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Independence of the Court of Justice of the European Union: Unchecked Member States power after the Sharpston Affair

Dimitry V. Kochenov | Graham Butler*

Abstract

The Court of Justice of the European Union (CJEU) is the apex of the EU legal order, and is the supreme arbiter of EU law. For decades, it has delivered judgments, collectively shaping European integration and 'integration through law'. It has undoubtedly been an authoritative leader in entrenching a European judicial culture, and has benefited from the cardinal principle of judicial independence enshrined in the EU Treaties, which in turn, it has insisted on being upheld as regards national courts. Questions have rarely arisen, however, about judicial independence of the CJEU. The Sharpston Affair of 2020–2021 opened the door to questioning such judicial independence. Is the CJEU at the mercy of the Member States? If so, what are the consequences for the EU legal order? This article reflects on the judicial independence of the CJEU, and offers reflections on how it can be preserved in the future.

1 | INTRODUCTION

With Brexit looming on 31 January 2020, the Conference of the representatives of the governments of the Member States issued, on 29 January 2020, a Declaration 'On the consequences of the withdrawal of the United Kingdom

* Dimitry V. Kochenov leads the Rule of Law working group at CEU Democracy Institute in Budapest, Hungary and is a Professor of Legal Studies at the CEU Department of Legal Studies in Vienna, Austria. Corresponding author: KochenovD@ceu.edu. Graham Butler is Associate Professor of Law at Aarhus University, Denmark. Email: gb@law.au.dk.

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from the European Union for the Advocates-General of the Court of Justice of the European Union'.[1] The Conference, putting forth a view on the implications of Brexit, tried to clarify that, as any other 'members of institutions, bodies, offices and agencies of the Union nominated, appointed or elected in relation to the United Kingdom's membership of the Union', the mandate of the "UK Advocate General" would 'automatically end as soon as the Treaties cease to apply to the United Kingdom, that is, on the date of the withdrawal'. It went on to state that '[i]n accordance with the Protocol order', the vacant post of Advocate General would then be assigned to the Hellenic Republic (Greece) to nominate an individual. Having due regard to Council Decision 2013/336/EU limiting the number of Advocates General to 11, the mandate of the new Advocate General nominated by Greece would end on what would have been the expiration date of the tenure of the Advocate General nominated by the UK—on 6 October 2021. The mandate of the nominee of Greece could then be renewed for the usual six-year term of office. On 30 January 2020, one day before Brexit was due to occur, the President of the Court of Justice of the European Union (CJEU) took note of the vacancy, as a result of the Conference's Declaration. Eventually, on 2 September 2020, an Advocate General was attempted to be appointed 'from 7 September 2020 to 6 October 2021 following the withdrawal of the United Kingdom from the EU'.[2]

All would have been fine, had the Conference's Declaration of 29 January 2020 not been an egregious ultra vires intervention on the part of the Member States and, as a consequence, had not constituted a blatant violation of the judicial independence of the CJEU according to Article 19 Treaty on European Union (TEU), imperiling the fundamental value of the rule of law as stated in Article 2 TEU. These actions, unlawfully removing a sitting member of the Court of Justice, in what became to be known as the "Sharpston Affair", unfolded as a series of unfortunate events, highlighting a puzzling impunity and lack of efficient safeguards against rule of law violations by the *Herren der Verträge* at the EU level. It is a cautionary tale which could have long-lasting effects if measures are not to be taken to ensure that no such situation happens again in the future, resulting in the Court of Justice failing to stop the Member States disrespecting the law and undermining judicial independence of that very court, when judicial review of such actions is sought. It is on such a reflective journey that this article will embark.

A court of law of any standing, including the two courts within the CJEU, should not normally have to determine whether it is enjoying full independence.[3] However, this is exactly what occurred in 2020–2021 when, for the first time, the judicial independence of the CJEU was called into question. Some could question the importance of such an ephemeral episode. After all, 'Brexit means Brexit', and Advocate General (AG) Sharpston's mandate ultimately, and as a matter of law, would have had to come to an end on 6 October 2021 in any event. However, the fact that such premature removal of a member of the Court of Justice was neither necessary nor urgent, and that the rule of law was sacrificed at the altar of what the Member States viewed as Brexit expediency, points to the gravity of the matter.

If judicial independence can be curbed on a whim, what does it say about the state and strength of the rule of law at the European level? Furthermore, if the question of the independence of national judiciaries vis-à-vis national executives has raised significant concerns, it is rather puzzling that the same cannot be said once the Court of Justice

[1]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). Council of the European Union. 29 January 2020.

[2]'L 292/1. Decision (EU) 2020/1251 of the Representatives of the Governments of the Member States of 2 September 2020 Appointing Three Judges and an Advocate-General to the Court of Justice. Official Journal of the European Union. 7 September 2020'.

[3]Exceptions are as frequent as they are important, however, ranging from the Polish Constitutional Court and the Supreme Court in some compositions, to the EFTA Court of the day. L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (SIEPS, 2021), 183–204; L. 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*', (2020) *RECONNECT Working Paper* No. 8, 1. The ECtHR has been quite intolerant of illegally appointed individuals on the bench, as seen in *Guðmundur Andri Ástráðsson v Iceland*, ECLI:CE:ECHR:2020:1201JUD002637418, and *Xero Flor w Polsce sp. z o.o. v Poland*, ECLI:CE:ECHR:2021:0507JUD000490718; *Grzęda v. Poland* App. No. 43572/18. The EFTA Court faced such issues in *Nobile* as a follow-up of Norway's attempts to tamper with its independence and lawful composition: Case E-21/16 *Pascal Nobile v DAS Rechtsschutz-Versicherungs AG* (Decision of the Court, 14 February 2017). Cf. Allan F. Tatham, 'Reappointment to International Courts and the Case of the EFTA Court', (2021) 20 *The Law & Practice of International Courts and Tribunals*, 119; C. Baudenbacher, 'Lawful Composition—the EFTA Court's Approach' (*Verfassungsblog*, 20 September 2020). C. Baudenbacher, *Judicial Independence: Memoirs of a European Judge* (Springer, 2019), 318–321.

is involved, as if the EU and national legal orders were parallel universes, not submitted to the same fundamental rules, or the Court of Justice deemed itself magically immune to such pressure and the fundamental values, on which the Union and the Member States are together founded. As a looming illustration of the threat of double standards of the rule of law and values at the national and supranational level, the Sharpston Affair sets a very dangerous precedent.

If simply ignored, it could question in the future, were similar events to repeat, the legitimacy of the Union as a legal system based on the rule of law, as well as that of the CJEU and its decisions.[4] At a time when contestations from national courts also abound, and illiberalism and populism are on the rise, it is contended that the Court of Justice should, more than ever, not only talk the talk, but walk the walk as well, if it wants to be faithful to its role of ensuring 'that in the interpretation and application of the Treaties the law is observed', and more particularly the values of Article 2 TEU. But if a silver lining has to be found out of this sad episode, it is that it sheds light on the weaknesses of the current system of safeguards protecting judicial independence at the EU level against rule of law violations that ought to be remedied.

The Sharpston Affair gave rise to EU constitutional issues of fundamental importance, which are the focus of this article. It seems quite evident that a project of "integration through law"[5] could not advance, absent the absolute certainty of the CJEU's independence from the other EU institutions on the one hand, and the Member States on the other.[6] This is especially true in a context in which numerous national courts have already experienced significant threats to their own independence.[7]

When being undermined nationally, they would look to the CJEU and the European Court of Human Rights (ECtHR) for protection.[8] A critical element of the independence that courts would seek to vindicate centres on their composition. As rightly underlined by the European Free Trade Association (EFTA) Court in *Nobile*, 'maintaining judicial independence requires that the relevant rules for judicial appointments […] must be strictly observed'.[9] Equally, the Court of Justice and the ECtHR have, in their own spheres, developed robust lines of case-law defending against the usurpation of judicial appointments, enabling the calling into question of the decisions taken by a "body" whose credentials as an "independent court" are more than dubious.[10]

It is therefore all the more puzzling to observe the possibility that in the Sharpston Affair, there was an appointment to the CJEU, and more specifically to the Court of Justice, in the absence of a vacancy, clearly regulated by EU primary law. The Court of Justice, thus, for a time, so composed, did not meet the basic requirements of Article 6 of the European Convention on Human Rights (ECHR) of being a lawfully composed tribunal, potentially leaving the legal force of the judgments rendered during this period with the participation of an unlawful appointee acting as an AG in limbo.

[4]D. Kochenov, '*De Facto* Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times', (2021) 40 *Polish Yearbook of International Law*, 197.

[5]See P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (A.W. Sijthoff, 1974), and the volumes of M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds.), *Integration through Law: Europe and the American Federal Experience* (De Gruyter), published throughout the 1980s.

[6]ECtHR, *Grzęda v. Poland* App. No. 43572/18.

[7]W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019); T.T. Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', (2018) 43 *Review of Central and East European Law*, 116; A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', (2018) 19 *German Law Journal*, 1839; K. Kovács and K.L. Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union', (2018) 51 *Communist and Post-Communist Studies*, 189; L. Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary', in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, 2015).

[8]D. Kosař and K. Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: *Baka v Hungary* and the Rule of Law', (2018) 10 *Hague Journal of the Rule of Law*, 83; G. Halmái, 'The Early Retirement Age of Hungarian Judges', in F. Nicola and B. Davies (eds.), *EU Law Stories* (Cambridge University Press, 2017), 471; K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, 'EU Values Are Law, after All', (2020) 39 *Yearbook of European Law*, 3.

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

[10]The ECtHR has admittedly taken a more principled position in this field, as its *Xero Flor* and *Grzęda* case-law on unlawfully appointed judges is quite clear and straightforward, while the CJEU does not demonstrate the same level of certainly and clarity, even accepting preliminary references from the judges, who would not qualify as lawfully appointed under the ECtHR standards, leading to a less stringent reading of the basic requirements of Art. 6 ECHR: Case C-132/20 *Getin Noble Bank*, ECLI:EU:C:2022:235. On this CJEU–ECtHR discrepancy, see L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (SIEPS, 2021), 183–204.

This extraordinary matter strikes at the very heart of the principle of legality and the rule of law which underpin the integration project—of direct concern to both levels of governance in Europe—and opens the possibility of yet another confrontation between the apex courts of the EU and ECHR legal orders,[11] a confrontation that the Court of Justice has been at pains to avoid, despite the wretched consequences. After all, pushing the exceptionalism of the EU legal order to establish an alternative reading of basic Article 6 ECHR guarantees, as the Court of Justice would be compelled to find in order to sustain its position, would only further undermine its legitimacy, which has already been questioned following the *Opinion 2/13* episode.[12] It goes without saying that an ensuing reply from the ECtHR, putting into question whether the Court of Justice—albeit for a limited period of time—met the basic requirement under the ECHR that it be composed as "established by law", would be quite a sobering lesson of the importance of paying attention to the law, and taking it seriously, what the Court of Justice remains required to do, its forays into exceptionalism notwithstanding. An alternative reading of Article 6 ECHR only applicable to the CJEU is obviously not an option, directly contradicting both ECHR law and the core values of the EU.

This article is structured as follows. Section 2 sets out and discusses the applicable law that provides for the lawful composition and judicial independence of the CJEU. Section 3 details the factual background of the Sharpston Affair, assessing the Member States' actions, the litigation launched, and the unwillingness of the CJEU to face down the Member States when they removed a sitting member of the Court of Justice in apparent breach of the EU Treaties and established case-law directly attacking all the key achievements of the Lenaerts Court following the seminal *Association of Portuguese Judges* ruling.[13] Section 4 normatively analyses the consequences of the CJEU's finding that the Member States' decisions are unreviewable, including those in direct conflict with EU primary law. It further delves into what could have been done to combat the challenge to the CJEU's independence when it was placed in jeopardy by the Member States. Section 5 offers concluding reflections on what the CJEU itself can learn from the Sharpston Affair, namely by reversing its dangerous view that Member States' decisions under Article 253 TFEU are unreviewable, no matter what they entail for the independence of the CJEU and its ability to meet the basic requirements of an independent tribunal in the light of Article 6 ECHR, Articles 2 and 19 TEU, and the EU Charter of Fundamental Rights.

By presenting these recent events, this article invites a reshaping of our understanding of the independence of the Court of Justice as a court of law, contextualised in the inherently multi-level nature of rule of law protection in Europe, and further reflection on how to strengthen it. It also aims to diagnose rule of law violations, while at the same time identifying their features showing the difficulty of the law to fight against its own violation when such violation relies on its perversion, i.e., when rule of law violations (ab)use the language of the law, which after all is but a tool. For the EU not to have an independent Court of Justice is a non-starter, even if that was the position essentially embraced en gros by the Court of Justice itself in the Sharpston Affair. This is precisely why the situation with the abuse of power by the Masters of the Treaties is extremely dangerous, and should be approached with all seriousness.

2 | THROUGH THE LOOKING GLASS, DARKLY: THE UNSUSTAINABLE LIGHTNESS OF EUROPEAN RULE WITHOUT LAW

In order to grasp the significance of the Sharpston Affair for the independence of the European judiciary and the rule of law in the EU, it is first and foremost necessary to address one legal question that actually did not get answered

[11] R. Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary', (2021) *European Law Journal* (early view).

[12] Cf. P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue—Autonomy or Autarky?', (2015) 38 *Fordham International Law Journal*, 955; D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', (2015) 34 *Yearbook of European Law*, 88.

[13] Case C-64/16, *Association of Portuguese Judges*, ECLI:EU:C:2018:117; L. Pech and S. Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case', (2018) 55 *Common Market Law Review*, 1827; L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (SIEPS, 2021).

by the Court of Justice in all the judicial proceedings, but holds the key to the whole affair: was the aforementioned Declaration by the Conference lawful? In order to make such a determination, the relevant provisions of EU primary law that provide for the judicial independence of the CJEU are systematically analysed; they have long been part of the TEU and TFEU and their predecessor treaties, in addition to the CJEU Statute, which is annexed to the EU Treaties and ranks as EU primary law.

2.1 | The impact of Brexit on the duration of the mandate of an Advocate General

In its Declaration, the Conference stated:

> In accordance with Article 50(3) of the Treaty on European Union, the Treaties cease to apply to the withdrawing Member State from the date of entry into force of the withdrawal agreement.
>
> The ongoing mandates of members of institutions, bodies, offices and agencies of the Union nominated, appointed or elected in relation to the United Kingdom's membership of the Union will therefore automatically end as soon as the Treaties cease to apply to the United Kingdom, that is, on the date of the withdrawal.

Consequently, the mandate of the "UK Advocate General" automatically ended upon Brexit, at least according to the Conference. The first question that needs to be tackled is thus *whether indeed, as a matter of EU law, the mandate of an Advocate General does end with the withdrawal of that Member State which nominated them*. In this regard, it is worth analysing Article 19(2) TEU, which establishes the basic composition of the Court of Justice. In particular, it provides that:

> '[t]he Court of Justice shall consist of one judge from each Member State. *It shall be assisted by Advocates-General*.
>
> The General Court shall include at least one judge per Member State' (emphasis added).

