to ongoing proceedings before the GCEU at the time.[75] The issues prior to the 2 September 2020 activity, that led to the third case at issue, *Sharpston v Council and Representative of the Governments of the Member States*,[76] could have been resolved through ordinary judicial processes, had Member States acted diligently. Instead, the Member States took a heavy-handed approach by proceeding to attempt to appoint a new AG, presenting the applicant with a *fait accompli*, thus rendering the other proceedings irrelevant.[77] It is no wonder that the only means of redress for AG Sharpston was judicial protection provided by the GCEU. More generally, it had previously been accepted that AG Sharpston could remain a member of the CJEU after Brexit had formally occurred given the aforementioned disconnect between judges and AGs in their legal status, despite both being full members of the Court. Indeed, AG Sharpston had issued seven Opinions

---

[73] C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, [2019] OJ C280/9.
[74] Case T-550/20 R *Order of the Judge Hearing Applications for Interim Measures in Sharpston v Council and Representatives of the Governments of the Member States* EU:T:2020:416, (4 September 2020), para 11.
[75] Case T-180/20 *Sharpston v Council and Representatives of the Governments of the Member States* (Application lodged 7 April 2020); Case T-184/20 *Sharpston v Court of Justice of the European Union* (Application lodged 9 April 2020).
[76] Case T-550/20 R *Order of the Judge Hearing Applications for Interim Measures in Sharpston v Council and Representatives of the Governments of the Member States* EU:T:2020:416, (4 September 2020).
[77] Case T-180/20 *Sharpston v Council and Representatives of the Governments of the Member States* (Application lodged 7 April 2020); Case T-184/20 *Sharpston v Court of Justice of the European Union* (Application lodged 9 April 2020).

since then.[78] It was therefore completely mystifying why the Member States tried to curtail the appointment of a member of the CJEU in such a brazen manner. The new AG could have been appointed already to take up office from October 2021, on the expiry of AG Sharpston's term of office, without any legal difficulty.

It must be remembered that the Interim Measures Order of GCEU Judge Collins of 4 September 2020 merely ensured nothing could change on 7 September 2020, when Mr. Rantos was to enter into office. As succinctly put by Judge Collins, the issues at stake in the case required 'detailed and comprehensive argument before the judge hearing the application for interim measures before the application for interim measures can be ruled'.[79] Its effect was a suspensory measure that maintains the status quo until the interim measures application was fully dealt with.[80] The defendants – the Council and the Representatives of the Governments of the Member States – were given until 11 September 2020 to submit their written observations on the interim measures application to Judge Collins. The appointment of Mr. Rantos to the position of AG, could therefore not happen on the date announced in the press release on the Council's website on 2 September 2020, which was meant to be Monday 7 September 2020. The Order of GCEU Judge Collins was of crucial significance for the protection of European judiciaries at both EU- and Member State-level, ensuring compliance with the principles of Article 19 TEU in the face of an arbitrary undermining effort against the mandates of the members of the judiciary.

[78] Case C-238/19 *EZ v Federal Republic of Germany, represented by the Bundesamt für Migration und Flüchtlinge* EU:C:2020:404, (28 May 2020), Opinion of AG Sharpston; C-693/18 *CLCV and others (Invalidation device on diesel engine)* EU:C:2020:323, (30 April 2020), Opinion of AG Sharpston; C-743/18 *Elme Messer Metalurgs* EU:C:2020:303, (23 April 2020), Opinion of AG Sharpston; C-681/18 *JH v KG* EU:C:2020:300, (23 April 2020), Opinion of AG Sharpston; C-639/18 *KH v Sparkasse Südholstein* EU:C:2020:206, (12 March 2020), Opinion of AG Sharpston; C-575/18 P, *Czech Republic v Commission*, EU:C:2020:205, (12 March 2020), Opinion of AG Sharpston; C-276/18 *KrakVet Marek Batko* EU:C:2020:81, (6 February 2020), Opinion of AG Sharpston.

[79] Case T-550/20 *Order of the Judge Hearing Applications for Interim Measures in Sharpston v Council and Representatives of the Governments of the Member States* EU:T:2020:416, (4 September 2020), para 12.

