Humiliating the Court?

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The Member States, dismissing an Advocate General before the expiration of her term of office on the Court, have demonstrated that they are ready to humiliate the Court of Justice by allowing post-Brexit frustrations take the place of the Primary Law of the EU. The Rule of Law stands replaced with political whim. As AG Sharpston's tenure is left in suspense, what is the worth of the core aspects of EU Rule of Law and judicial independence, when the Member States are willing to alter the composition of the Court by a political declaration? Make no mistake: of, course, as Alexander Somek has famously claimed, one of the key principles of EU law is that the law is never clear, as exemplified in the preliminary ruling procedure. This might indeed be absolutely true of many a sub-field of EU law, but has not until now applied to the appointment and dismissal of the Advocates General: the Treaties and the Statute of the Court are crystal clear on the matter, yet, the Member States seem to be ready to mingle this clarity away, allowing political declarations – like in the times of the Luxembourg compromise – to take the place of Primary Law and requiring *contra legem* interpretation of the latter.

The facts of the matter are simple and Daniel Halberstam's analysis is clear and convincing: AG Sharpston should stay on the Court until the expiration of her current 6-year mandate, no matter what the Member States proclaim. Moves to the contrary are in breach of Primary Law and would constitute a most worrisome example of outright dismissal of one of the crucial elements of the Rule of Law, a core value of the Union: security of tenure of the members of courts. Any authoritative analysis of the Rule of Law's core elements – from Lord Bingham's much-quoted book to the Venice Commission Rule of Law Checklist (at 33) make this simple fact undisputable. Worse still, the ECJ's own fundamental recent Rule of Law case-law honours security of tenure and the prevention of undue dismissals of the members of the judicial branch (C#216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para. 64; C#619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para. 75). The principle of irremovability has been elevated to a principle of 'cardinal importance' (C#192/18 *Commission v. Poland (Judges' Retirement Age)* EU:C:2019:924, para 115). In line with academic doctrine and global good practice, the ECJ 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' (C#619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para. 76). *A fortiori*, this principle applies to all the courts in the EU, including the ECJ, which is fully bound by the Rule of Law and determines the position of all the members of the Court, including the Advocates General.

In the Statute of the Court this principle is safeguarded by Art. 6, which prohibits the deprivation of an AG of the office without a unanimous vote of all the Judges and other AGs stating that the person concerned 'no longer fulfils the requisite conditions

or meets the obligations arising from the office', thus combining the principle of irremovability with the safeguard of judicial self-governance at the supranational level. Both principles are being breached in relation to AG Sharpston.

This is so due to the fact that there is clearly no vacancy, while the replacement procedure has already started:

1. The legal grounds for the duties of an AG to end are clearly enumerated in the Statute of the Court. Arts 5 and 6 (combined with Art. 8) give an exhaustive list of reasons: normal replacement, death, resignation, or deprivation of office. The latter is done by the unanimous decision of all the Judges and AGs with the exception of the AG concerned. It is quite clear that in the case of AG Sharpston none of the grounds listed above apply.
2. The Statute is clear. Only in the cases mentioned above can a vacancy arise, allowing the Member States to appoint a replacement. In the absence of any reference to a 'UK AG' in Art. 19(2) TEU no Declaration connecting AG Sharpston's position to a particular (former) Member State (let alone Art. 101 of the Withdrawal Agreement (WA) including the AG among 'Members of the Institutions' merely for the purposes of Title XII of the Agreement, as Halberstam has also rightly underlined) could be read in such a way as to alter Art. 19(2) TEU and the rules laid down in the Statute of the Court. Claiming the contrary would amount to suspending key aspects of the Rule of Law by way of interpretation aids – an unlikely move in any properly functioning constitutional system. Or should we really try to allow Recital 8 WA to apply to the AG overriding all the clear provisions of the Treaties and the Statute of the Court as well as the 'principle of cardinal importance' – irremovability? Given that none of the Primary Law grounds for the duties of the AG to end applies to AG Sharpston, no vacancy has arisen, which the Member States could fill.
3. A new AG can only be appointed if there is a vacancy. Since no vacancy has arisen under Arts 5 and 6 of the Statute of the Court, it is difficult to see on what ground Greece is now looking for a candidate to become an AG to replace AG Sharpston.

What is going on in front of our eyes, is that the Member States decided to ignore the rules on AG's dismissal and thus illegally created an ephemeral vacancy by political agreement. This happened in breach of the ECJ's case-law on irremovablity and security of tenure as cited above, and openly fails to follow the rules of EU Primary Law. Filling this ephemeral and illegally created vacancy with a new AG would thus amount to a direct violation on the rules of filling vacancies in Primary Law and the rules on the duration of the terms of the ECJ Judges and AGs. The Member States thereby undermine the Rule of Law and, in particular, the principles of security of tenure and irremovability, the importance of which is constantly underlined in the recent ECJ case-law.

This is quite something, given that *all* the legal rules at hand are violated with no legal basis or even a reference to a legal basis, besides an allusion to AG Sharpston in the Withdrawal Agreement as a 'member of institutions' 'nominated, appointed, or elected in relation to the UK's membership of the Union' (Article 50(3) WA). The clear problem in this regard – and Halberstam has rightly seen it too – is that

unlike with the Judges, once again, nowhere do the Treaties or the Statute of the Court connect positions of AGs with specific Member State nationalities. The informal understandings that arose among the Member States and took the form of Declarations, such as Declaration 38, cannot possibly alter the Primary Law in force, let alone add an additional ground of removing a sitting AG from the bench before the 6-year-term expires. Irremovability of the members of the Court thus perishes in the face of the political interference of the Member States, undermining the independence of supranational judiciary.

When alluding to values in the context of the on-going battle for the Rule of law in the EU where the ECJ plays *the* crucial part, leading by example is an absolute must and the Court's position here – in the absence of own police and a navy – is quite fragile. This has not prevented the Court from coming up with some deeply problematic decisions harming the substance of the Rule of Law in Europe and the level of our Human Rights protection, like Opinion 2/13 for instance, where the principle of autonomy of EU law clearly got the upper hand above the Rule of Law. The situation of AG Sharpston is of an infinitely simpler order – no legal-theoretical engagements like the contributions by Eeckhout and Halberstam following Opinion 2/13 is even required: what is at hand is in direct violation of even the most circular and outright elementary Rule of Law understandings, akin to the great *dictum* in *Le Verts*. Dismissing an AG without a legal basis based on a *contra legem* interpretation of the law triggered by apolitical declaration combined with one of her nationalities is not at all in accordance with the law, since *all* the relevant black letter rules which are very clear and straightforward stand hereby to be violated.

This is not at all how 'the Rule of Law – not men' works, even though it is in line with the thicker and thicker case-law of the Court on randomly punishing people for holding multiple nationalities. What we are facing though is potentially more explosive and counter-intuitive than even *Tjebbes*. One of two citizenships of the AG, while officially *irrelevant* by law for the dismissal and thus *not* leading to the dismissal right away on the Brexit date – unlike was the case with the British judges – is deployed at the political whim of the Member States to punish the UK for Brexit. This is done by violating our own law and *humiliating our own Court* through undermining both its independence and its attempts to take the Rule of Law seriously in the current difficult circumstances.