At first sight, this indicates that *judges* of the Court of Justice are not completely divorced from the Member State that nominated them for appointment, their full independence notwithstanding. This bond between judges and Member States follows them throughout their tenure at the Court of Justice and General Court, and was de facto confirmed when, on the day a Member State withdrew from the Union, the judges originally nominated by the withdrawing Member State ceased to be members of the CJEU. The UK-nominated judges left the CJEU on the day of Brexit—on 31 January 2020.[14] It can be asserted that such a bond, when healthy, ensures the richness and quality of the CJEU's work, whose legal concepts, albeit autonomous in their meaning and interpretation, are often deemed to be inspired by the legal traditions common to the Member States.

In contrast to judges, the *Advocates General* are bound neither to a given Member State nor to their nominating Member State continuing to be a Member State. Article 19(2) TEU makes this clear by including a straightforward distinction between the judges and the Advocates General—one judge per Member State forms a court, assisted by *only* a number of Advocates General[15] of *unspecified* national affiliation. The clear separation between the two different categories of the members of the Court of Justice in the text invites the interpretation that once an Advocate General is in situ on the Court of Justice, the continued membership in the Union of the Member State

[14] Judge Vajda of the Court of Justice, and Judge Forrester of the General Court. The UK had not nominated a second member of the General Court.
[15] The number is specified elsewhere, in Article 252 TFEU, and is critically not connected to the number of Member States.

which put the Advocate General forward for appointment is *not* a requirement for the Advocate General to serve to the end of their mandate.

This interpretation is comforted by the role assigned to Advocates General. As made clear by Article 19(2) TEU, their task is to assist the Court of Justice. Their role is not to decide on a given case, but to deliver an Opinion which informs, but does not bind the Court of Justice.[16] Judges' decisions, on the other hand, are binding, which might also explain why Member States are adamant to each have their own at the Court of Justice and at the General Court. The ability of an Advocate General, an unquestionably independent official, to serve the Court of Justice is not conditioned on the status of the nominating Member States vis-à-vis the Union during their mandate. Any alternative reading would introduce an additional qualifying requirement for Advocates General to serve on the bench, which is absent from the primary law of the Union. This reading was de facto confirmed when, on the day that a Member State withdrew from the Union, AG Sharpston—originally nominated by the withdrawing Member State—continued her tenure as a member of the Court of Justice, while the UK judges stepped down immediately. Moreover, her membership was in no way nominal: AG Sharpston continued to issue fundamentally important Opinions many months after the UK's withdrawal.[17]

Thus, a brief analysis of Article 19(2) TEU reveals that, according to both the spirit and the letter of the EU Treaties, an Advocate General would have to remain a member of the Court of Justice until the end of their mandate, without regard to the date of the withdrawal of the nominating Member State from the Union. It is an essential feature of judicial independence that the duration of the mandate of an Advocate General shall be determined as a matter of law, and not as a matter of expediency such as, in the circumstances of this case, due to Brexit. In this regard, it is also worth recalling that Article 253 TFEU provides that Advocates General 'shall be appointed by common accord of the governments of the Member States for *a term of six years*' (emphasis added).

2.2 | Vacancies at the Court of Justice: The exhaustive list of ordinary and extraordinary methods

The next question to be asked is thus *whether EU law provides for exceptions to the principle of irremovability of Advocates General*. This thus leads to examining the applicable EU law pertaining to vacancies on the Court of Justice. Like the EU Treaties, which set out the definitive procedure for the nomination and appointment of members of the Court of Justice, the CJEU Statute, annexed to the EU Treaties, also provides essential elements to ensure the judicial independence of the Court of Justice. The Statute lists four ways for vacancies to arise. As Article 8 of the Statute applies Articles 2 to 7 to Advocates General, these provisions apply equally to judges and Advocates General.

Article 5 of the Statute provides:

> 'Apart from *normal replacement*, or *death*, the duties of a Judge shall end when he *resigns*. Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench' (emphasis added).

[16]See G. Butler and A. Łazowski, 'Let's Take the Canvass Out: Advocates General at the Court of Justice of the European Union', in G. Butler and A. Łazowski (eds.), *Shaping EU Law the British Way: UK Advocates General at the Court of Justice of the European Union* (Hart Publishing, 2022).

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

These three customary grounds—normal replacement, death and resignation—are the ordinary and usual way that vacancies arise. Normal replacement happens every few years[18] as terms end and new members are appointed, death in service is infrequent, but does happen,[19] and resignation has been frequently exercised for various reasons.[20] Use of the term "*normal* replacement" seems indeed to refer to the duration of the mandate of Advocates General, a set term of office. Similar to the two other grounds mentioned with it, death and resignation, "normal replacement" refers to the personal circumstances of the incumbent, such as whether they are serving out the remainder of a prior term, or whether they serving a full term to which they have been appointed. Critically, it does not refer to external circumstances such as Brexit.

There is indeed, however, one single extraordinary fourth way in which a vacancy could arise, which can be through the Court of Justice acting itself to remove a serving member. Article 6 of the CJEU Statute provides (again, applying to Advocates General via Article 8 of the CJEU Statute) that

> [*a*] *Judge may be deprived of his office* or of his right to a pension or other benefits in its stead *only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office.* The Judge concerned shall not take part in any such deliberations …. In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification [emphasis added].

This fourth, extraordinary way to create a vacancy has, however, never been invoked. One could have argued that the Sharpston case, in the context of Brexit, could have fit within the category of 'no longer fulfil[ing] the requisite conditions', or even 'meeting the obligations arising from his office', with the affiliation to a withdrawing Member State interpreted as a reason serious enough to interrupt the tenure of an Advocate General before the normal expiration date of their tenure.

However, as also mentioned in Article 6 of the CJEU Statute, this would have required the judges and AGs of the Court to *unanimously* reach such a conclusion, and thus consciously weaken an essential safeguard for judicial independence and the rule of law, i.e., the principle of irremovability protecting their office. In any event, Article 6 of the CJEU Statute was *not* invoked as the "official" dismissal of the Advocate General, as originated in a Declaration of the Conference.

Read together, the ordinary ways for vacancies to arise via Article 5 of the CJEU Statute and the extraordinary way via Article 6 of the CJEU Statute mean that there are *only four* ways for vacancies to arise. Accordingly, and as exceptions to the principle of irremovability, this should be considered an *exhaustive* and *limitative* list of how vacancies can arise in accordance with the letter and the spirit of the EU Treaties. Moreover, it guarantees the security of tenure for all members, judges and Advocates General alike during their term of office and limits the possibility of undue influence. Importantly, there is no procedure for other EU institutions or any other entity, among which are the Council and the representatives of the governments of the Member States, or any such conference, to meddle with these four grounds.

It thus results from a careful analysis of the CJEU Statute that none of the cases legally trigger a vacancy on the bench in the Sharpston Affair. AG Sharpston did not come to the normal end of her mandate that would have triggered her replacement following Brexit, nor did she resign, nor pass away. Moreover, she was not deprived of her office following the unanimous opinion of all the other judges and Advocates General that she no longer fulfilled the requisite conditions or met the obligations arising from her office. The only possible conclusion is thus that, by the

[18]Under Article 253 TFEU, and other provisions of the CJEU Statute, usually every three years.

[19]A number of members of the Court of Justice have died while in office. In reverse chronological order, AG Bot (2019), AG Ruiz-Jarabo-Colomer (1999), Judge (and former AG) Mancini (1999), Judge Ioannou (1999), Judge Schockweiler (1996), Judge Joliet (1995), Judge Chloros (1982) and AG Dutheillet de Lamothe (1972).

[20]Some recent examples offer an indication of its frequency. For example, AG Hogan (2021) resigned to serve as a Judge of the Supreme Court (of Ireland); Judges Malenovský (2020), Rosas (2019) and Fernlund (2019) resigned to retire; and Judge Levits (2019) resigned to become President of Latvia.

time of Brexit, and notwithstanding the Declaration of the Conference, to the contrary, *there was no vacancy for an Advocate General on the Court of Justice*. This was so, not only in law, but in fact. Brexit did not interrupt AG Sharpston's tenure, unlike the UK judges' mandate, and she continued to issue Opinions as usual.

This results in only one outcome: *the said Declaration of the Conference was unlawful, as they did not have the power to determine a vacancy at the Court of Justice, by virtue of the principle of separation of powers*. Indeed, as the Court of Justice itself has recently stated in *A.K. and Others*, 'in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive'.[21]

It is one thing for Member States to be competent to *nominate* judges and Advocates General, which they are pursuant to Article 253 TFEU, but it is quite another thing to have the power to *destitute* judges and Advocates General, which the Member States do not have. Such unlawful dismissal constituted a clear threat to judicial independence and an encroachment on the rule of law, which is the very reason why a limitative set of rules regulating vacancies has been defined in the CJEU Statute, with no role for the Member States to play. The Declaration of Conference, manifestly, constituted a case of *usurpation of power*.

2.3 | The constitutional dimension of the Member States' usurpation of power

June 2016 saw a non-binding referendum in the UK with the result of a majority of the voting public opting to prefer that the Member State would leave/withdraw from the EU. The conditions for this withdrawal were entirely unclear and did not form part of the political debate.[22] After domestic legal processes, culminating in the *Miller* case before the UK Supreme Court,[23] the British Parliament voted to grant 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 which commenced in March 2017.[24] This culminated, with legal twists and turns and a number of delays along the way, in a withdrawal agreement between the UK and the EU in January 2020.[25] This in turn meant that from 1 February 2020, the UK was no longer an EU Member State.

Article 50(3) TEU, according to which '[t]he Treaties shall cease to apply *to the State* in question from the date of entry into force of the withdrawal agreement' (emphasis added), was of disputed interpretation.[26] While Article 50 TEU as a whole provided a route for Member States to withdraw from the Union, it was merely that, and could not in turn be understood as a means to *amend* the text of the EU Treaties. Put differently, the actual withdrawal of a Member State would by automatic operation of law render the judge nominated by the withdrawing Member State no longer a judge of the Court of Justice, but this same event could not amend the norms of EU primary law, which establish how vacancies for Advocates General may arise.

Moreover, Article 50 TEU cannot serve as a pretext to enable the Member States to amend EU primary law by way of an ad hoc political declaration, such as the Declaration of the Conference. This would conflict with the otherwise exhaustive grounds provided for the creation of vacancies in the Court of Justice and the similarly limited

[21] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others v Sąd Najwyższy* ECLI:EU:C:2019:982 (*Independence of the Disciplinary Chamber of the Supreme Court*), para. 124.

[22] A. O'Neill, 'Brexit, Democracy, and the Rule of Law', (2020) *European Law Journal* (early view).

[23] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Paul Craig, '*Miller*, EU Law and the UK', in Mark Elliott, Jack Williams and Alison L. Young (eds.), *The UK Constitution after* Miller: *Brexit and Beyond* (Hart Publishing, 2018).

[24] For initial assessments, K.A. Armstrong, *Brexit Time: Leaving the EU—Why, How and When?* (Cambridge University Press, 2017); M. Dougan (ed.), *The UK after Brexit: Legal and Policy Challenges* (Intersentia, 2017); F. Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford University Press, 2017); C. Closa Montero (ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press, 2017).

[25] 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', (2020) 45 *European Law Review*, 163.

[26] As alluded to in Case T-550/20 R, *Sharpston v Council and Representatives of the Governments of the Member States* ECLI:EU:T:2020:416 (Order of the Judge Hearing Applications for Interim Measures) (4 September 2020), para. 11.

provisions establishing the procedures for amending the EU Treaties in accordance with Article 48 TEU. An ad hoc declaration is not among either of these. Furthermore, obviously, reading Article 50 TEU together with Article 253 TFEU could not result in an appointment procedure being inverted to become a *removal* procedure. This is neither foreseen in EU law nor in any way related to the crucial principles of the European legal tradition, including judicial independence and security of tenure. Given the above, it is not surprising that the occurrence of Brexit did not result in the immediate termination of AG Sharpston's membership on the Court of Justice, as it did for UK judges.

Notwithstanding the evident stipulation of the law, there appeared to have been a view from within the Court of Justice, shared by the Member States, that the formal withdrawal of the UK would result in an early termination of an Advocate General. In other words, the legal fact of Brexit was implied to amount to an opportunity to amend the guarantees of the security of tenure of the Advocates General provided in EU primary law, and to apply this amendment *retroactively* to the Advocate General in question, who had been proposed for re-nomination in 2015 by the UK. Any such amendment would have had to follow the procedures foreseen for this purpose and could not have been achieved with either retroactive effect or the lack of erga omnes application. In other words, such an amendment would not apply to an Advocate General whose tenure had begun *before* the entry into force of the amendment; nor could it have a personalised scope of application, focusing on the dismissal of one particular member of the Court of Justice.

This is nevertheless exactly what happened: as in the times of the Luxembourg compromise,[27] the Member States allowed a mutual political understanding, expressed in the form of a Declaration, to this time override the guarantees of independence of the Court of Justice and the security of tenure of its members.[28] The political declaration thus took the place of the EU Treaties and required a contra legem interpretation of the latter in a targeted blow to the Court of Justice's independence. In the absence of any reference to a "UK Advocate General" in Article 19(2) TEU,[29] no such declaration connecting AG Sharpston's position to a particular (former) Member State—let alone Article 101 of the Withdrawal Agreement (WA), which included the Advocate General among 'Members of the Institutions' 'nominated, appointed, or elected in relation to the UK's membership of the Union'[30] merely for the purposes of Title XII of the Agreement[31]—could be read in such a way as to alter Article 19(2) TEU and the CJEU Statute.

Illegally moving to dismiss an Advocate General in September 2020 before the expiration of her mandated term, the Member States showed that they were ready to trample on the Court of Justice's independence and the rule of law, thereby allowing a political accord among the Member States—translating post-Brexit frustrations—to take the place of EU primary law. Due to its manifest illegality, this was a "de facto" dismissal, which led another person, Athanasios Rantos, to be illegally appointed to the Court of Justice in the absence of a vacancy. The rule of law was thus replaced with the political whims of the Member States, and, as will be seen, without any safeguard to effectively stop such violation. It would be "rule *by* law", if only the behaviour of the Member States had been legal. Since it was not, the standard was even lower than that: an outright usurpation of power.

[27]See V. Fritz, 'The First Member State Rebellion? The European Court of Justice and the Negotiations of the "Luxembourg Protocol" of 1971', (2015) 21 *European Law Journal*, 680. Since the Luxembourg compromise has never been formally overruled or dismissed from the body of EU law, it can be argued that it is part of the *acquis*: C. Delcourt, 'The *Acquis Communautaire*: Has the Concept Had Its Day?', (2001) 38(4) *Common Market Law Review*, 829. Cf. J. Ziller, 'Defiance for European Influence—the Empty Chair and France', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

[28]It is stating the obvious that a declaration cannot have the effect of amending the Treaties, especially in crucial institutional issues and particularly when the declaration amounts to doing the opposite of what the Treaties aspire to secure in primary law. For the classical work on declarations, see A.G. Toth, 'Legal Status of Declarations Annexed to the Single European Act', (1986) 23(4) *Common Market Law Review*, 803.

[29]Some scholars did not think that EU primary law is necessary: S. Lashyn, 'The Unsuccessful Bid of the *British Advocate-General* to Remain on the Bench Despite Brexit', (2021) 84 *Modern Law Review*, 1414 (italics added).

[30]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, Article 50(3).

[31]D. 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*, 23 February 2020).