[80] ibid, para 8.

Act III: Orders of the CJEU VP Silva de Lapuerta, AG Sharpston dismissed, and the secret swearing in of Mr. Rantos (Luxembourg, Sept 10, 2020)

The day after the Order of GCEU Judge Collins was made, on 5 September 2020, both the Council and the representatives of the governments of the Member States quietly lodged an appeal against the Order of GCEU Judge Collins. The appeal was filed on an *ex parte* basis. No notice of this appeal was given to AG Sharpston, and nothing was publicly disclosed until it was too late. Yet Mr. Rantos was obviously aware of the appeal and its likely outcome, as attested by the fact that he was sworn-in as an 'AG' immediately after the Orders of the Vice-President of the CJEU in the *ex parte* appeal were delivered: pointing to clear complicity between parties on Kirchberg plateau, unbeknownst to AG Sharpston.

On the morning of 10 September 2020, without formal prior notice or publicity that appeal proceedings were brought against the Order of GCEU Judge Collins brought by the Council and representatives of the Governments of the Member States; the CJEU Vice-President, Judge Rosario Silva de Lapuerta delivered two Orders,[81] setting aside the Interim Measures Order of GCEU Judge Collins. This was a watershed moment for the independence of the CJEU. The CJEU, through its Vice-President, agreed to dismiss its own sitting member without even notifying AG Sharpston of the appeal against the suspensory order protecting her tenure guaranteed in the EU primary law. The CJEU did so by arguing, effectively, that the Member States could indeed dismiss members of the CJEU at will, and that such decisions were beyond judicial review.

AG Sharpston's fight for the independence of the CJEU, according to very CJEU through its Vice-President, had 'prima facie' 'no prospect of success'.[82] AG Sharpston was thus dismissed, notwithstanding her apparent security of tenure, thus in direct breach of Article 253 TFEU. The first time AG Sharpston heard of the mere existence of the appeal that was brought was when the CJEU Vice-President set aside the Interim Measures

[81] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020); Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020).

[82] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 29; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 29.

Order of GCEU Judge Collins on the morning of 10 September 2020, whilst her replacement was being sworn into office. In absence of AG Sharpston, but with Mr. Rantos on stand-by, ready to take the oath,[83] the CJEU Vice-President ruled that the appeal brought by the Council and representatives of the governments of the Member States was admissible. AG Sharpston was not presented with an opportunity to present written or oral argument before the CJEU on the appeal that was brought in total secrecy.

These Orders of the CJEU Vice-President omit mentioning that the Interim Measures Order of GCEU Judge Collins was not final, or taking account of the reasonable deadline that he set, within his mandate as per Article 157(1) of the Rules of Procedure of the GCEU, for the respondents to submit observations. The deadline that Judge Collins set for 11 September 2020 had not even expired. Nonetheless, the CJEU Vice-President ruled that AG Sharpston did not have a 'prima facie case' in relation to the main case in which the Interim Measures Order by GCEU Judge Collins had been issued.[84] She found that Judge Collins erred in law,[85] since the activity of 2 September 2020 in question under Article 253 TFEU was adopted by the representatives of the governments of the Member States, and not the Council,[86] on the assumption that no case can, *per se*, be brought against the decisions of the Member States not meeting in Council or the European Council. The CJEU Vice-President thus ruled as if Article 253 TFEU did not require *expressis verbis* that the appointments be done for 'six years'.

More puzzlingly, while the representatives of the governments of the Member States were deemed to be beyond the law, their actions beyond the scope of judicial review, they did – as seen from the Orders of the CJEU Vice-President – have legal standing to lodge

[83] C Frati, 'Coup de théâtre à la CJUE' (*Paperjam* 10 September 2020) <https://paperjam.lu/article/coup-theatre-a-cjue>.
[84] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 22; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 22.
[85] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 29; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 29.
[86] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 24; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 24.

an appeal, and thus could sue, whilst simultaneously having no capacity to be sued. The CJEU Vice-President did not appear to have been bothered by such a contradiction. If the 2 September 2020 activity were not to be reviewable according to her reading, then it would not follow at all that the representatives of the governments of the Member States would even have the capacity to lodge an appeal. Yet seeing no issue in their standing, the CJEU Vice-President found that the acts of the representatives of the governments of the Member States could not be subjected to judicial review, given they fall outside the scope of Article 263 TFEU.[87] This was despite the fact that the Member States were operating within the scope of the powers conferred in the EU Treaties, namely, Article 253 TFEU.

