CJEU's Independence and Lawful Composition in Question (Part V)

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End of the road at the CJEU

The Sharpston Affair is over, at least as a matter of proceedings before the Court of Justice of the European Union (CJEU). The outcome leaves much to be desired. On 16 June 2021, the CJEU issued two Orders (C-684/20 P ('Order 1'), and C-685/20 P ('Order 2'), putting a final tragic full stop in the Sharpston litigation. Aimed at saving the CJEU's dignity, the litigation had evolved before the General Court and (on a previous, then secret appeal) the CJEU Vice-President. Now that it is over, we submit that the opposite result has been achieved. At the critical juncture when the CJEU's authority stands contested by the courts of established democracies, the phony panels of the 'illiberal' ones, as well as the immature in-betweens, the CJEU managed to pour oil into the fire and signed off its own lack of independence: when it is needed the most, its legitimacy is in the doghouse.

The conclusion of the First Chamber of the CJEU is as sad as much as it is tragic for the self-respect and the claim to authority of the institution. In sum, the CJEU is not independent from the Member States, as the *ultra vires* actions of the Masters of the Treaties are not reviewable by the CJEU. To put it another way, what the EU Treaties say about the independence and composition of the CJEU only matters as long as the Member States do not think otherwise.

This outcome is a significant setback for the very idea of integration through law, as it is truly unclear at this point whether the CJEU is able to meet the basic threshold of independence established in EU and ECHR law.

The Orders of the First Chamber of the CJEU

The applicant, former AG Sharpston, was legally appealing against the Orders of the General Court (T-180/20, T-184/20, T-550/20), which we had previously outlined in Part IV of this saga. These were delivered with little room for interpretation by the General Court, given the CJEU VP had previously delivered Orders in a secretly lodged appeal, allowing Mr. Rantos to be sworn in as 'AG' under the cover of darkness. Therefore, whilst AG Sharpston was formally appealing the Orders of the General Court, in reality, AG Sharpston was really asking the CJEU to *de facto* review the wanting reasoning offered by its Vice-President.

The CJEU divided its two Orders of 16 June 2021 into two parts each. Firstly, it examined whether the decision made by 27 of the 28 Member States (the Conference) on 29 January 2020, pre-Brexit, which sought to prematurely end the mandate of AG Sharpston as a member of the CJEU, was a judicially reviewable act – the Declaration (XT 21018/20). Secondly, it examined whether the decision made by the representatives of the governments of the Member States (the Representatives) in September 2020, post-Brexit, which sought to appoint Mr. Rantos in AG Sharpston's seat, was a judicially reviewable act – Decision 2020/1251 – made on the basis of Article 253 TFEU within the EU legal order.

On both decisions, in both Orders, as regards the Declaration and the Decision, the CJEU capitulated to the Member States, relying on old-fashioned originalism. The CJEU 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*'. (Order 1,

para. 42 & Order 2, para. 49). It also drew an even more egregious position beyond the *Bangladesh Aid* case that the CJEU VP has previously misconstrued. The CJEU put 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*' (Order 1, para 44 & Order 2, para. 50). The CJEU also wonderfully covered up the astonishing substantive errors of its Vice-President by refusing to engage in orderly way with the fundamental issues, by merely stating the applicant's claims were '*manifestly inadmissible since… [the CJEU VP's Orders]…does not constitute the subject matter of the present action*' (Order 1, para. 57 & Order 2, para. 62).

In short, instead of trying to save face at the very least, in the two not fully reasoned judicial decisions in question, the CJEU made the situation significantly worse: it merely stood behind the General Court, who in turn had no choice but the follow the prior Orders of the CJEU VP. Shamefully, the CJEU substantially refused to put up an argument against the Member States inferring in its composition, and even went out of its way to facilitate them, thus failing to learn from the EFTA Court, who was earlier subjected to similar abuse. In a mockery of reason worthy of Alice in Wonderland, the CJEU did not even serve the appeals brought by AG Sharpston on the defendants – the Council, Conference, Representatives of the Governments of the Member State – sparring them from even trying to defend their actions before the CJEU.

Unreviewable actions setting Primary Law aside

This conclusion of the CJEU, without a shadow of a doubt, is very damaging for the EU legal order. Indeed, it is puzzling why the case was dealt with in a five-judge chamber, as opposed to a Grand Chamber or Full Court formation, which it ordinarily would for big constitutional questions such as those raised like these proceedings.