Any authoritative analysis of the rule of law's core elements, from Lord Bingham's much-quoted book[32] to the Venice Commission's Rule of Law Checklist,[33] make this simple fact undisputable. Worse still, the Court of Justice's own recent rule of law jurisprudence honouring security of tenure and the prevention of undue dismissals of members of the judiciary had been mostly exemplary as regards national courts.[34] The principle of irremovability had been elevated to a principle of "cardinal importance".[35] In line with academic doctrine and global good practice, the Court of Justice 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 mandate is for a fixed term*' (emphasis added).[36] A fortiori, this principle must apply to all the courts in the EU, including both the Court of Justice and the General Court. This principle demands that Advocates General should have the same guarantees of independence as those of the other members of the Court of Justice.

To summarise, what the Article 50(3) TEU argument reveals is the constitutional nature of the rule of law violation perpetrated by the Member States. Only by magically pulling an argument of constitutional stature out of their hat could Member States try to spin their obvious ultra vires action as lawful. Let it be recalled that it is not by accident that rules pertaining to the principle of irremovability and its exceptions, cardinal to the safeguard of European judicial independence, have been carefully crafted in EU primary law. It is precisely to ensure their respect, essential to the rule of law, that such rules have been attributed the highest rank in the EU hierarchy of norms.

The fact that Member States did not think twice before breaching the EU fundamental pact becomes even more worrying if put back in a context in which rules of questionable status, at least in EU law, seem to be flourishing, and more and more power is allocated to the Council and European Council—the Member States—under the banner of urgency and the correlated need to act to face a never-ending poly-crisis. However, in the Sharpston Affair, was the wish to get rid of Brexit, including of an Advocate General whose mandate was bound to end in any case in October 2021, really worth weakening the principle of irremovability, judicial independence and the rule of law, allegedly one of the most fundamental EU values?

More deeply troubling was what the questions arising in the Sharpston Affair related to the ability of law to impede a rule of law violation when it relies on the perversion of the meaning of the law, at the nexus of the rule and its interpreter. The strength and contemporary face of rule of law violation is its ability to create a parallel legal reality which aims to asphyxiate rule of law by its rule by law nemesis until it replaces it totally.[37] What was witnessed at the EU level with the Sharpston Affair was "just" one instance but, as analysed in subsequent sections of this article, through its different phases, it illustrated the typical domino structure and spillover effect of a successful rule of law violation, which is one of the reasons why the proceedings brought before the CJEU by AG Sharpston ought to be taken seriously and tackled.

When a violation occurs, and even more so for one of defining importance for European integration, the first reflex of a (constitutional) lawyer is to check for counter-powers and remedies, as signs of the existence of a healthy checks and balances system. It is no exaggeration to say that, in the Sharpston Affair, one would be at pains to find any, thus also highlighting that rule of law violations do not stop at the letter of the law but touche upon law in action or law in life context.

[32]T. Bingham, *The Rule of Law* (Penguin, 2010). This book is where Lord Bingham expanded on his highly referenced work in Tom Bingham, 'The Rule of Law', (2007) 66 *The Cambridge Law Journal*, 67.

[33]Venice Commission of the Council of Europe, 'Rule of Law Checklist' (Venice Commission of the Council of Europe, 2016).

[34]Case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586 (*Deficiencies in the system of justice*) (28 July 2018), para. 64; Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531 (*Independence of the Supreme Court*) (24 June 2019), para. 75. For a full analysis, see L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (SIEPS, 2021).

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

[36]Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531 (*Independence of the Supreme Court*) (24 June 2019), para. 76.

[37]This is how 'Ruling by Cheating' works, analysed in A. Sajó, *Ruling by Cheating* (Cambridge University Press, 2021).

3 | THE SHARPSTON AFFAIR: A GLARING LACK OF MECHANISMS

The rule of law is about tempering power.[38] What the Sharpston Affair revealed—as demonstrated below—is that no mechanism, whether administrative or judicial, emerged as an effective way of countering the Member States' usurpation of power. The issue of the judicial independence *of the Court of Justice* arose specifically because of the Sharpston Affair. The events which transpired are telling of how such issues arise and how they were adjudicated on. In the tale which unfolded, Judge Collins of the General Court[39] emerged alongside AG Sharpston as a strong supporter of the rule of law in the face of the immense unlawful pressure of the Member States to break the law and ignore the guarantees of independence of the Court.

However, protecting the rule of law cannot rely on the virtues (of a few) only. The Sharpston Affair offers a powerful illustration that stronger safeguards should be put into place to tame the Member States' ability to abuse the rule of law. The rule of law violation by the *Herren der Verträge* through the Declaration of the Conference spilled over into a judicial saga as a new form of rule of law violation, putting into question the Court of Justice's independence and impartiality. This judicial rule of law violation, by the Court of Justice itself, had two facets: an objective one through a denial of (proper administration of) justice, and a subjective one through a denial of the right to an effective remedy and a fair trial.

Most notably, instead of defending a sitting member of the Court of Justice in the face of an obvious abuse of power by the Member States in a concerted assault on its independence, the Court of Justice chose the side of the abuse of power against the law. Adding insult to injury, its refusal to review Member States' action was in itself clothed in the language of the law, deploying the rule of law as a justification for the lack of its own independence and deprivation of the key principles of Articles 2 and 19 TEU, as well as 47 of the Charter, as applied to the supranational adjudication.[40] In this context, it is crucial to see if such abuse could have been prevented from occurring, either by the President of the Court of Justice, or the Article 255 TFEU panel.

3.1 | Potential blocking intermediaries?

After the unlawful Declaration of the Conference on 29 January 2020, the President of the Court of Justice wrote to the Council on 31 January 2020, stating that a post for an Advocate General would be vacant from 1 February 2020. There have been different interpretations regarding the legal value of that letter. It is contended by a former President of the EFTA Court, analysing the same set of events, that the post held by AG Sharpston was vacated from that point.[41]

The General Court provided a different assessment, however, while adjudicating on AG Sharpston's action for annulment brought against the letter from the President of the Court of Justice inviting the Member States to provide for the appointment of an Advocate General. The General Court reasoned as follows:

> In the contested letter, the President of the Court of Justice refers to the declaration of 29 January 2020, by indicating that it is apparent from it that an Advocate General's post will soon be vacant. That paragraph *cannot be regarded as producing legal effects* itself with regard to the applicant. As the Court of Justice of the European Union correctly submits, the fact of referring to a vacancy cannot

[38]M. Krygier, 'Tempering Power', in M. Adams et al. (eds.), *Bridging Idealism and Realism in Constitutionalism and Rule of Law* (Cambridge University Press, 2016); see Bingham, 'The Rule of Law', above, n. 32.

[39]By complete happenstance, subsequent to the Sharpston Affair, Judge Collins of the General Court was later appointed as a member of the Court of Justice as an Advocate General in 2021, and thus has since become AG Collins, replacing AG Hogan, who resigned from the Court of Justice three years before the end of his term of office to take up a national judicial post in Ireland. AG Collins is serving out the remainder of that term.

[40]It is not the first time that the idea of the rule of law emerges as a justification for the principle's clear violations: D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', (2015) 34 *Yearbook of European Law*, 88.

[41]C. Baudenbacher, 'Lawful Composition—the EFTA Court's Approach' (*Verfassungsblog*, 20 September 2020).

> create that vacancy. The President of the Court of Justice does not have such a power and it does not follow from that paragraph that he claims to be the source of that vacancy. In so far as *the role of the President of the Court of Justice is merely to take note of the existence of a vacancy, that does not equate to declaring that the vacancy in question exists* [emphasis added].[42]

The absurdity of the situation was rightly called out by Lashyn: '[I]s it possible to take note of the vacancy's existence and imply that it does not exist at the same time?'[43] There cannot be any doubt that an assumption was created that a vacancy had arisen, even if it did fly in the face of everything that the applicable law would demand.

One key question remains, though: Even if one would agree that the President of the Court of Justice did not have the power to create a vacancy, from a rule of law standpoint, does that mean that he had the obligation to give right to an unlawful declaration violating the judicial independence of his own Court? It will never be known what happened behind closed doors, but one could also wonder whether, on the contrary, the President of the Court of Justice did not have the legal duty to uphold the rule of law, and bravely, just do nothing. This would have neutralised the Member States' illegal move to prematurely dismiss AG Sharpston. It would also remove a legally questionable assumption that the President of the Court of Justice's task is to assist the Masters of the Treaties in an unlawful attack on the Court of Justice. Lowering the flag of judicial independence on the ship under the President's command was the captain's choice, which sent shockwaves around the legal community.

Indeed, what could have happened, had the President of the Court of Justice not written that letter? The Conference could not have done anything on their own. They could have asked the judges and Advocates General of the Court of Justice to unanimously deprive AG Sharpston of her office in accordance with Article 6 of the CJEU Statute—an impossible course of action, given how unlikely it would be to expect all the members of the Court of Justice to join the servile political position, which is blind to the law and directly attacks their own court of law. This episode demonstrates, in any case, the necessity of reinforcing the Court of Justice's judicial independence against undue pressures. It demonstrates to an equal measure the importance to check the President of the Court of Justice's discretion in vital matters pertaining to the defence (or not) of the Court of Justice's independence.

Another way to have stopped this manifest violation of judicial independence and the rule of law would have been for the newly appointed Mr. Rantos to be deprived of his initial mandate in accordance with the same Article 6 of the CJEU Statute, but this did not happen. Exploring all possible scenarios, Mr. Rantos could have also decided to refuse the illegitimate appointment to the Court of Justice, or resign his office, pursuant to Article 5 of the CJEU Statute of the Court. But he did not.

That Member States were able to use and abuse judicial appointments to the Court of Justice also raises questions about the other checks on their powers. Previously, reforms had been introduced to respond to the risk of unsuitable persons becoming members of the Court of Justice and General Court, in the form of an expert panel to ensure that *all* members of the CJEU were suitability qualified to perform their duties. This Article 255 TFEU panel is there to scrutinise the competence of proposed nominees for appointment when a vacancy on the CJEU arises.

The panel established under Article 255 TFEU played a role in the Sharpston Affair. When that panel receives a nomination, it scrutinises candidates once a vacancy has duly arisen, or is about to arise. It appears from the appointment of Mr. Rantos to the Court of Justice that his nomination was indeed scrutinised by the Article 255 TFEU panel[44] prior to the representatives of the governments of the Member States formally appointing him under the Article 253 TFEU procedure (which was the same decision that led to the unlawful dismissal of AG Sharpston). While

[42]Case T-184/20, *Sharpston v Court of Justice of the European Union*, ECLI:EU:T:2020:474 (Order of the General Court) (6 October 2020), para. 29.
[43]S. Lashyn, 'The Unsuccessful Bid of the British Advocate-General to Remain on the Bench Despite Brexit', (2021) 84 *Modern Law Review*, 1414, 1420.
[44]'L 292/1. Decision (EU) 2020/1251 of the Representatives of the Governments of the Member States of 2 September 2020 Appointing Three Judges and an Advocate-General to the Court of Justice. Official Journal of the European Union. 7 September 2020'.

Member States are not obliged to follow the recommendation of the Article 255 TFEU panel, they have always followed it to date, and have never overruled a recommendation.

Yet, simply because the Article 255 TFEU panel receives documents about candidates for appointment to the CJEU under Article 253 TFEU, one could think that this does not necessarily mean that the Article 255 TFEU panel *must* scrutinise the candidates. Rather, it can be argued that given the independence under which the Article 255 TFEU panel is supposed to operate, it should only scrutinise nominated candidates *once a vacancy has duly arisen, for a term which is set to expire for a sitting member*, or, alternatively, *when proof that a vacancy is soon to arise in a lawful manner has been formally communicated to it*. It is therefore submitted that, in situations like that of Mr. Rantos, whose credentials were submitted to the panel by Greece, the Article 255 TFEU panel could have declined to offer an opinion on the qualifications of Mr. Rantos to be a member of the Court of Justice. This could have been done, not on the basis of his qualifications, but rather on the grounds that the Article 255 TFEU panel can only scrutinise a candidate's competence to be a member of the CJEU once a vacancy has duly arisen, or the Article 255 TFEU panel has been provided with evidence that a vacancy is soon to lawfully arise.

Given that the Declaration of the Conference was unlawful, that the letter of the President of the Court of Justice was either of a mere declaratory nature or equally unlawful, and that AG Sharpston, unlike the UK judges, was still a sitting member of the Court of Justice when the Article 255 TFEU panel received documentation regarding Mr. Rantos, the panel could have declined to provide an opinion, and thus have denied the representatives of the governments of the Member States the possibility of appointing him *in absence of a vacancy*. This power of the Article 255 TFEU panel would have allowed it to be a blocking intermediary and a de facto check on the Member States, which was the very purpose for which the panel was established. This, however, simply did not happen. The panel failed to protect the rule of law, and played a role in an unlawful appointment that tainted the Court of Justice, which is exactly the opposite of the goal it was designed to achieve.

To summarise, after the Conference took upon themselves without any valid legal basis to try and dismiss an Advocate General, a power they did not have, but belonged to the Court of Justice, the President of the Court of Justice *merely* declared a vacancy, Article 255 TFEU panel *only* checked the credentials of Mr. Rantos, and the Court's members collectively did *not* avail themselves of the options offered by their own Statute. At first sight, they all stuck to the strictures of the law, yet they did not.

Some could argue that this points to the limits of a formalist approach to and definition of law, but the Sharpston Affair shows that the same flaws apply to a substantive approach since the meaning of the rules and concepts themselves were twisted as well. This sheds light on the perverse, pervasive and adaptative nature of rule of law violations from a legal perspective. This is the very reason why legal mechanisms *whose main aim* is to protect judicial independence and the rule of law at the EU level should be set. The Sharpston Affair glaringly illustrated that such mechanisms are currently lacking and should urgently be put into place in order to avoid any future violations of judicial independence and the rule of law at the supranational level. Respect for the rule of law should not be a mere option if one takes it seriously as an EU fundamental value. This also illustrated the fundamental nature of law as a political power-tempering tool in democratic regimes.

The double standards emerging as a result of the complex failure of the EU's institutions and procedures to shield the CJEU from the abuse of power by the *Herren der Verträge* add another argument to the urgency of solving this issue: preaching judicial independence as an essential part of EU law at the national level while not applying it to the very courts of law tasked with enforcing the principle supranationally is in and of itself an attack on the core principles of Articles 2 and 19 TEU. This is particularly clear in light of the ongoing development at the Member State level. As already observed, in the Polish case of rule of law backsliding, as just one example, judicial mechanisms have been key in fighting *coups* against judicial independence and upholding the rule of law. Can the same be told regarding the Sharpston Affair?

3.2 | A denial of (proper administration of) justice

On 2 September 2020, the Member States, by common accord, decided to appoint Mr. Rantos as the Advocate General proposed by Greece,[45] after the Article 255 TFEU panel found him to be qualified, to be appointed to a vacancy that did not exist. They determined 7 September 2020 as the date on which he would take up his office. This decision was apparently made in the ordinary way, by 'common accord of the governments of the Member States' ('2 September 2020 activity' in the language of Judge Collins of the General Court), as set out in both Article 19 TEU and Article 253 TFEU, provisions which permit Member States to act within the EU legal order.[46]

But it was no ordinary appointment. In their decision, the Member States stated that Mr. Rantos was appointed as an Advocate General 'following the withdrawal of the United Kingdom from the EU'. Therefore, the decision was in fact two-pronged: to appoint a new member and to validate de facto the dismissal of a sitting Advocate General, enforcing their own illegal Declaration of the Conference, thus setting aside all the EU primary law on judicial vacancies, judicial appointments, and security of tenure. As previously mentioned, if Member States had the power to appoint Advocates General, by application of the principle of separation of powers found in Articles 5 and 6 of the CJEU Statute, they, by contrast, did not manifestly have the power to remove Advocates General from their office.