To reinforce the claim of the *prima facie* inadmissibility of AG Sharpston's case before the GCEU, the CJEU Vice-President further relied on *Bangladesh Aid*,[88] an external relations law case to claim that 'representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the courts of the Union'.[89] The argument however appears faulty on the face of it, since the representatives of the governments of the Member States would obviously be limited to appointing eleven AGs, as Judge Collins rightly pointed in his Order. In the absence of a vacancy, the representatives of the governments of the Member States cannot legitimately refer to Article 253 TFEU to appoint yet another AG if the consequence is undoing the previous appointment, in direct breach of the six-year term of office established by that very provision.

In other words, the CJEU Vice-President failed to make clear that the representatives of the governments of the Member States simply *did not have the power* to appoint any AG legally using Article 253 TFEU without the direct breach of the EU Treaties, as long as a vacancy had not arisen. The reasoning offered by the Orders thus

---

[87] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 28; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 28.

[88] Joined Cases C-181/91 and C-248/91 *Parliament v. Council and Commission* EU:C:1993:271, [1993] ECR I-3685. Cf. Luca Pantaleo, *Bangladesh Aid (Joined Cases C-181/91 and C-248/91), in* EU EXTERNAL RELATIONS LAW: THE CASES IN CONTEXT (Graham Butler & Ramses A. Wessel eds., 2021).

[89] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 26; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 26.

authorizes abuse of power by the Member States in the cases where the scope of action taken by their common accord should be very specific and clearly articulated in the EU Treaties. Under Article 253 TFEU, Member States are acting in a capacity that the EU Treaties give them the competence to do so, and is not just an exercising of *ad hoc* actions outside of the EU legal framework. Powers conferred upon the Member States under Article 253 TFEU must be considered to be within the spectrum of what the EU Treaties, at various junctures, are called 'institutions, bodies, offices and agencies'. It is incorrect to read the EU Treaties that specifically invests powers can be absolved of any review whatsoever. Yet the CJEU Vice-President appeared certain of the CJEU's powerlessness in the face of a decision of the Member States taken in direct breach of this provision, and proceeded with taking the final decision to set aside the suspensory Interim Measures Order of GCEU Judge Collins.[90] It is submitted that this could not be the view of the Court, and the Court would not hold so, if it got to hear the case as a whole.

The Orders of the CJEU Vice-President was based on a presumption repugnant to EU primary law, which consists in the lack of independence of the CJEU and non-applicability of the principle of irremovability to the members of the CJEU. This presumption is flawed and does much harm to the institution. Instead of striving to ensure that the CJEU meets the high standard of judicial independence and irremovability of judges established in its own case law, the CJEU Vice-President precisely renounced those principles, which the CJEU had otherwise been quite successful in elucidating in a line of recent judgments. This unceremonious conclusion offered in the Orders of the CJEU Vice-President confirmed that members of the CJEU can be removed from office by the Member States, at will, through an action such as the one taken to remove AG Sharpston from office, and install Mr. Rantos in her place. Again, through the Court's famous consequential reasoning, the Orders of the CJEU Vice-President do not stack up with fuller scrutiny.

The fact that the CJEU Vice-President in essence argued that there is no appeal against the decision of the Member States taken on foot of Article 253 TFEU, which the

[90] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), paras 31-36; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), paras 31-36.