In order to qualify as a court or tribunal under Article 19(2) TEU, which binds both the national and the supranational levels of independence of the European judiciary, judicial irremovability and security of tenure on the one hand, as well as the requirement of qualifying as a body established by law on the other hand, are both crucial. A close reading of the latest orders of the CJEU dismissing AG Sharpston's appeals, make crystal clear that the CJEU would not qualify as a 'court or tribunal', should its own standards of judicial independence be applied to itself. The abyss of double standards separating the CJEU from the national courts of all levels and in direct violation of the starting premises of the applicable law is staggering: the CJEU would not be able to send itself an admissible preliminary question.

The fact that governmental interference with the composition of a body sitting as a court is not reviewable in the national system is never an argument in favour of existing independence. In fact, it is an argument that the contrary is true. What is a sign of true perversion of legal reasoning is to claim that the non-reviewability of potentially illegal decisions, annihilating the structural independence of the CJEU, is nothing but compliance with the law. This cannot be, since the law cannot solidify the situation of judicial non-independence in the context where it set out to establish a body tasked to ensure that the rule of law is observed.

By refusing to examine the issue of interference with the CJEU's own independence by the Member States, the message that is sent by the recent *final* orders of the CJEU is clear: it is not a given that the CJEU is a legally composed court, just as it is not clear that it actually meets the basic requirements of independence binding all the institutions worthy of the name in the Union as per Article 19 TEU, as interpreted by the CJEU itself. Such a message is deeply troubling, since the EU Treaties aspire to create a situation where the contrary is the given norm. Be it as it may, in EU law, as the CJEU has just clarified, it is for the Member States, not for the CJEU that they created, or, 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 known all along, but now they emerged as farcically sovereign. 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.

Compliance with the ECHR

The two Orders of the CJEU made clear that it is not only a body which lacks independence in order to qualify as a 'court' in the sense of EU law, but also that it is not a court 'established by law', in the sense of Article 6 of the European Convention on Human Rights (ECHR). The ECHR applies to the EU legal order, the esoteric belly ramble of *Opinion 2/13* notwithstanding, and as the European Court of Human Rights (ECtHR) assumes given its *Bosphorus* doctrine. Recently, the ECtHR was clear and convincing in its *Xero Flor* judgment, analysed on this blog. *Xero Flor* has refined and further developed a three-prong *Ástráðsson* test of the ECtHR, upon which the initial understanding is established that appointment procedures of members of a court of law are essential for the standard of Article 6 ECHR to be met. The three-prong text is the following:

1. The existence of a manifest breach of domestic law during the appointment process. Just as in a recent case involving the destruction of the Polish Constitutional Tribunal, which was at issue in *Xero Flor* (in the context discussed *con brio* by Wojciech Sadurski), where several members of a national court were appointed in the absence of a vacancy required by law, the Member States did not wait for any vacancy to arise with their 'appointment' of 'AG' Rantos, as we discussed earlier on this blog;

2. The breach should pertain to a fundamental element of the procedure. Just as in the aforementioned discussion of the Polish Constitutional Tribunal in *Xero Flor* has demonstrated: several members of the Polish Constitutional Tribunal were not elected when the vacancy arose, AG Sharpston was not replaced upon the emergence of a vacancy: she was simply kicked out without any legal basis in the EU Treaties or the Statute of the Court as we have discussed earlier in detail;

3. The third element of the ECtHR test is the availability of effective review of the allegation that a court of law is not lawfully composed. Just as in the Polish situation at issue in the *Xero Flor* case, where the ECtHR found that there was no available remedy left in Poland, the CJEU has clarified in the *Sharpston* cases that there was, in fact, no remedy at all.

Given that an Advocate General is a full member of the CJEU en par with the judges, it is beyond any doubt that, as of 16 June 2021, when the clarification of non-reviewability of the abuse of power by the Member States came in the *Sharpston* cases, the CJEU would have difficulty in sustaining valid arguments for why it is a court established by law, in line with Article 6 ECHR. What this means for the continued assumption of 'Convention compliance' that the ECtHR sees of the EU legal order, as per its *Bosphorus* doctrine, is thus an open question.

Conclusion

Whatever one might think about the special nature of the supranational legal order, the EU legal order, the law continues to matter. It is unquestionable that all the 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 of Member States. With respect, the argument of the First Chamber of the CJEU, that the Member States' grave interference with the CJEU's composition was unreviewable is outright garbage, which will not convince anyone and falls short of the basic standards of ECHR standards and EU law itself. This was no act of judicial minimalism of the CJEU, but rather, complete judicial abdication to the Masters of the Treaties. In time, this will be seen as a major misstep, and one that will live long in the memory of the institution, as an episode they would rather forget.

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