The legal issue was thus that the office to which Mr. Rantos was being appointed was not vacant. AG Sharpston was still in situ and would have remained there until 6 October 2021, the official end of her mandate. If the Member States had got their way immediately, there would have appeared on the bench of the Court of Justice—on 7 September 2020—a member whose right to act as a lawfully appointed member of the Court of Justice was far from obvious. Confronted by this EU constitutional conundrum, AG Sharpston quickly considered how to prevent her unlawful early dismissal from the Court of Justice.

The Court of Justice had recently built up extensive case-law upgrading interim measures on rule of law matters, in particular, the abuse of power in Poland, where judicial appointments and dismissals were routinely made with no regard to the principles at the essence of Article 19 TEU.[47] AG Sharpston concluded, rightly, that procedurally, in cases of abuse of power by the Member States, assisted by the President of the Court of Justice, the interim measures requests had to be made before the General Court, and there had to be a substantive case to be heard for the application for interim measures even to be considered. AG Sharpston and her legal representatives lodged an action for annulment of 2 September 2020 activity,[48] coupled with an accompanying interim measures application to temporarily suspend the effects of 2 September 2020 activity, in as far as it concerned the appointment of a new Advocate General in her place, and until her main action would be decided.[49]

For the very first time, a sitting member of the Court of Justice sought judicial protection from the Member States, before the lower General Court, in light of an attempt by the Member States to remove a member of the Court of Justice, outside of the ordinary and extraordinary methods prescribed in the CJEU's Statute. At the time, this approach was precisely advocated for by the current authors to safeguard the rule of law in the EU, and to fend off the attack against the independence of the EU's main court.[50]

[45]Council of the European Union, 'EU Court of Justice: Three Judges and an Advocate-General Appointed' (2 September 2020) <http://www.consilium.europa.eu/en/press/press-releases/2020/09/02/eu-court-of-justice-three-judges-and-an-advocate-general-appointed/>.

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

[47]P. 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', (2019) 56 *Common Market Law Review*, 541. Cf. Case C-619/18, *Commission v Poland*, ECLI:EU:C:2018:852 (Order of the Vice-President) (19 October 2018); Case C-619/18, *Commission v Poland*, ECLI:EU:C:2018:1021 (Order of the Court) (17 December 2018).

[48]Case T-550/20, *Sharpston v Council and Representatives of the Governments of the Member States*, lodged 4 September 2020.

[49]Case T-550/20 R, *Sharpston v Council and Representatives of the Governments of the Member States*, lodged 4 September 2020.

[50]See D. Kochenov and G. 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*, 3 September 2020). Subsequent developments were also analysed in real time: D. Kochenov and G. Butler, 'It's Urgent II: The EU General Court Temporarily Suspends the Attempted Appointment of a New Advocate General' (*Verfassungsblog*, 6 September 2020); D. Kochenov and G. Butler, 'It's Urgent III: AG Sharpston Dismissed in a Radical Move: The Court of Justice Proclaims Its Own Lack of Independence' (*Verfassungsblog*, 11 September 2020); D. Kochenov and G. Butler, 'CJEU's Independence in Question, Part IV' (*Verfassungsblog*, 23 December 2020); D. Kochenov and G. Butler, 'CJEU's Independence and Lawful Composition in Question (Part V)' (*Verfassungsblog*, 19 June 2021).

The highest bar for a party to clear for interim measures to be granted by the General Court was that of urgency. Given that the appointment of Mr. Rantos was to take effect on 7 September 2020, the week following the 2 September 2020 activity aiming to appoint him, thus dislodging AG Sharpston from the Court of Justice, time was of the essence. The interim measures would have secured AG Sharpston's office, and her action would also seek to ensure that Member States would have to follow the rules and thereby uphold the judicial independence of the Court of Justice in the face of immense pressure from the President to the contrary.

The same day as her application was lodged, on Friday, 4 September 2020, Judge Collins of the General Court, the judge hearing the application for interim measures under Article 157(4) of the Rule of Procedure of the General Court,[51] ordered the suspension of operations and all consequential effects of 2 September 2020 activity, insofar as it purported to appoint a new Advocate General in lieu of AG Sharpston and until he could determine the interim measures application itself.[52] The Order of Judge Collins questioned whether a vacancy had existed at all at the Court of Justice. In his own words, '[a]s of the date of the making of this order[,] each of these eleven posts are occupied'.[53] In this context, reasoned Judge Collins, the appointment, were it to go ahead, would effectively 'terminate [AG Sharpston's] mandate' before the term she was appointed under had expired.[54]

Judge Collins also explicitly queried the lawful composition of the Court of Justice, wanting to consider further whether the representatives of the governments of the Member States could indeed remove a member of the Court of Justice, emphasising the consequences of having a new Advocate General, whose appointment was questionable. In explaining his Order, 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 who 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 [Court of Justice], 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.[55]

The Order of Judge Collins reflected the growing practice of the CJEU, born of necessity, to use interim measure tools at their disposal to safeguard the rule of law. The interim measures procedure had, prior to this, never been used to suspend with immediate effect an effort by the representatives of the governments of the Member States to appoint members to the Court of Justice, and in this case, dismiss a member from the Court of Justice.

It is worth recalling that the interim relief Order of Judge Collins of 4 September 2020 merely ensured that the status quo was maintained on 7 September 2020, when the would-be Advocate General was due to take up his office. As 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'.[56] Its effect was a temporary, suspensory measure which maintained the status quo until the interim measures application had been fully dealt with.[57] The respondents—the Council and the representatives of the governments of the

[51]Ordinarily, it is the President of the General Court which would hear interim measures applications, or where necessary, the Vice-President of the General Court. Where neither are available, it then falls to a President of one of the chambers. At the time, Judge Collins was President of the Third Chamber of the General Court.

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

[53]Ibid., para. 4.

[54]Ibid., para. 7.

[55]Case T-550/20 R, *Sharpston v Council and Representatives of the Governments of the Member States* ECLI:EU:T:2020:416 (Order of the Judge Hearing Applications for Interim Measures) (4 September 2020), para. 13.

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

[57]Case T-550/20 R, *Sharpston v Council and Representatives of the Governments of the Member States* ECLI:EU:T:2020:416 (Order of the Judge Hearing Applications for Interim Measures) (4 September 2020), para. 8.

Member States—were given one week to submit their written observations on the interim measures application. The appointment of a new Advocate General to replace AG Sharpston could therefore not happen on the date intended by the Member States. However, although Judge Collins had given the respondents until Friday 11 September 2020 to file their observations, the matter never returned before him.

On Saturday, 5 September 2020, the day after Judge Collins had issued his Order, both respondents, the Council and the representatives of the governments of the Member States, quietly lodged an appeal against this temporary, suspensory interim relief Order, bringing it to the desk of the then Court of Justice Vice-President, Judge Silva de Lapuerta.

On the morning of Thursday, 10 September 2020, without formal prior notice or publicity that the respondents had appealed against the Order of Judge Collins, the Court of Justice Vice-President ruled the respondents' appeal admissible and issued two Orders, one in relation to the Council's appeal and one in relation to the representatives of the governments of the Member States' appeal.[58] By these Orders, she set aside the preliminary interim relief Order of Judge Collins—which the latter deemed necessary for the proper administration of justice faced with a case raising complex issues of law before he could rule on the interim measures application itself—and dismissed AG Sharpston's application for interim measures in its entirety without even notifying AG Sharpston of the appeal that had been lodged. AG Sharpston's pleas to secure the judicial independence of the Court of Justice, according to the same Court of Justice through its Vice-President, had "prima facie" "no prospect of success".[59]

Such a statement "prima facie" cannot fail to raise eyebrows for several reasons, both substantial and procedural. As demonstrated in the previous section, the decision to appoint a new Advocate General, in the absence of a vacancy due to the prior Advocate General's possibly unlawful dismissal, was, to say the least, and in the circumstances of the case, neither legally uncontroversial nor anecdotal. Even those who would beg to differ with AG Sharpston's arguments before the General Court or our own in this article would concede that the Court of Justice Vice-President's characterisation flies in the face of what a "court" is about: to uphold justice and the rule of law.

Substantially, it is enough to contrast the "no prospect of success" conclusion by the Court of Justice Vice-President with Judge Collins' own rationale for granting interim relief. In his Order of 4 September 2020, Judge Collins noted:

> One part of the application alleges, in fine, that the appointment of Mr. Rantos by the Representatives of the Governments of the Member States constitutes an unwarranted and unjustifiable interference with the autonomy and independence of the Court of Justice as provided under the treaties establishing the European Union. It further pleads that the Decision is subversive of the independence and autonomy of the judicial branch of government of the European Union and that it usurps powers that the treaties establishing the European Union attribute to the Court of Justice exclusively.
>
> Another part of the application asserts that the Decision is grounded upon an erroneous interpretation of Article 50(3) TEU, which provision has not had the benefit of authoritative interpretation by the Court of Justice.
>
> Both of these issues raise *complex issues of law* that, *at a very minimum*, require *detailed and comprehensive argument* before the judge hearing the application for interim measures before the application for interim measures can be ruled [emphasis added].

The Court of Justice Vice-President's Orders of 10 September 2020 were based on precariously dubious reasoning and legal grounds. In effect, the Court of Justice Vice-President claimed that AG Sharpston's application had "*prima facie*" (emphasis added) "no prospect of success" in substance, and at the same time took upon herself to

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

decide on her own that a "common accord" decision under Article 253 TFEU was not subject to judicial review, substantively or procedurally.

Most intriguingly though, the Court of Justice Vice-President did not state whether the Member States' actions were lawful or unlawful. Rather, she stated that the matters at hand were *unreviewable*, and on this ground not only set aside the temporary interim relief Order of Judge Collins, but also took the freedom to dismiss AG Sharpston's as yet decided application for interim measures in its entirety. Of particular note is the Court of Justice Vice-President's abuse of the appeal proceedings. The Court of Justice Vice-President's Orders following the appeal against the suspensory interim relief Order of Judge Collins amounted to a de facto decision on the merits of the full case before the General Court.

As such, the Court of Justice Vice-President 'purported to decide the entire case on an ex parte application against an ex parte freezing order'.[60] This was a gross irregularity, particularly on an issue which was less clear-cut than was portrayed, and with far-reaching implications. What the Court of Justice Vice-President's Orders did was effectively confirm that any member of the Court of Justice, including its judges, can be removed on the basis of a decision of the Member States acting under Article 253 TFEU, and that such an act is non-reviewable in contexts beyond Brexit. Rather than allowing Judge Collins to conclude the interim measures proceedings before the General Court after a proper hearing, the result was a harmful farce.

A particularly striking aspect of the Court of Justice Vice-President's Orders was that they tacitly confirmed presumptions ordinarily repugnant to EU primary law: that the Court of Justice is not independent, and that the principle of the irremovability of its members can be disapplied without legal ground. Instead of striving to ensure that the Court of Justice met the high standards of judicial independence and irremovability of members established in its own case-law—let alone met the basic standard set out by the ECtHR[61]—the Court of Justice Vice-President precisely renounced those principles, which the Court of Justice had otherwise been quite successful in elucidating in a line of prior judgments as regards national courts and tribunals.[62]

Furthermore, even if Article 253 TFEU regarding the appointment, by common accord of the Member States, of judges and Advocates General to the Court of Justice could properly be understood to permit the de facto removal of a member of the Court of Justice under the circumstances faced by AG Sharpston (which it is argued it could not, and which the Court of Justice failed to determine), this decision must have been subject to judicial review for procedural irregularities. Any other reading left the Court of Justice open to the charge that it lacked independence.

According to the Court of Justice Vice-President, the source of the non-reviewability of the Member States' decision to appoint Mr. Rantos and thus effectively dismiss his predecessor, AG Sharpston, was the fact that the challenged 2 September 2020 activity had been adopted by the representatives of the governments of the Member States under Article 253 TFEU, and not the Council, which could not therefore be challenged, per se, on the basis of the assumption that no claim may be brought against the decisions of the Member States not meeting in Council or the European Council. One could legitimately wonder whether such an assumption is not, per se, a complex issue of law that should not have been eluded or brushed under the carpet by one single judge, even the Court of Justice

[60] J. 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>.

[61] E.g., *Guðmundur Andri Ástráðsson v Iceland*, ECLI:CE:ECHR:2020:1201JUD002637418, and *Xero Flor w Polsce sp. z o.o. v Poland*, ECLI:CE:ECHR:2021:0507JUD000490718; *Grzęda v. Poland* App. No. 43572/18.

[62] As previously mentioned, the 2 September 2020 activity demonstrated a clear breach of the principles of independence and irremovability, failing to meet the 'cardinal' (in the Court of Justice's own formulation) principles of the rule of law and the organisation of the judiciary, in breach of Articles 19 and 2 TEU. In the years just past, the CJEU had built up a rich case-law on judicial independence from Case C-64/16 *Association of Portuguese Judges*; Case C-192/18, *Commission v Poland, (Independence of Ordinary Courts)*; C-619/18, *Commission v Poland (Independence of the Supreme Court)*; Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others v Sąd Najwyższy*; and Case C-274/14 *Banco de Santander*. For a detailed analysis of all this case-law, see Pech and Kochenov, SIEPS Report, op. cit. With regard to independence criteria, see G. Butler, 'Independence of Non-judicial Bodies and Orders for a Preliminary Reference to the Court of Justice', (2020) 45 *European Law Review*, 870. This solid line of case-law, fully vindicated in light of the apparent rule of law challenges in Europe at the time, clarified that the dismissal of a member of a national judiciary or quasi-judicial body during that person's term of office violated EU law. In the Court of Justice's own case-law, breaching the irremovability of members of judicial bodies was an explicit violation and could not be compatible with EU law.

Vice-President, and even more so in a case in which the independence of the Court of Justice itself—the key element of qualifying as a "court" under Article 6 ECHR, Article 19 TEU, and Article 47 of the EU Charter—was at stake.

One could contend that, within the scope of EU law, the very idea that the Council and the representatives of the governments of the Member States are separate entities is entirely fictitious. The idea of 'the governments of the Member States' as a decision-making body within the scope of EU law as an alias for the Council, deciding by unanimity, is distinguished as such only in relation to Article 253 TFEU. The way this concept is used in all other cases in the EU Treaties is to describe the governments of the Member States as separate national institutions, which can meet together in a conference for treaty change purposes, or other similar instances. To all intents and purposes, when speaking about judicial appointments, in reality, the representatives of the governments of the Member States and the Council are one and the same. This can be analogised with the situation which arose in *NF v European Council*.[63] There, the "EU–Turkey Statement" was found at first instance to be an act beyond judicial review, on the less-than-promising interpretation in that case that it was an act which could not be attributed to the European Council, even though in reality it was.