EU Treaties empower them to make by common accord. The Orders curtail of the promise of *Les Verts*,[91] let alone have regard to all the recent case law of the CJEU on judicial independence. The presumption that Member States can violate the EU Treaties is coupled with the erroneous assumption of Member States' impunity in undermining independence of the CJEU, even in cases of direct violation of the provisions of EU primary law on the security of tenure. The Orders must therefore be seen to be in direct contradiction with the terms of the mandate set in the EU Treaties. By breaching both the security of six-year tenure set out in Article 253 TFEU, it also ignored the lack of a vacancy on the CJEU required to invoke Article 253 TFEU in the first place. The Orders of the CJEU Vice-President have the potential to undo any idea of judicial independence in the EU which is not a situation in line with the rule of law, thus reminiscent of Hungary and Poland, not of the EU as a whole, pointing in the direction of letting the 'Masters of the Treaties' to dwell beyond the law.

The CJEU Vice-President took a very strict reading of who comes within the scope of a judicially review act on the basis of the normal action for annulment procedure under Article 263 TFEU. The representatives of the governments of the Member States, it would appear to the CJEU Vice-President, to be beyond the ability of judicial review of the CJEU. But this cannot be correct. The actions of the Member States in this instance were, after all, *procedural* irregularities that can be subject to judicial review. It was not about, and has never been about that of the person appointed to replace AG Sharpston, which would quite obviously fall within the political question doctrine.[92] Yet, the very idea that the Council on the one hand; and the representatives of the governments of the Member States on the other hand; are separate entities in entirely fictitious. For all intents and purposes, and in reality, they are one-in-the-same.

This can be analogized to the situation arisen in *NF v European Council*.[93] There, the 'EU-Turkey Statement' was found to be beyond a judicially reviewable act at first instance, and the less-than-promising read in that case which could not attribute an

---

[91] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166, [1986] ECR 1339.
[92] Graham Butler, *In Search of the Political Question Doctrine in EU Law*, 45 LEGAL ISSUES OF ECONOMIC INTEGRATION 329–354 (2018).
[93] Case T-192/16 *Order of the General Court for NF v European Council* EU:T:2017:128, [2017] OJ C232/25. Cf. Mauro Gatti, *NF v European Council (Case T-192/16)*, *in* EU EXTERNAL RELATIONS LAW: THE CASES IN CONTEXT (Graham Butler & Ramses A. Wessel eds., 2021).

action to the European Council, even though in reality, it was. However, it has been alluded to by the President of the CJEU, writing *obiter*, that there is nothing in principle from the CJEU through another procedure,[94] of such a case coming before the CJEU again, reviewing whether such activity can be judicially reviewable, and better deciphering what is an act within the scope of judicial review by the EU courts. The apparent lack of judicial reviewability of actions of the Member States that are either sanctioned by, or have effects on the EU legal order, it is contended, is not a settled question in EU law, and is still up for debate in order for judicial review to be found in appropriate instances, like the situation of AG Sharpston.

Moreover, the absolutism of the Orders of the CJEU Vice-President on the lack of reviewability in Article 253 TFEU is difficult to match with a proper system of judicial review.[95] At the most extreme end up the spectrum, such rationale, such as irregularities on the use of Article 253 TFEU could allow the representatives of the governments of the Member States free reign to do as they wish. For instance, it could permit the Member States to disregard the Article 255 TFEU committee process on vetting the suitability of candidates for appointment to the EU courts; or even, expand the number of members of the CJEU beyond those specified in the EU Treaties through court packing. In this case, most egregiously, the lack of judicial review meant that a member of the CJEU was forcibly removed from office prior to the expiry of their term of office.

The fact that AG Sharpston was not even notified of the appeal against the Interim Measures Order of GCEU Judge Collins, while AG-to-be Rantos was ready to be sworn-in, is just one in a line of violations of the core principles of procedural justice and fairness enshrined in Article 47 CFR giving the whole affair an unusual sense of injustice. The Rules of Procedure of the CJEU state that '[t]he application shall be served on the opposite party, and the [Vice-] President shall prescribe a short time limit within which that party may submit written or oral observations'.[96] This did not happen for AG

[94] Koen Lenaerts, *The Court of Justice of the European Union and the Refugee Crisis*, *in* AN EVER-CHANGING UNION?: PERSPECTIVES ON THE FUTURE OF EU LAW IN HONOUR OF ALLAN ROSAS , 10 (Koen Lenaerts et al. eds., 2019).

[95] The authors are grateful to Prof. Sébastien Platon for bringing the significant points discussed *infra* to their attention.

[96] Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 [2019] OJ L-316/103, art 160(5).

Sharpston. Whilst Article 160(7) states that the CJEU Vice-President 'may grant the application even before the observations of the opposite party have been submitted', it would appear that the only reason that this would happen is for reasons of exceptional urgency. This was not the situation in this case. In the prior week's Order of GCEU Judge Collins, the defending parties to the proceedings were given one week, until 11 September 2020, to lodge their written submissions to the GCEU. This was so that the presiding judge of the GCEU, Judge Collins, could fully adjudicate on the application for interim measures, pending a case full on the legality of the appointment made by the Member States, as per the ordinary course of events in the case.[97] The Rules of Procedure of the GCEU permit a case to be expedited on an application, which the applicant made.

The sensible solution of GCEU Judge Collins ensured that the defending parties, the Council and the representatives of the governments of the Member States, had the possibility to submit written observations, and guaranteeing the rights of all parties of their rights of Article 47 CFR. Instead, however, rather than submit written observations, the Member States went ahead and appealed the Order of GCEU Judge Collins to the CJEU covertly, asking for that Order to be set aside. However, the actual interim measures proceedings had not yet been concluded, as Judge Collins was still seized of the interim measures application.

Prima facie, there was no compelling reason for the CJEU Vice-President to act the way in which she did, given that the interim measures proceedings were still pending before GCEU Judge Collins. The urgency that existed for GCEU Judge Collins issuing his Order did not apply to the CJEU Vice-President issuing her Orders. After GCEU Judge Collins had initially issued his Order, the case lost urgency, and the CJEU Vice-President should have rightly dismissed the appeal, letting the suspensory Order of GCEU Judge Collin's stand whilst he was still seized of an interim measures application, for which he had not yet delivered his final interim measures decision. Alternatively, the CJEU Vice-President could have immediately referred the appeal against the Order of GCEU Judge Collins to the CJEU under Article 161(1) of the Rules of Procedure of the CJEU so that chambers of three judges, five judges, Grand Chamber, or Full Court, could hear the case

[97] Case T-550/20 *Order of the Judge Hearing Applications for Interim Measures in Sharpston v Council and Representatives of the Governments of the Member States* EU:T:2020:416, (4 September 2020).

(and come to a more appropriate conclusion). Regrettably, rather than seeking what could have been wiser counsel of a broader sphere of colleagues on the CJEU, she did not do so. The secrecy of this appeal likely fed into the CJEU Vice-President's decision not to refer the appeal before her to the broader membership of the CJEU, given that Article 161(1) mandates that such a referral is to be done 'immediately'. It was not necessary for the speed at which Mr. Rantos entered into office as an AG to proceed in such a rushed manner. The CJEU Vice-President acted, just like the Member States, with unnecessary haste.

Strikingly, when initiating their appeal, the Member States had requested that the CJEU Vice-President rule on the appeal against the Order of GCEU Judge Collins without hearing AG Sharpston.[98] The CJEU Vice-President could have acted in a similar way to GCEU Judge Collins, given that she was now seized of an appeal of a suspensory interim measure Order. The CJEU Vice-President could have made an Order to the effect that the legal team of AG Sharpston were given a similar seven-days to lodge their written response to the appeal brought against the Order of GCEU Judge Collins. Regrettably, and in violation of Article 47 CFR, she did not do so, and the CJEU Vice-President deliberately never got to see AG Sharpston's legal position as regards the Order of GCEU Judge Collins. Article 47 CFR states that '[e]veryone shall have the possibility of being advised, *defended* and represented',[99] as extensively analyzed by Pech.[100] It is submitted that AG Sharpston's rights to be defended were not respected, given that the Orders of CJEU Vice-President, in effect, resulted in the entering into office of Mr. Rantos as 'AG', thus depriving AG Sharpston of her office (and the CJEU of its independence).