Intriguingly, the President of the Court of Justice has written elsewhere, suggesting that there would be nothing in principle preventing the Court of Justice from reviewing, through another procedure, whether this kind of activity can be judicially reviewable, and better deciphering what is an act within the scope of judicial review by the CJEU.[64] The apparent impossibility of judicially reviewing actions of the Member States, which are either sanctioned by or have effects on the EU legal order, is a fundamental question of EU constitutional law and is still open for discussion, and for judicial review to be allowed in appropriate instances such as the situation of AG Sharpston. To say the least, this should have prevented the Court of Justice Vice-President from eluding the issue and too confidently brushing it under the "no prospect of success" carpet.

Perhaps even more puzzlingly, while the representatives of the governments of the Member States were deemed to be beyond the law, and their actions beyond the scope of judicial review, they did, as is evidenced by the Court of Justice Vice-President's Orders, have legal standing to lodge an appeal against interim measures suspending the effect of their decision to appeal and could thus sue whilst simultaneously not be sued. The Court of Justice Vice-President did not appear to be troubled by this. It is also worth mentioning that the Court of Justice Vice-President omitted the fact that the suspensory interim relief Order of Judge Collins was not final. The procedure was ongoing before Judge Collins. That Order was therefore in principle not capable of appeal.[65]

Moreover, the Court of Justice Vice-President found that the acts of the representatives of the governments of the Member States could not be subjected to judicial review, as they fell outside the scope of Article 263 TFEU.[66] This was despite the fact that the Member States were operating within the scope of powers conferred in the EU Treaties, namely, Article 253 TFEU. Under this article, Member States may act in the capacity the EU Treaties provide them the competence to do so, and not simply to take ad hoc actions outside the EU legal framework. The powers conferred upon the Member States under Article 253 TFEU must be considered as being within the spectrum of what the EU Treaties, at various junctures, have called 'institutions, bodies, offices and agencies', which is drawn as widely as it suits.[67]

[63]Case T-192/16, *NF v European Council*, ECLI:EU:T:2017:128. See M. Gatti, 'Attribution of Authorship of "EU" Legal Acts: NF and Others v European Council', in G. Butler and R.A. Wessel (eds.), *EU External Relations Law: The Cases in Context* (Hart Publishing, 2022).

[64]K. Lenaerts, 'The Court of Justice of the European Union and the Refugee Crisis', in K. Lenaerts et al. (eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing, 2019), 10.

[65]See Article 56 of the Statute of the Court.

[66]According to Article 263 TFEU: 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.'

[67]See, e.g., Case C-551/21, *Commission v Council*, ECLI:EU:C:2022:163 (*Gabon*) (Order of the President of the Court of Justice) (3 March 2022), on allowing the High Representative of the Union for Foreign Affairs and Security Policy intervene in a case.

It was incorrect of the Court of Justice Vice-President to read the EU Treaties as investing specific and defined powers which are nonetheless absolved of any review whatsoever. Yet the Court of Justice Vice-President appeared certain of the Court of Justice's powerlessness to review a decision of the Member States taken in direct breach of the provision which established the power to decide in the first place, and proceeded to take the final decision to set aside Judge Collins's suspensory Order. Again, although one can disagree with the legal analysis in this article, it cannot be contested that such an issue manifestly constitutes a complex issue of law regarding the reviewability of the Member States' collective decision that should have prevented the Court of Justice Vice-President, in the first place, not only from setting aside the temporary interim relief Order of Judge Collins, but also from dismissing AG Sharpston's not-yet-decided application for interim measures in its entirety based on her own appreciation of the main case itself. In this sense, the Court of Justice Vice-President's Orders constitute a manifest denial of justice, if not a straightforward abuse of power.

To reinforce the claim that AG Sharpston's case before the General Court was prima facie inadmissible, the Court of Justice Vice-President further relied on *Bangladesh Aid*,[68] an EU external relations law case, to argue 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'.[69] This argument, however, appeared wrong from the outset, since the representatives of the governments of the Member States would obviously be limited to appointing 11 Advocates General, as Judge Collins rightly pointed out in his Order. In the absence of a vacancy, the representatives of the governments of the Member States could not legitimately refer to Article 253 TFEU to appoint another Advocate General if the consequence was to undo a previous appointment, in direct breach of the six-year term of office established by that very provision.

Moreover, the absolutism of the Court of Justice Vice-President's Orders on the impossibility of reviewing a decision under Article 253 TFEU was difficult to reconcile with a proper system of judicial review. At the most extreme end of the spectrum, this approach to irregularities in the use of Article 253 TFEU could grant the representatives of the governments of the Member States free rein to do as they wish. For instance, it could permit the Member States to disregard the Article 255 TFEU panel process on vetting the suitability of candidates for appointment to the CJEU, or even to expand the number of members of the Court of Justice beyond those specified in the EU Treaties through court packing. The Sharpston Affair, opened by the unlawful Declaration of a Conference, coupled with a questionable letter from the President of the Court of Justice, as we have seen, and further facilitated by the Court of Justice Vice-President, thus set a very dangerous precedent regarding the Court of Justice's independence, as nothing would prevent such occurrence from happening again, without an evolution of thinking concerning the core guarantees of the CJEU's independence. It did raise complex issues of law that would have deserved a better treatment than a bundled-up dismissal from the Court of Justice Vice-President.

Based on the foregoing, it would appear that the Court of Justice Vice-President cared little about legal reasoning or the law and enabled the Member States' unlawful behaviour to be pushed through. By its Vice-President's very questionable Orders, the Court of Justice seems to have paid lip service to the Masters of the Treaties and set aside one of its main missions, upholding the rule of law, while abdicating its judicial independence of its own volition. The fact that the Court of Justice Vice-President essentially argued that there could be no appeal against a decision by common accord of the governments of the Member States under Article 253 TFEU curtailed the promise of *Les Verts*,[70] and paid scant regard to all the recent case-law of the Court of Justice on judicial independence. The Court of Justice Vice-President's Orders thus have the potential to undo any idea of judicial independence in the

[68] Joined Cases C-181/91 and C-248/91, *Parliament v Council and Commission*, ECLI:EU:C:1993:271 (*Bangladesh Aid*). See L. Pantaleo, 'The Reviewability of Acts Adopted by the Member States Meeting within the Council: Parliament v Council and Commission (*Bangladesh Aid*)', in G. Butler and R.A. Wessel (eds.), *EU External Relations Law: The Cases in Context* (Hart Publishing, 2022).

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

[70] Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, ECLI:EU:C:1986:166.

EU. Letting the "Masters of the Treaties" roam beyond the reach of the law is not in line with the rule of law, and thus is more reminiscent of the situation in Hungary and Poland than of the EU as a whole.

The genius, but, at the same time the heart, of the egregious denial of (proper administration of) justice, if not abuse of power committed by the Court of Justice Vice-President, consisted substantially in dissociating the issue of the appointment of a new Advocate General pursuant to Article 253 TFEU from the question of the legality of the de facto dismissal of his predecessor in the absence of a vacancy based on the more than doubtful legality, if not manifest illegality, of the Declaration of the Conference on the premature ending of AG Sharpston's mandate as a Brexit side effect. One could argue, at this point, that it was "merely" a narrow "reading" of the EU Treaties, which nonetheless stuck to the letter of the law (although inherently flawed as previously demonstrated). However, this would be forgetting that the advocated denial of (proper administration of) justice also consisted procedurally not only in setting aside the interim Order of Judge Collins, but also in dismissing AG Sharpston's application in its entirety, with ripple effects on her main action and any other actions she may have brought before the CJEU. This illustrates a well-known fundamental paradox, characterised by Scheppele as "autocratic legalism"[71]: although the rule of law relies on law as a tool to ensure its protection, rule of law violations also adopt the disguise of the law. Law is used as a tool to destroy its very raison d'être in a democratic regime based on the rule of law. This could lead to a revival of old controversies between positivists and naturalists on the role and nature of law. However, this would only sow division, while totally missing the most important point: rule of law violations rely on the perversion of the law, whether substantive or formal.[72]

The shady circumstances in which Mr. Rantos took office, and AG Sharpston de facto dismissed, only reinforce the impression that something went utterly wrong, tucked away in the fairyland Duchy of Luxembourg. A replacement for AG Sharpston was sworn into office the very same morning the Court of Justice Vice-President issued her Orders. More precisely, or more confusingly, Mr. Rantos got sworn in at the beginning of a hearing session on Thursday 10 September 2020, which took place from 09:00 to 10:00, while AG Sharpston, who was unaware of the appeal made by the respondents before the Court of Justice Vice-President, got notified of the Court of Justice Vice-President's Orders via an automatic email sent by the Registry to her lawyer at 09:14.

Pursuant to the Court of Justice's rules, the notification to her lawyer, equally unaware of the appeal, became effective at 09:54 when he downloaded the Orders of the Court of Justice Vice-President. Technically, but one could wonder at this point if anyone cared anymore about such finesse as respecting the Court of Justice's procedural notification rules, albeit crucial for upholding the rule of law, the new Advocate General, Mr. Rantos, got sworn in at a time when AG Sharpston was still protected by the interim relief Order of Judge Collins.

As recounted by AG Sharpston, 'By happy chance, the Deputy Registrar had a copy of the oath of office in Greek and the new member of the Court was immediately sworn in behind doors guarded shut'.[73] Such *coup (de théâtre)*[74] was thus formidable in many ways to the point that one could wonder whether it is a faithful application of Article 2 of the CJEU Statute which states that '[b]efore taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court'. Note, without pun intended, that secrecy is supposed to apply to the deliberations of the Court of Justice only, and not to the oath itself, as otherwise, this would defeat its purpose.

To summarise, the then Court of Justice Vice-President it took upon herself to dismiss in its entirety the interim relief Order of Judge Collins and AG Sharpston's request for interim measures on very questionable legal grounds, both procedurally and substantively. Her Orders de facto signed the ending of the mandate of AG Sharpston, abruptly replaced by Mr. Rantos.

[71]K.L. Scheppele, 'Autocratic Legalism', (2018) 85 *University of Chicago Law Review*, 545.
[72]M. Krygier, 'The Rule of Law: An Abuser's Guide', in A. Sajó et al. (eds.), *Abuse: The Dark Side of Fundamental Rights* (Eleven Academic Publishing, 2006).
[73]See E. Sharpston, 'The end of 'l'affaire Sharpston'—but not of the issues that it raised', Note dated 6 August 2021.
[74]C Frati, 'Coup de théâtre à la CJUE' (*Paperjam* 10 September 2020) <https://paperjam.lu/article/coup-theatre-a-cjue>.

By the same token, the Orders signalled a denial of justice in an objective sense, characteristic of rule of law violations, which means two things. First, AG Sharpston was denied a proper ruling on the validity of the Declaration of the Conference regarding the consequences of Brexit on her mandate, while such validity was at the least raising complex issues of law. Second, the Orders of the Court of Justice Vice-President legally enforced a Declaration which we have grounds to believe was manifestly unlawful and constituted a perceived undue interference from the Member States on the Court of Justice's independence, in breach of the separation of powers and the rule of law as enshrined in EU primary law.

From a legal standpoint, as much as judges are deemed the mouth of the law, and thus incarnate the rule of law, they do so only if they themselves abide by the legal rules that govern and circumscribe their mandate and mission. Moreover, from a political standpoint, as much as they are deemed to play the part of counter-majoritarian institutions in a healthy system of checks and balances in democratic regimes, they can do so only if the necessary safeguards are put into place in order to protect their independence. This is without doubt a cause for concern. On the morning of Thursday, 10 September 2020, justice was definitely not served.

3.3 | A denial of the right to an effective remedy and to a fair trial

The first time AG Sharpston learned of the existence of the appeal was when the Court of Justice Vice-President set aside the interim relief Order of Judge Collins on 10 September 2020, while her replacement was being sworn into office. The Council and the representatives of the governments of the Member States' appeals, as respondents, were filed on an ex parte basis, and no notice of them were communicated to AG Sharpston, and nothing was disclosed publicly. How obvious the outcome of the judicial proceedings should have been, to the detriment of AG Sharpston, or perhaps more accurately in her favour, for the case to be dismissed by a single judge in the comfort of the Court of Justice Vice-President's office, without even *notifying* AG Sharpston?

The fact that AG Sharpston was not notified of the appeal to the Order of Judge Collins, while Mr. Rantos was apparently prepared for office, was just one of a series of violations of the core principles of procedural justice and fairness enshrined in Article 47 of the EU Charter of Fundamental Rights, lending to the whole affair an unusually acute sense of injustice. Article 160(5) of the Court of Justice's Rules of Procedure states 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'.[75] This did not happen for AG Sharpston.

While Article 160(7) of the Court of Justice's Rules of Procedures provides that the Court of Justice Vice-President 'may grant the application even before the observations of the opposite party have been submitted', it does not mean that the opposite party should not be notified of the appeal, and consequently, it does not justify that AG Sharpston was not made aware of the existence of an appeal in violation of Article 160(5) of the Court of Justice's Rules of Procedure. If anything, the Court of Justice Vice-President manifestly erred in law by denying to AG Sharpston, at least, the minimum guarantees of the right to an effective remedy.[76]

This is even without mentioning that Article 160(3) of the Court of Justice's Rules of Procedure specifies that such application is conditional upon the 'urgency' of the matter and so does a fortiori a derogation to Article 160 (5) of the Court of Justice's Rules of Procedure, whereby the application is granted even before the submission of the opposite party's observations. Apart from short-circuiting the proceedings in the General Court in order to kill two birds with one stone—allowing for Mr. Rantos to be sworn in as an Advocate General, and making AG Sharpston's dismissal final—one can wonder what the urgency was in depriving AG Sharpston of her right to a fair hearing before the Court of Justice Vice-President. By acting the way she did, the Court of Justice Vice-President

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

[76]See also Kieran Bradley, 'Appointment and Dis-Appointment at the CJEU: Part II—The Sharpston Litigation', (2022) 21 *The Law & Practice of International Courts and Tribunals*, 178.

only reinforced the suspicion that a case raising uncomfortable rule of law issues going to the heart of the CJEU's position vis-à-vis the *Herren der Verträge* was rushed and brushed under the carpet.

There was no apparent need for Mr. Rantos to be sworn into office with such haste, the very same day the Court of Justice Vice-President issued her Orders, apart from making their consequences irreversible, which was the very reason why Judge Collins granted suspensory interim relief in the first place. Judge Collins had given the respondents one week, until Friday 11 September 2022, to lodge their written submissions so that he could fully adjudicate on the application for interim measures, pending full proceedings on the legality of the appointment made on the basis of Article 253 TFEU, as per ordinary procedure.[77]

The General Court's Rules of Procedure permitted a case to be expedited on an application, which the applicant made. The interim solution of Judge Collins ensured that the respondents had the possibility to submit written observations and guaranteed all parties' rights under Article 47 of the Charter. Instead, however, rather than submit written observations, the Member States went ahead and appealed the Order of Judge Collins directly to the Court of Justice in secret, requesting that it be set aside but without—and this fact is important—the actual interim measures proceedings having yet been concluded, as Judge Collins was still seized of the interim measures application.

In such circumstances, prima facie, there was no compelling reason for the Court of Justice Vice-President to act the way she did, given that the interim measures proceedings were still pending before Judge Collins in the General Court. The urgency for Judge Collins to issue his Order did not apply to the Court of Justice Vice-President in issuing hers: once the Order of Judge Collins for interim relief had been issued, the case lost its urgency, and the Court of Justice Vice-President should have dismissed the appeal, letting the suspensory Order stand, and allowing Judge Collins to deliver his final decision regarding the requested interim measures.

Alternatively, the Court of Justice Vice-President could also have immediately referred the appeal against the Order of Judge Collins in the General Court to the Court of Justice, pursuant to Article 161(1) of the Rules of Procedure of the Court of Justice, so that a fuller chamber of judges could have heard the case in the Court of Justice, given that a central element of the original application concerned the undermining of the institution's independence by the Member States. Regrettably, rather than seeking what could have been wiser counsel of a broader sphere of colleagues on the Court of Justice, the Court of Justice Vice-President did not do so but acted alone. Among all the possible options, she took the most contentious action, one that coincidentally abode by the Council and the Member States' interests. Instead of strengthening judicial independence and the rule of law, the Court of Justice Vice-President straightforwardly achieved the exact opposite and deprived AG Sharpston of her right to an effective remedy as enshrined in Article 47 of the Charter.

Strikingly, when initiating their appeal, the Member States requested that the Court of Justice Vice-President rule on their appeal against the Order of Judge Collins without hearing AG Sharpston.[78] Indeed, AG Sharpston was not offered any opportunity to present written or oral arguments before the Court of Justice on the secret appeal. The Court of Justice Vice-President could have acted in a similar way to Judge Collins, given that she was seized of an appeal against a suspensory interim relief Order. The Court of Justice Vice-President could have made an Order which would have allowed AG Sharpston's legal team a similar seven days to lodge their written response. Regrettably, and in violation of Article 47 of the Charter, she did not do so, and deliberately never saw AG Sharpston's legal position.

Article 47 of the Charter states that '[e]veryone shall have the possibility of being advised, *defended* and represented' (emphasis added).[79] It can be argued that AG Sharpston's right to be defended was not respected, given

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

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

[79]*Emphasis added*. See the extensive analysis in L. Pech, 'The Right to an Independent and Impartial Tribunal Previously Established by Law under Article 47 of the EU Charter of Fundamental Rights', in Steve Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Second Edition, Hart Publishing, 2021).

that the Court of Justice Vice-President's Orders effectively resulted in Mr. Rantos taking office as Advocate General, thus depriving AG Sharpston of her office (and casting doubts on the Court of Justice's independence). More generally, the absence of notification of the appeals to AG Sharpston, together with the deprivation of her right to a hearing, constitute a clear breach of the principle of equality of arms, in contradiction with the Court of Justice's own case-law.[80] As the Court of Justice explained itself in *Guardian Industries and Guardian Europe v Commission*:

> 30. The principle of respect for the rights of the defence is a fundamental principle of EU law. That principle would be infringed if a judicial decision were to be based on facts and documents of which the parties themselves, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to formulate an opinion (*Snupat* v *High Authority*, 42/59 and 49/59, ECLI:EU:C:1961:5, 84).
>
> 31. The principle of equality of arms, which is a corollary of the very concept of a fair hearing and the aim of which is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (*Otis and Others*, C-199/11, ECLI:EU:C:2012:684, paras. 71 and 72).[81]

More recently, in the *Bezirkshauptmannschaft Hartberg-Fürstenfeld* case, the Court of Justice also highlighted the importance of the principle of equality of arms by stating that

> it is important to bear in mind that the principle of equality of arms, which is an integral part of the principle of effective judicial protection of the rights that individuals derive from EU law, enshrined in that provision, in that it is a corollary, like, in particular, the principle *audi alteram partem*, of the very concept of a fair trial, implies an obligation to offer each party a reasonable opportunity to present its case in conditions that do not place it in a clearly less advantageous position by comparison with its opponent (see, to that effect, judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, ECLI:EU:C:2019:861, paragraph 61 and the case-law cited).[82]

It is thus all the more puzzling that, in the Sharpston Affair, the Court of Justice Vice-President gave scant regard to a principle the Court of Justice holds so dear. By the same token, one cannot dissociate the assessment of the Court of Justice Vice-President's Orders from their concrete legal ripple effect. If the main argument developed by the Court of Justice Vice-President was that 'prima facie, the main action […] has no prospect of success', this concretely implies that *one single judge*, without even hearing the opposite party, took the freedom to assess not only an appeal against a provisional interim relief Order, as asked by the respondents, but the outcome of AG Sharpston's action for annulment regarding the appointment of a new member of the Court of Justice in her place, which aimed to preserve the judicial independence of the Court of Justice itself.

Through the links between the interim relief Order of Judge Collins, the dismissal of the interim measures application in its entirety and the main case at hand before the General Court, the Orders of the Court of Justice

[80] As for the ECtHR, 'Equality of arms implies that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage *vis-à-vis* the other party (*Kress v. France* [GC], 2001, § 72; *Regner v. the Czech Republic* [GC], 2017, §146; *Dombo Beheer B.V. v. the Netherlands*, 1993, § 33)'. https://www.echr.coe.int/documents/guide_art_6_eng.pdf See also *APEH Üldözötteinek Szövetsége and Others v. Hungary*, 2000, § 42; *Beer v. Austria*, 2001, § 19.

[81] Case C-580/12 P, *Guardian Industries Corp. and Guardian Europe Sàrl v Commission*, ECLI:EU:C:2014:2363, para. 30 (12 November 2014).

[82] Case C-219/20, *LM v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, ECLI:EU:C:2022:89, para. 46 (10 February 2022).

Vice-President had a decisive impact on the outcome of the main case, as well as of all the other cases brought by AG Sharpston before the General Court. The subsequent Order of the General Court to dismiss AG Sharpston's action as manifestly inadmissible relied and expressly referred to the Orders of the Court of Justice Vice-President, presented as the authoritative voice of "the Court of Justice".[83] As for AG Sharpston's parallel actions for annulment concerning the Declaration of the Conference,[84] and regarding the decision contained in the letter of the President of the Court of Justice of 31 January 2020 inviting the Member States to provide for the appointment of an Advocate General to the post held by AG Sharpston,[85] respectively, both encountered the same fate: inadmissibility.

It is worth mentioning that the three cases taken by AG Sharpston in the General Court were dealt with the very same day, 6 October 2020, by the same chamber of the General Court, effectively copy-and-pasting the logic of the Orders of the Court of Justice Vice-President, portraying it as the position of the "Court of Justice". The idea cannot be shaken that the authority of the higher Court of Justice had a decisive impact on the lower General Court, which "simply" loyally abode by the Orders of the Court of Justice Vice-President.

In principle, one could have wished for the General Court to decide, in whole independence, even with the knowledge that this would have stirred controversy and even though odds are that its rulings would have been appealed before the Court of Justice, and possibly struck down. In doing so, the General Court would have taken decisions of principle and stood up for the fundamental value of the rule of law enshrined in Article 2 TEU. It would have saved the honour of the CJEU as an institution and reminded all as to why it is held in such high regard by all courts within the EU, and why more often than not it is respected for its bold stances reflecting its role as Guardian of the Treaties and engine of European integration based on shared values. The Orders of the Court of Justice Vice-President, and their negative ripple effect in all the cases launched by AG Sharpston before the General Court, denied her right to an effective remedy, whilst nonetheless, the Court of Justice has repetitively asserted in its case-law that 'the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law'.[86]

AG Sharpston was thus effectively deprived of her right to a fair trial multiple times. Following the Court of Justice Vice-Presidents legally dubious decision not to notify AG Sharpston of the appeals by the Members States and the Council against the interim relief Order of Judge Collins, the Court of Justice Vice-President also deprived AG Sharpston of her right to a (fair) hearing in the framework of these appeals, despite the absence of any urgency. That was instance number one. By issuing Orders which set aside the interim relief Order of Judge Collins and dismissing AG Sharpston's application for interim measures in its entirety, the Court of Justice Vice-President again deprived her of her right to a fair trial as the merits of the case were not addressed by Judge Collins. This was instance number two. By the ripple effect of the Court of Justice Vice-President's Orders grounded on the 'prima facie no chance of success' of AG Sharpston's main action, AG Sharpston was again deprived of her right to a fair trial. The General Court religiously obliged. It did not decide on the merits of the cases and judged all AG Sharpston's actions inadmissible by a dutiful application of the Court of Justice Vice-President's assessment, which was made on dubious legal grounds, constituting instance numbers three,[87] four,[88] and five.[89] Furthermore, one could wonder whether the findings of the ECtHR in *Helle v Finland* regarding Article 6(1) of the ECHR, whose

[83]Case T-550/20, *Sharpston v Council and Representatives of the Governments of the Member States*, ECLI:EU:T:2020:475 (Order of the General Court) (6 October 2020).
[84]Case T-180/20, *Sharpston v Council of the European Union and Conference of the Representatives of the Governments of the Member States*, ECLI:EU:T:2020:473 (Order of the General Court) (6 October 2020).
[85]Case T-184/20, *Sharpston v Court of Justice of the European Union*, ECLI:EU:T:2020:474 (Order of the General Court) (6 October 2020).
[86]Cf. Case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para. 95; Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, para. 73; Case C-64/16, *Association of Portuguese Judges*, ECLI:EU:C:2018:117.
[87]Case T-550/20, *Sharpston v Council and Representatives of the Governments of the Member States*, ECLI:EU:T:2020:475 (Order of the General Court) (6 October 2020).
[88]Case T-180/20, *Sharpston v Council of the European Union and Conference of the Representatives of the Governments of the Member States*, ECLI:EU:T:2020:473 (Order of the General Court) (6 October 2020).
[89]Case T-184/20, *Sharpston v Court of Justice of the European Union*, ECLI:EU:T:2020:474 (Order of the General Court) (6 October 2020).

meaning and scope are supposed to be the same as Article 47 CFR pursuant to Article 52 CFR, could not be transposed in the Sharpston Affair. As put by the ECtHR,

> the Court would emphasise that the notion of a fair procedure requires that a national court which has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings.[90]

Was the procedure at all fair, considering that the General Court gave sparse reasons for its bundle-up decisions by incorporating the reasons of the Court of Justice Vice-President—a single judge of the Court of Justice—and which issued Orders marred with irregularities, on an ex parte application against an ex parte freezing order, did not in fact address the essential issues which were submitted to its jurisdiction and did merely endorse without further ado the findings reached by the Court of Justice Vice-President? The requirement of addressing the merits of the cases would have seemed all the more important where the litigant, AG Sharpston, had not been able to present her case orally before the Court of Justice Vice-President.

Relatedly, one could also contend that the ECtHR's recent findings in *Grzęda*[91] concerning the premature termination of the applicant's term of office, according to which 'on account of the lack of judicial review in this case the respondent State impaired the very essence of the applicant's right of access to a court',[92] finds application in the Sharpston case:

> The Court further emphasise[d] the need to protect a judicial council's autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers, and its role as a bulwark against political influence over the judiciary. In assessing any justification for excluding access to a court with regard to membership of judicial governance bodies, the Court considers it necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law.[93]

This says it all, and one can only regret that the Court of Justice did not adopt a similar reasoning. Instead of abiding by the Member States' whims—exactly what happened with the abusive regulation by Polish authorities, leading to the *Grzęda* and *Xero Flor* cases—the Court of Justice could have taken the Sharpston Affair as an opportunity to denounce their threat on judicial independence and the rule of law and to reaffirm the EU core values and principles while setting an example against any abusive attempts to undermine the independence of the Court in the future.

In the *Otis* case, the Court of Justice emphasised that '[t]he principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented'.[94] It results from the previous developments that in the Sharpston Affair, every single element of the principle of effective judicial protection laid down in Article 47 CFR was violated—all this in order to achieve an outcome directly contradictory to the promise of Articles 2 and 19 TEU.

[90] ECtHR, *Helle v. Finland*, 1997, § 60.
[91] ECtHR, *Grzęda v. Poland* App. No. 43572/18.
[92] ECtHR, *Grzęda v. Poland* App No. 43572/18, para. 349.
[93] ECtHR, *Grzęda v. Poland* App No. 43572/18, para. 346.
[94] Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, ECLI:EU:C:2012:684 (6 November 2012), para. 48.

Nevertheless, after the General Court delivered its three Orders on 6 October 2020 dismissing all of AG Sharpston's case before it in a small three-judge formation,[95] closing the substantive cases and effectively following the Court of Justice Vice-President, who had abused the process, an appeal was brought by AG Sharpston against two of those three Orders thus sending the matters back to the Court of Justice in the hope that it would finally consider the merits of the cases of the issues arising in the Sharpston Affair.

Subsequently, on 16 June 2021, without prior public notice, the Court of Justice, sitting as its First Chamber of merely five judges, delivered two Orders in the appeals that AG Sharpston had lodged against the closing Orders of the General Court. On substance, they examined two issues: first, whether the Declaration of the Conference, which sought prematurely to end the mandate of AG Sharpston as a member of the Court of Justice, was a judicially reviewable act,[96] and second, whether the Decision to appoint Mr. Rantos to AG Sharpston's seat on the basis of Article 253 TFEU, decided within the EU legal order, was a judicially reviewable act.[97]

In its Orders, the Court of Justice capitulated to the Member States as regards both the Declaration and the Decision. Whereas the Court of Justice had never shied away from bold rulings in order to protect the integrity of EU law and the rights individuals derived from it based on a teleological interpretation of the EU Treaties—to the point that it has repetitively been accused of judicial activism, not the least by the Member States—in the Sharpston cases, it relied on old-fashioned originalism preserving the interests of the Member States. It stated that '[i]t is clear that [...] the intention of the authors of the Treaties, reflected by Article 263 TFEU [was] to exclude from judicial review [...] acts which it is for the Member States to adopt, such as decisions appointing members of the EU Courts'.[98]

It also elaborated an even more egregious position on the *Bangladesh Aid* case, which the Court of Justice Vice-President had previously misconstrued. The Court of Justice stated that 'it follows [...] that it is [...] immaterial whether the representatives of the governments of the Member States acted within the framework of the Treaties or other legal sources, such as international law'.[99] This is quite a disconcerting statement coming from an institution which has made the defence of the autonomy of EU law its trademark as the engine of European integration, without any regard to the virulence of the attacks from its detractors.

The Court of Justice also wonderfully covered up the astonishing substantive errors of its Vice-President by refusing to engage in an ordered manner with the fundamental issues, by merely stating that the applicant's claims were 'manifestly inadmissible since [the Orders of the Court of Justice Vice-President] do not constitute the subject matter of the present action', perpetuating the role of inadmissibility as a shield against any inconvenient questions for the Member States and now the Court of Justice.[100] These findings of the Court of Justice, departing from its role as Guardian of the Treaties as enshrined in Article 19(1) TEU, were without a shadow of a doubt very damaging for the consistency of the Court of Justice's case-law, the integrity of the EU legal order, the legitimacy of the CJEU and the EU as a whole.

Moreover, it is puzzling why the case was dealt with in a five-judge chamber—the First Chamber—as opposed to a Grand Chamber or Full Court formation, which would be expected when answering big constitutional questions such as those raised by these proceedings. It seems that the Sharpston cases would have deserved the same

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

[96]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). Council of the European Union. 29 January 2020.

[97]'L 292/1. Decision (EU) 2020/1251 of the Representatives of the Governments of the Member States of 2 September 2020 Appointing Three Judges and an Advocate-General to the Court of Justice. Official Journal of the European Union. 7 September 2020'.