What is particularly noteworthy is that the CJEU Vice-President abused the appeal against interim measures proceedings. It was tantamount to the CJEU Vice-President deciding the entire substance of a case before the GCEU on an interim measures appeal case before the CJEU. The result was a harmful farce of a situation, as opposed to letting

---

[98] Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020), para 10; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020), para 10.

[99] *Emphasis added.*

[100] Laurent Pech, *The Right to an Independent and Impartial Tribunal Previously Established by Law Under Article 47 of the EU Charter of Fundamental Rights*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers et al. eds., Second Edition ed. 2021).

GCEU Judge Collins reach conclusions after a proper hearing in the pending interim measures proceedings before the GCEU. The abuse of the appeal against interim measures proceedings by the CJEU Vice-President is evident given that her Orders seem to be capable, or at least an attempt to be capable, to amounting to *de facto* decision on the merits of the case, while hearing an appeal against a suspensory Interim Measure Order by the GCEU. As reported, the CJEU Vice-President 'purported to decide the entire case on an *ex parte* application against an *ex parte* freezing order'.[101] This, it is submitted, was a gross irregularity in the Orders of the CJEU Vice-President, particularly on an issue that is less clear-cut than was portrayed.

Normally, a new member of the CJEU entering into office is a wonderful occasion for the person concerned. It is done in an open, public manner, with celebrations to mark the occasion. They are even occasionally streamed online on the CJEU's website, like was the case for the entry into office of two new judges on 7 October 2020, as part of the same 2 September 2020 activity, for which there was clearly two vacancies arising for judgeships, and thus, no legality issue. The entry into office of 'AG' Rantos however, marks a stark contrast to the norm, in which the swearing into office of a new member of the CJEU, in the height of secrecy, under highly questionable legal grounds. This happened under cloak-and-dagger, with extensive administrative cooperation in the background so that the new 'AG' could enter into office immediately after the Orders of the CJEU Vice-President were delivered on the morning of 10 September 2020. Cumulatively, it is submitted that legitimate questions can now be raised about the lawful composition of the CJEU, as will be discussed next. What the Orders of the CJEU Vice-President has done is effectively license and sanction any of the members of the CJEU, including judges, to be removed from office at the will of the Member States through actions on the basis of Article 253 TFEU; and according to the CJEU, that this would be a non-reviewable act. As parties that instigated these events, the Member States must hang their head in shame. Separately, the mechanisms in place and the actions of the CJEU Vice-President resulted in the CJEU failing to protect one of its own members: a tragic drama that, as custom, culminates in a tragedy.

---

[101] Joshua Rozenberg, *EU court rules against British QC: Member states overturn injunction won by Eleanor Sharpston last week*, A LAWYER WRITES , https://rozenberg.substack.com/p/eu-court-rules-against-british-qc (last visited Oct 15, 2020).

Postlude: Independence absent, and the question of a lawfully composed CJEU

Let no mistake or misunderstanding arise from these events – what occurred was the Member States successfully sacking a member of the CJEU. AG Sharpston's tenure as a member of the CJEU was terminated in a way that was not as explicitly set down in the EU Treaties and Statute of the CJEU. This was executed, bizarrely, with *all* Member States violating EU law, and humiliating the Court through undermining both its independence and its attempts to take the rule of law seriously in the prevailing difficult circumstances. This is not at all how 'the rule of law – not men' is to work. The question therefore was why did the CJEU, through the Orders its Vice-President on 10 September 2020, let this happen. To this, there is no straightforward answer. Yet how can the 'principle of irremovability' that the CJEU has been using in its judgments of late continue to be utilized as a ground for legal reasoning when the CJEU's own members do not possess the same protection for irremovability? When the EU law textbooks and commentaries to the EU Treaties are updated in time, the legal aspects of the removal of AG Sharpston from the CJEU deserves the appropriate attention for the legal issues that have arisen in this EU constitutional law drama.