[98]Case C-684/20 P, *Sharpston v Council of the European Union and Conference of the Representatives of the Governments of the Member States*, ECLI:EU:C:2021:486 (Order of the Court) (16 June 2021), para. 42; and, Case C-685/20 P, *Sharpston v Council and Representatives of the Governments of the Member States*, ECLI:EU:C:2021:485 (Order of the Court) (16 June 2021), para. 49.

[99]Ibid., para. 44; ibid., para. 50.

[100]Ibid., para. 57; ibid., para. 62.

treatment as cases tackling rule of law issues in the national realm or, it is to be hoped, some pending cases related to the reviewability of Member States' decisions acting by common accord.[101]

The appeal lodged by AG Sharpston against the General Court's closing Orders offered the Court of Justice a final opportunity to clarify, in a well thought out and clearly reasoned way, whether it actually believed that decisions under Article 253 TFEU were as completely removed from judicial review as the Court of Justice Vice-President had asserted. It was thus disappointing that the Court of Justice, which has done so much for the articulation of the principle of the rule of law and, in particular, judicial independence and irremovability of judges in previous years,[102] collectively disregarded this principle.

The timing of the effort by the Member States to act against the principle of irremovability and independence of the judiciary was particularly poor. The Court of Justice had been the only institution of the Union achieving a measure of success in the promotion of judicial independence in the Member States where it is under attack.[103] Preventing the erosion of the impartiality of courts and their ability to interpret the law in compliance with cardinal principles as well as the letter of the law is precisely what the rule of law boils down to. Judge Collins rightly demonstrated, in the face of an undermining of the EU judiciary by the Member States, that the EU was indeed a Union based on the rule of law. The six-year mandate of the members of the Court of Justice and the General Court was never meant to be until the Member States decide otherwise.

The Sharpston Affair, which was marked by such manifest irregularities and absence of fairness, both procedurally and substantively, raises objectively justified doubts whether, in handling the multiple actions brought by AG Sharpston, the Court of Justice was impartial or could be perceived as impartial. Questions of the lack of independence emerge as one of the main factors here. One could distinguish independence of the Court of Justice from the Member States, from the independence of the General Court from the Court of Justice, flagging problems on both counts.

This is even more confounding when one thinks that AG Sharpston ended up being left without any remedy whatsoever. Indeed, following *Opinion 2/13* of the Court, the EU has still not acceded to the ECHR, thus preventing AG Sharpston, after exhaustion of all EU remedies, from bringing her case before the ECtHR. Moreover, the high threshold of exhausting national remedies in order to do so would discourage even the staunchest defender of the rule of law.[104] This is even more regrettable when, based on the ECtHRs recent case-law, whether *Xero Flor*[105] or *Grzęda*,[106] there is every reason to believe that her case would have finally been heard before an independent and impartial court, with the Sharpston Affair finally having the arising issues addressed by a court of law. Justice, after all, is about righting wrongs. It is as much about the acknowledgement as it is about knowledge, establishing the facts and applying legal rules.

[101] Joined Cases C-59/18 *Italy v Council* and C-182/18 *Comune di Milano v Council*, pending; Joined Cases C-106/19 *Italy v Council and Parliament* and C-232/19 *Comune di Milano v Parliament and Council*, pending; in Case C-743/19 *Parliament v Council*, pending, all relating to decisions relocating the seat of the European Medicines Authority (EMA) and the seat of the new European Labour Authority (ELA).

[102] L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (SIEPS, 2021). All the fundamental case-law notwithstanding, it is necessary to keep in mind that all the rule of law case-law of the recent years failed to bring about any tangible change on the ground in the Member States where the rule of law, including the independence of the judiciary, is known to be a problem: D. Kochenov, '*De Facto* Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times', (2021) 40 *Polish Yearbook of International Law*, 197.

[103] D. Kochenov and P. Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU', (2020) 1 *European Yearbook of Constitutional Law*, 243.

[104] Further damage to the Court of Justice from Member State actions and the Court of Justice's own short-sighted Orders could have been mitigated by initiating proceedings in a Member State court against its government, as one decision-making component of the representatives of the governments of the Member States. The room for optimism here was limited, yet the avenue remained unexplored. This route through the national courts could have led in another direction altogether—to the ECtHR to challenge the Member State on the basis of a violation of Article 6 ECHR. Although the past record of the ECtHR in substance in such cases used to be quite weak, the many victories in cases on illegally dismissed prominent court members notwithstanding. Crucially, the ECtHR has not demanded the restoration of the *status quo ante*, which has meant that the illegally dismissed court members have not been able to regain office in the context in which the security of tenure, precisely, was the crux of the matter. However, the ECtHR also has case-law which required that justice not only be done but also be seen to be done. In this sense, it is difficult to claim that justice was done or even seen to be done to AG Sharpston.

[105] ECtHR, *Xero Flor w Polsce sp. z o.o. v Poland* App. No. 4907/18.

[106] ECtHR, *Grzęda v. Poland* App. No. 43572/18.

In the meantime, it remains that the current configuration of the EU judiciary deprived AG Sharpston of her right to an effective remedy and to a fair trial in violation of Article 47 of the Charter. This points to the gravity of the attack on the rule of law and judicial independence. The removal of AG Sharpston's successor from the bench would have been, in any case, hardly possible and is now too late considering that Mr. Rantos's (short) mandate—which was lawfully that of AG Sharpston—has come to an end.

The practical consequences of the appointment of Mr. Rantos for the independence of the CJEU cannot be undone. This is because the removal of AG Sharpston's successor from the bench was hardly possible and is reflective of the Pyrrhic victory the Commission won in *Commission v Hungary (Judicial Retirement)*,[107] that, in the absence of effective interim measures, situations such as those in *Commission v Poland (Independence of the Supreme Court)* should never be repeated.[108]

The Sharpston Affair is a glaring example of justice interrupted in a context in which the Court of Justice manifestly did not play its part as a tempering-power institution. Instead of stopping the rule of law violation committed by the Member States acting by common accord to dismiss AG Sharpston through an unlawful Declaration, the Court of Justice gave the Member States a free pass, which triggered a new rule of law violation characterised by a lack, or perceived lack, of both impartiality and independence towards the Masters of the Treaties, in violation of the principle of separation of powers and in violation of the mission bestowed upon the Court by Article 19(1) TEU as Guardian of the Treaties which 'shall ensure that in the interpretation and application of the Treaties the law is observed'.

As previously demonstrated, this lack, or perceived lack, of independence found a double concrete expression, an objective one through the denial of proper administration of justice, both procedurally and substantively, and a subjective one through the denial of AG Sharpston's right to an effective remedy and a fair trial. Both point in the same direction: the Court of Justice's repeated avoidance of tackling the rule of law violation committed by the Member States, the issue of the validity of their Declaration, which is the original sin at the heart of the Sharpston Affair. All in all, what it illustrates is a worrying lack of tempering-power mechanisms and rule of law safeguards at the EU level. Granted, as much as Brexit, this is a situation which could have been foreseen only with difficulty. However, now that the issue has been identified, what can be done about it? What is and what will be the legacy of the Sharpston Affair?

4 | THE LEGACY OF THE SHARPSTON AFFAIR

4.1 | The Court of Justice through a rule of law prism

To qualify as a court or tribunal under Article 19(2) TEU, which underpins the independence of both the national and the supranational levels of the European judiciary, judicial irremovability and security of tenure, and being a body established by law, are both crucial. A close reading of the Orders of the Court of Justice Vice-President dismissing AG Sharpston's appeal points to the double standards which separate the Court of Justice from national courts of all levels, and in direct violation of the essential axioms underlying the applicable law.

The fact that arbitrary government intervention in the composition of a body sitting as a court could not be subject to review in the relevant national system was never an argument in support of a judiciary's independence. In fact, it is rather an argument for precisely the contrary. It is a perversion of legal reasoning to claim that the non-reviewability of potentially illegal decisions simply reflects compliance with the law, and it annihilates the structural independence of the CJEU as an institution. This is problematic because a provision of law cannot remedy

[107]Case C-286/12, *Commission v Hungary*, ECLI:EU:C:2012:687 (*Judicial retirement*).
[108]Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531 (*Independent of the Supreme Court*).

a situation of judicial non-independence, where the same provision exists solely to establish the body tasked with ensuring that the rule of law is observed.

By refusing to examine the issue of interference with the Court of Justice's own independence by the Member States, the message sent by the Court of Justice's *final* orders was clear. As mentioned, almost as a warning by Judge Collins in his interim relief Order, it was not a given that the Court of Justice was a lawfully composed court, just as it was not clear that it actually met the basic requirements of independence binding all the institutions worthy of the name in the Union as per Article 19 TEU. This message is troubling, since the EU Treaties aspire to create a situation in which the contrary should be the norm.

Be it as it may, in EU law, as the Court of Justice clarified, it it was for the Member States, neither for the Court of Justice that they created nor, for that matter, "the law" that they created, to decide on the exception. To put it differently, EU law failed to shape the reality of the sovereignty of the law. That the Member States are sovereign was never in doubt, but as a result of these Orders—both of the Court of Justice Vice-President in September 2020 and those of the Court of Justice itself in June 2021—the Member States have emerged as farcically sovereign, to the extent of being unconstrained by the rules they themselves established to govern their cooperation in the EU context and the institutions created to that end. This happened for a petty reason: to punish a former Member State, no matter what. This "what" happened to be the law of their Union.

The Sharpston Affair thus unearthed a fundamental question: whether the Court of Justice would qualify as a 'court or tribunal established by law' were its own standards of judicial independence or the ECtHR's, for that matter, to be applied to it. In this regard, it starts or ends with a Catch-22 situation. The President of the Court of Justice wrote to the Council on 31 January 2020 stating that a post of Advocate General would be vacant from 1 February 2020, and that the post held by AG Sharpston was vacated from that point. This raised the embarrassing question, as perceptively noted by Baudenbacher, of whether the Court of Justice was lawfully composed in the period between the withdrawal of the UK from the EU on 31 January 2020 and AG Sharpston's dismissal from the Court of Justice on 7 September 2020, extended by the effect of the interim relief Order granted by Judge Collins, until such a time when he was indeed replaced on foot of the Orders of the Court of Justice Vice-President.[109] This is provided that the Declaration by the Conference is deemed lawful.

Under this assumption, AG Sharpston's mandate 'automatically end[ed …] on the date of the withdrawal', i.e., 31 January 2020, and therefore her tenure was unlawful from 1 February 2020 until 10 September 2020. Alternately, one can consider, as this article contends, that the said Declaration was unlawful, and so was the tenure of Mr. Rantos as a member of the Court of Justice from 10 September 2020, the date of AG Sharpston's de facto dismissal by the effect of the Orders of the Court of Justice Vice-President, until 6 October 2021, the day AG Sharpston's mandate should have lawfully ended, and the remainder of the mandate of AG Sharpston in fact expired (which was fulfilled by Mr. Rantos, as if he was a lawful AG). Either/or, at some point in time, there were legitimate doubts as to the composition of the Court of Justice. These are two unsustainable outcomes which could have been easily avoided had the Court of Justice Vice-President not hurriedly abided by the Member States' Brexit whims, and confiscated the case from Judge Collins in the General Court.

Based on the Court of Justice's recent judgment in *Getin Noble Bank*,[110] the question whether it could have been considered to be an independent and impartial court previously established by law, following the questionable circumstances in which a sitting judge was appointed, depends on whether

> such irregularities are not of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to serious and legitimate

[109] C. Baudenbacher, 'Lawful Composition—the EFTA Court's Approach' (*Verfassungsblog*, 20 September 2020).
[110] Case C-132/20, *Getin Noble Bank*, ECLI:EU:C:2022:235 (29 March 2022).

> doubts, in the minds of individuals, as to the independence and impartiality of the judge concerned.[111]

The two Orders of the Court of Justice clarified that, at the time of the Sharpston Affair, the Court of Justice was not only a body which potentially lacked the independence and the impartiality to qualify as a "court" as it is understood in EU law, but also was not a court "established by law" in the sense of Article 6 ECHR. The ECHR applies to the EU legal order through Article 52(3) and 53 of the Charter, the esoteric belly rumble of *Opinion 2/13* notwithstanding, and as the ECtHR has assumed, given its *Bosphorus* doctrine.[112] Immediately prior to the Sharpston Affair, the ECtHR had been clear and convincing in its *Xero Flor* judgment,[113] which refined and further developed the ECtHR's three-prong *Ástráðsson* test, upon which is established the initial understanding that the appointment procedures of the members of a court of law are essential for the Article 6 ECHR standard to be met.

The ECtHR, 'in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers',[114] formulated a three-prong test, which is as follows: first, there must be a manifest breach of domestic law during the appointment process, as was evident in *Xero Flor*, where several members of a national court were appointed in the absence of legally required vacancies. Likewise in the current case, the Member States did not wait for a vacancy to arise on the Court of Justice before appointing Mr. Rantos. Second, the breach should pertain to a fundamental element of the procedure. In *Xero Flor*, the breach amounted to court-packing and was assessed to undermine the independence of the court in question. AG Sharpstons unceremonious removal from the Court of Justice, in the absence of a legal basis in the EU Treaties or the Statute of the CJEU, and the denial of the possibility of review, can be regarded as of the same liking. Third, the review performed by the national courts of the legal consequences of the alleged breach of the relevant judicial appointment procedure must also comply with the ECHR. In *Xero Flor*, the ECtHR found that no review was conducted and no remedy was available or provided.

Given that Advocates General are full members of the Court of Justice on a par with the judges, it is beyond doubt that, as exemplified by the two Orders of the Court of Justice confirming the non-reviewability of the usurpation of power by the Member States in the Sharpston Affair, the Court of Justice would have had difficulty arguing that, until 6 October 2021, the date of expiration of AG Sharpston's virtual but lawful mandate and effective but unlawful mandate of Mr. Rantos, who acted as an AG, it was a court established by law in line with Article 6 ECHR. The *Grzęda* case of the ECtHR only reinforces this problematic finding.[115]

The saga of the Sharpston Affair showcases the shortcomings of the essential set-up of the supranational European judiciary and the limits of a system in which the principle nemo judex in causa sua simply has no place. As previously mentioned, the question of the Court of Justice's judicial independence and whether it was a court established by law relates to one specific episode which is now in the past. AG Sharpston's mandate would have lawfully ended on 6 October 2021, and so did the short mandate of Mr. Rantos as a would-be AG. However, the legacy of the Sharpston Affair consists in demonstrating that no court is beyond attacks against its judicial independence, and the upholding of the rule of law is a never-ending battle which requires constant vigilance. One can also hope that this painful lesson and the efforts of AG Sharpston to uphold the rule of law in the EU will not be in vain. The best way to honour the righteous acts of bravery of AG Sharpston would be to finally build the rule of law safeguards that are still dearly missing.

[111]Case C-132/20, *Getin Noble Bank*, ECLI:EU:C:2022:235 (29 March 2022), para. 132.

[112]ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, Judgment of the Grand Chamber of the ECtHR (Application No. 45036/98).

[113]ECtHR, *Xero Flor w Polsce sp. z o.o. v Poland* (Application No. 4907/18). See also earlier case-law, D. Kosař and K. Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: *Baka v Hungary* and the Rule of Law', (2018) 10 *Hague Journal on the Rule of Law*, 83.