It is disappointing that the CJEU, which has done so much for the articulation of the principle of judicial independence in the recent years, would come under threat from the Member States, collectively disregarding this principle. The timing of the effort by the Member States against the principle of irremovability and independence of the judiciary was particularly poor. The CJEU had been the only institution of the Union achieving at least some success.[102] Blocking illegal moves on time in the courts of law acting impartially and in full compliance with the cardinal principles as well as the letter of the law is precisely what the rule of law boils down to. GCEU Judge Collins rightfully demonstrated – in the face of an undermining of the EU judiciary by the Member States – that the EU

[102] Dimitry Kochenov & Petra Bárd, *The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, *in* EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 2019: JUDICIAL POWER: SAFEGUARDS AND LIMITS IN A DEMOCRATIC SOCIETY 243–287 (Ernst Hirsch Ballin, Gerhard van der Schyff, & Maarten Stremler eds., 2020); SADURSKI, *supra* note 12.

is indeed a Union based on the rule of law. The six-year mandate of the members of the CJEU has never been 'until the [Member States] decide otherwise'.

These are not easy times for the person that was illegally appointed an 'AG'. The entire appointment by the Member States was performed in a manner that was in a direct violation of the EU Treaties and Statute of the CJEU, and was no fault of the now-'AG' Mr. Rantos, whom was not a party to the legal proceedings. There was nothing ever to be said against the distinguished Greek lawyer. The issue has always been one of raising important questions of EU constitutional law. The situation regrettably, is that Mr. Rantos was simply not a lawfully appointed member of the CJEU, since Member States cannot replace an existing member of the CJEU unless a vacancy has duly arisen, which none had.

When the President of the CJEU submitted a letter to the Council on 31 January 2020 stating that an Advocate General's post would be vacant from 1 February 2020, that assertion, is contended, must be understood as meaning that the post held by AG Sharpston was thus vacated from that point. That is the reading of a former President of the EFTA Court analyzing the same set of events.[103] He therefore raises the question of whether the CJEU was lawfully composed between the withdrawal of the UK from the EU on 31 January 2020, and AG Sharpston's dismissal from the CJEU on 7 September 2020. The fundamental question of what he is getting at is determining *when* the mandate of AG Sharpston actually ended.

Nevertheless, whatever about the lawful composition of the CJEU between February and September 2020, the question has to turn to the matter of the lawful composition of the CJEU *after* the entering into office of Mr. Rantos, and whether 'AG' Rantos should be understood as being a lawful member of the CJEU. In light of this, it has to be questioned about what could be done about the state of affairs that the Member States and the Orders of the CJEU Vice-President created. Fortunately, the events of September 2020 can be corrected. Whilst the return of AG Sharpston to be a member of the CJEU is beyond possibility, the three different cases which she lodged before the GCEU have now been

[103] Baudenbacher, *supra* note 9.

closed by Orders of the GC on 6 October 2020,[104] given the CJEU Vice-President abused the process.

If any or all of these three Orders are appealed to the CJEU, the question of the lawful composition of the CJEU will arise. This opportunity afforded to the CJEU would have to consider whether AG Sharpston's dismissal was unlawful or not, notwithstanding the finding of the CJEU Vice-President of no *prima facie* case in the first place. Individually or collectively, these three cases, on their merits, if appealed, offer the CJEU (and not just an Order of the CJEU Vice-President) an opportunity to clarify, in a well-thought out and clearly reasoned way, whether it actually believes that decision made under Article 253 TFEU are wholly removed from judicial review. The arguments made in this article support the assertion they must be (contrary to the Orders of the CJEU Vice-President). This is so that any irregularities, like the ones seen in these Three Acts, can be prevented from ever happening again, resulting in a much reinforced guarantee of the independence of the CJEU.

As regards the lawful composition of the CJEU, this remains an ongoing issue. Other than AG Sharpston appealing the three closing Orders by the GCEU, on foot of the aforementioned Orders of the CJEU-President, there are two ways in which the CJEU could be forced to address questions about its own lawful composition, in light of the presence of 'AG' Rantos on the CJEU. The first way would be for a national court, which has an existing case through the preliminary reference procedure under Article 267 TFEU pending before the CJEU, to submit an additional question about whether the decision that will eventually be made by the CJEU in the case would be valid. Secondly, alternatively, a national court making a new preliminary reference could include a similar question, akin to aforementioned situation at the EFTA Court in the *Nobile* case.

Yet, the practical consequences for the independence of the CJEU cannot be undone. This is because the removal of AG Sharpston's successor from the bench would hardly be possible: exactly the situation with the Pyrrhic victory of the Commission in *Commission*

[104] Case T-180/20 *Sharpston v Council and Representatives of the Governments of the Member States* (Order of the General Court, 6 October 2020) ECLI:EU:T:2020:473; Case T-184/20 *Sharpston v Court of Justice of the European Union* (Order of the General Court 6 October 2020) ECLI:EU:T:2020:474; Case T-550/20 *Sharpston v Council and Representatives of the Governments of the Member States* (Order of the General Court, 6 October 2020) ECLI:EU:T:2020:475.

v. Hungary (Judicial Retirement), in the absence of effective interim measures to ensure that such situations never arise as demonstrated, for example, in *Commission v Poland (Independence of the Supreme Court)*. Indeed the only way for the recently installed 'AG' Rantos to be removed would be for members of the CJEU to do so, in accordance with the strict rules contained in the Statute of the CJEU. Or alternatively, through another 'unreviewable' act by the Member States within Article 253 TFEU in breach of the duration of the mandate (!).

Further damage to the CJEU on foot of the Member States actions and the CJEU Vice-President's short-sighted approach could be mitigated by the initiating of proceedings in a national court of Member States against a particular government, as one component of the decision-maker of the representatives of the governments of the Member States. The room for optimism here is limited, yet it is an unexplored avenue. This route through the national courts could lead in another direction altogether – to the European Court of Human Rights (ECtHR) in Strasbourg for a violation of a Member State or Article 6 of the European Convention on Human Rights (ECHR). Yet, the track record of the ECtHR in substance on such cases is quite weak,[105] as many victories on the illegally dismissed prominent court member notwithstanding. Crucially, the ECtHR does not demand the restoration of the *status quo ante*, which means that the illegally dismissed court members cannot regain office in the context where the security of tenure, precisely, it the crux of the matter. However, the ECtHR also has case law that justice must not only be done, but it also must seem to be done. In this sense, it is difficult to claim that justice was done, or even seen to be done to AG Sharpston.

The Orders of the CJEU Vice-President delivered on 10 September 2020 boasted precariously poor reasoning for all the reasons outlined. For the EU Treaties to afford Member States to act by common accord in Article 253 TFEU is, of course, subject to judicial review for procedural irregularities. Any other reading leaves the CJEU open to the charge that it lacks independence. Kumm is absolutely right, that 'courts are not simply engaged in applying rules or interpreting principles. They assess justifications'.[106]

---

[105] David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 HAGUE J RULE LAW 83–110 (2018).
[106] Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS OF HUMAN RIGHTS 142–175, 144 (2010).

This is something that the CJEU Vice-President did not do. Worse still, the CJEU Vice-President foreclosed any serious conversation in the absence of the navy and the army. The only weapon that the Court has is the clarity of the argument and the ability to be crystal clear and absolutely convincing. There is simply nothing else in stock.[107] The Orders of the CJEU Vice-President are truly a low point on this count.

There will be one day in which the CJEU will have to take the necessary steps towards ensuring that Article 253 TFEU decisions, when they affect the workings of EU institutions, are brought within the proper scope of judicial control for procedural matters. This will allow the CJEU to regain control over its independence. In the meantime, there is the lingering question: is the Court lawfully composed in light of this entire affair? There are solid arguments to make the case that it is not. The presence of Mr. Rantos as an 'AG' on the CJEU, in light of the activities of both the Member States and the CJEU itself, casts doubt over a clear affirmative answer to this question. It is for the Court to now answer this question itself, preferably with a straight and honest face.

[107] But see, analyzing a press-release medium, e.g. Justin Lindeboom, *Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment*, 21 GERMAN LAW JOURNAL 1032–1044 (2020).