[114]ECtHR, *Xero Flor w Polsce sp. z o.o. v Poland* (Application No. 4907/18), para. 250.

[115]For the general criticism of this case, see D. Kosař and M. Leloup, '"Saying Less Is Sometimes Saying More" (Even in the Rule of Law Cases)', *EU Law Live* (31 March 2022).

4.2 | From the Sharpston Affair to necessary reforms?

Writing in the pages of the same issue of the *European Law Journal*, Judge Safjan asked whether it is worth being a *Rejtan*, a Polish Don Quixote:

> 'Is the Rejtan's true gesture—to disagree if something is not consistent with one's fundamental beliefs, just an act of useless despair? [...] Expressing one's opinion, thoughts, views, even if it does not bring directly any tangible, immediately visible result, goes far beyond pure symbolism and translates into reality'.[116]

It is in this spirit that the shapes of some much-needed reforms and case-law evolution can be sketched, in hopes of triggering further contributions and a healthy discussion.

To summarise, what occurred in the Sharpston Affair was that the Member States successfully dismissed a member of the Court of Justice and openly ignored the rules of EU primary law put in place to make such actions impossible. They did it with the assistance of the very Court of Justice whose independence was under attack. This was executed, bizarrely, with *all* Member States violating EU law, undermining both the Court's 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 intended to work. As for the reason why the Court of Justice allowed this to happen, there is no straightforward answer.

However, one of the main questions is how to prevent Member States from usurping power in the future. One of the first responses is for the Court of Justice to finally address the issue of the non-reviewability of acts adopted by the Member States by common accord, currently conveniently standing in a lawless gap. The mechanisms for guaranteeing the independence of the Court of Justice proved materially deficient in the Sharpston Affair, culminating in the Court of Justice failing to protect one of its own members. There will thus be in future cases nothing in principle to prevent the representatives of the governments of the Member States from acting the way they did with respect to AG Sharpston, with any other member of the Court of Justice they no longer want in situ, whatever might be the reason or the pretext chosen. Accordingly, these Masters of the Treaties are free to act as they think fit, so long as it is not contrary to the EU legal order as the Court of Justice now understands it. Given the limits to constraining the Member States from exercising their political will, attention must be paid to what could be done, as a matter of EU constitutional and institutional law. This all points in one direction: the need for the Court of Justice to reverse its respective Orders, both of its Vice-President, and of the First Chamber. There will come a day when the Court will have to take the necessary steps to ensure that Article 253 TFEU decisions—the 'common accord of the representatives of the governments of the Member States'—are brought within the proper scope of judicial control for procedural matters when they affect the workings of EU institutions. Indeed, the pending cases relating to decisions of the seat of EU agencies could offer more insight in this regard.[117] This would allow the Court to regain control over its judicial independence.

Another possibility would be to revise Article 263 TFEU to add Member States' decisions adopted by common accord to the list of judicially reviewable acts, at least with regard to Article 253 TFEU, thereby leaving no discretion in the hands of the Court of Justice as to whether interference in the composition of the two courts within the CJEU is subject to judicial review.

It would thus be high time to reinstate an EU Civil Service Tribunal (CST),[118] which would be competent to deal with cases involving members of the EU judicial system. Over its short life, as the only established specialised court

[116]M. Safjan, 'Is It Worth Being a Rejtan?', *European Law Journal*, in this issue.

[117]Joined Cases C-59/18 *Italy v Council* and C-182/18 *Comune di Milano v Council*, pending; Joined Cases C-106/19 *Italy v Council and Parliament* and C-232/19 *Comune di Milano v Parliament and Council*, pending; and Case C-743/19 *Parliament v Council*, pending, all relating to decisions relocating the seat of the European Medicines Authority (EMA) and the seat of the new European Labour Authority (ELA).

[118]On the life and times of the CST, see G. Butler, 'An Interim Post-Mortem: Specialised Courts in the EU Judicial Architecture after the Civil Service Tribunal', (2020) 17 *International Organizations Law Review*, 586.

within the EU judicial architecture, the CST was without doubt a success on dealing with the staff law issues. But for this reform to be fully effective, such cases would not be automatically appealable by parties all the way to the Court of Justice, given the current design of the EU Treaties and the issue of the review procedure (*le réexamen*). An appeal against irregular appointments could thus be brought before the full CST in plenary session. Another, possibly complementary solution would be for the EU to finally complete its accession to the ECHR, thus giving the ECtHR jurisdiction to hear such cases. The EU's accession to the ECHR would in any case be much welcomed in order to minimise the risks of rule of law violations at the EU level in the future. This might not be a panacea, but the awareness that there is indeed a watchdog might also have a preventive effect. The autonomy of EU law has never meant its absolution from observing the law.

As for the appointment of judges and Advocates General, it is submitted that the Article 255 TFEU panel will have to play a stronger role in the future in reinforcing the judicial independence of the Court of Justice by not abetting the Member States in attempts to undermine the independence of the CJEU. The panel's activity report usually includes detailed information on the procedures it has established for assessing the candidates and how it interprets the requirements set out in the Treaty. It would thus be advised that the next report contain the explicit rule that the Article 255 Panel shall check the existence of a vacancy and even possibly its lawfulness prior to making an assessment of the candidate's qualifications, on the basis that the existence of a vacancy is a condition sine qua non for the appointment of a new member of the CJEU. If rule of law violations rely on a perversion of the law itself, the only way to fight them from a legal standpoint is to limit the possibilities for such occurrences to happen in practice again.

5 | CONCLUSION

The Sharpston Affair illustrates and thus allows us to better identify the possible features of successful rule of law violations, which is essential in order to put into place effective safeguards and remedies. In the EU context, rule of law violations threaten the EU constitutional model characterised by a subtle, if not fragile, equilibrium between balance and separation of powers. More often than not, successful rule of law violations come in groups. First, an initial rule of law violation occurs and spills over, absent sufficient safeguards, while signalling and amplifying an imbalance of powers. In the Sharpston Affair, this is what the pre-judicial sage illustrates: in lieu of the rule of law, a rule by the "law" of the Member States acting by common accord. Second, one rule of law violation triggers the next, showcasing this time a collusion of powers to the detriment of the separation of powers.

One the one hand, issues pertaining to the absence of a proper balance of powers illustrate a worrying trend of increasing imbalance of powers to the benefit of the Member States, and reminding once again of the reasons behind the classical criticism of the Court of Justice in the leading academic literature. Indeed, the Court of Justice has been accused of being at once both activist[119] and not interested in engagement with the real world, piling poor reasoning on top of poor communication,[120] and failing as an independent arbiter through its overweening concern with ever-closer integration,[121] parading a 'constitutionally unfounded claim to *Kompetenz Kompetenz*',[122] becoming famous for reasoning from consequences[123] and turning the rule of law into a means to justify its own free hand.[124]

[119]H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers, 1986).
[120]J.H.H. Weiler, 'Epilogue: Judging the Judges—Apology and Critique', in M. Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing, 2013); J. 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', (2020) 21 *German Law Journal*, 1032.
[121]G. Davies, 'Legislative Control of the European Court of Justice', (2014) 51 *Common Market Law Review*, 1579.
[122]G. Davies, 'Interpretative Pluralism within EU Law', in G. Davies and M. Avbelj (eds.), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar, 2018).
[123]J. Bengoetxea, 'Reasoning from Consequences from Luxembourg', in Henning Koch et al. (eds.), *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf Publishing, 2010).
[124]D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', (2015) 34 *Yearbook of European Law*, 88.

On the other hand, issues pertaining to the separation of powers shed light on the weaknesses of the European judiciary, often thought of as, or feared to be, too powerful, blinding us to the possibility that it itself could be vulnerable and actually under attack. In this regard, the timing of these rule of law problems at the Court of Justice was particularly unfortunate. Just two years prior to the September 2020 developments, the Court of Justice had delivered its landmark decision in the *Association of Portuguese Judges* case,[125] which started a line of case-law allowing the Court of Justice to gradually locate the principle of judicial independence and judicial irremovability at the centre of the supranational understanding of the rule of law in the EU. A gradual articulation of the substance of judicial irremovability and independence is the crucial essence of the rule of law in the EU and is a value on which the EU and the Member States[126] were built. It grew out of specific infringement proceedings brought by the Commission against Poland, including in the *Polish Supreme Court* and *Ordinary Courts* cases,[127] as well as preliminary references such as *A.K. and Others*.[128] Judicial independence came to be the crowning achievement of the Lenaerts Court, moving the understanding of the rule of law in the EU a step further towards a well-articulated and forward-looking substantive and enforceable principle of law.[129]

This was particularly the case given that the articulation of the principle was accompanied by a significant reinforcement of the interim measures tool available to the Court of Justice in such cases. When requested by parties before the Court of Justice, illegal attacks against judicial independence in the Member States could thus be stopped at their inception, with a clear interim requirement to restore the status quo ante.[130] Even if this use of interim measures did not save the independence of the Polish Supreme Court from total demolition and collapse, just as the Polish Constitutional Tribunal before it,[131] these developments were of overwhelming significance at the level of principle.[132] They have also given the Court of Justice both jurisdiction and prominence among all the other institutions of the Union taking part in the fight for the rule of law,[133] allowing it to emerge as probably the key winner in the whole context of the rule of law crisis in the EU, albeit a winner who failed to change the situation on the ground in the Member States experiencing rule of law problems, to the better.[134]

[125]Case C-64/16 *Association of Portuguese Judges* ECLI:EU:C:2018:117; L. Pech and S. Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case', (2018) 55 *Common Market Law Review*, 1827.

[126]T. von Danwitz, 'Values and the Rule of Law: Foundations of the European Union—An Inside Perspective from the ECJ', (2018) 21 *Potchefstroomse Elektroniese Regsblad*, 1; M. Klamert and D. Kochenov, 'Article 2 TEU', in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019); L.S. Rossi, '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) *Revue Trimestrielle de droit européen*.

[127]Case C-192/18, *Commission v Poland*, ECLI:EU:C:2019:924 (*Independence of Ordinary Courts*); C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531 (*Independence of the Supreme Court*).

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

[129]Case C-791/19 R, *Commission v Poland*, ECLI:U:C:2020:277 (*Disciplinary Chamber of the Supreme Court*) (Order of the Court) (8 April 2020). Cf. L. Pech, 'Protecting Polish Judges from Poland's Disciplinary "Star Chamber"', (2020) 57 *Common Market Law Review*. For more on the newest approach to the interim measures, see P. 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', (2019) 56 *Common Market Law Review*, 541. Cf. Case C-619/18, *Commission v Poland*, EU:C:2018:852 (Order of the Vice-President) (19 October 2018); Case C-619/18, *Commission v Poland*, ECLI:EU:C:2018:1021 (Order of the Court) (17 December 2018).

[130]The Court of Justice embarked on the reinvention of interim measures in *Polish Forest*, deploying Article 279 TFEU to this end for the first time: see Wennerås, above, n. 47. 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 the 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 measures related to the rule of law were issued by the 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. See Pech, above, n. 129.

[131]See Koncewicz, above, n. 7; Śledzińska-Simon, above, n. 7; Sadurski, above, n. 7.

[132]K.L. Scheppele, D. Kochenov and B. 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', (2020) 39 *Yearbook of European Law*, 3.

[133]D. Kochenov and P. Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU', 1 (2020) *European Yearbook of Constitutional Law*, 243.

[134]D. Kochenov, '*De Facto* Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times', (2021) 40 *Polish Yearbook of International Law*, 197.

It was clear, in other words, that a great deal had changed in Europe since the Court of Justice first espoused that the EU is 'based on the rule of law', as it did in its *Les Verts* judgment back in 1986.[135] The Court of Justice has shown a strong commitment to defending the essential building block of classical constitutionalism: judicial independence. However, once the principles that the Court of Justice had formulated so admirably were brought to bear closer to home—on itself—the Court of Justice ducked. What is observed in the Sharpston Affair was closer, in all respects, to the scandalous story of the CJEU's own reform a few years previously,[136] which should have been a warning sign, but which went a long way further.

A healthy system of both balance and separation of powers presupposes conflicts about how far the influence of one branch would extend over the others. In the EU, with its long-established principle of institutional balance, safeguarding the independence of the Court of Justice—the likely arbiter in any inter-institutional conflict—is of particular importance.[137] The rule of law, a constitutional principle of the Union,[138] 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 EU Treaties-mandated term of office had not expired. Numerous questions arose as a result, the most important being how to remedy this situation to make sure that such naked abuse of power by the Member States—resulting in a disempowered Court of Justice and the explicit violation of the core values of the Union—would never happen again.

Whatever one might think about the special nature of the EU legal order, the law continues to matter. It is unquestionable that all litigants have solid reasons to expect the CJEU to be both independent and lawfully composed, in accordance with the EU Treaties, and that the CJEU would protect and defend itself from any perceived or actual interference from Member States. The Sharpston Affair was an EU constitutional muddle of grand magnitude.[139] The main victim was the EU legal order, with Member States left with the spoils of their misconduct unabashed and a court of law wounded. The Orders of the Court of Justice dismissing AG Sharpston's case, and the prior arguments of the Court of Justice Vice-President—that the Member States' grave interference in the CJEU's composition was unreviewable—were legally flawed decisions, failing to convince an honest reader, and demonstrably falling short of the basic standards of EU law and that of the ECHR.

The only weapons the Court of Justice has are its clarity of argument and the ability to persuade. To hold back in this case was no act of judicial minimalism by the Court of Justice, but rather judicial abdication to the Masters of the Treaties. In all, a major misstep resulted, and one that will live long in the memory of the CJEU as an episode it would rather forget. It is thus to be hoped for the necessary safeguards to be erected and for much-needed reforms to be enacted so that the Sharpston affair will be transcended and recalled as the Sharpston reforms. This sad episode proves Jean Monnet right in his insistence on the need to establish well-designed and functioning institutions for the European integration project. It further illustrates that no one relies on the bravery and exemplarity of (a few) individuals only for the rule of law to be upheld. Lawlessness constantly lurks around the corner when robust and effective institutions guaranteeing meticulous adherence to the rule of law are missing.

[135]Case C-294/83, *Parti écologiste 'Les Verts' v European Parliament*, EU:C:1986:166, [1986] ECR 1339. K. Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010); Pech, above, n. 13; M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999).

[136]A. Alemanno and L. Pech, 'Thinking Justice outside the Docket: A Critical Assessment of the Reform of the EU's Court System', (2017) 54 *Common Market Law Review*, 129. Also, G. Butler, 'An Interim Post-Mortem: Specialised Courts in the EU Judicial Architecture after the Civil Service Tribunal', (2020) 17 *International Organizations Law Review*, 586. For prior reforms, see J.H.H. Weiler, 'The Judicial après Nice', in G. de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford University Press, 2001).

[137]See K. Lenaerts, 'On Judicial Independence and the Quest for National, Supranational and Transnational Justice', in G. Selvik et al. (eds.), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Springer, 2019).

[138]L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* 2009.

[139]See E. Sharpston, 'The end of 'l'affaire Sharpston'—but not of the issues that it raised', Note dated 6 August 2021.

ORCID

Dimitry V. Kochenov https://orcid.org/0000-0001-9266-1188

Graham Butler https://orcid.org/0000-0002-8911-0817

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