Comments & Questions of Online Lecture on “The primacy of EU law over national law "Rule of law contested - the Case of the Polish Constitutional Court”

Prof. Ian Forrester (Former Judge of the Court of Justice of the European Union)

Comments: I will describe a judgement of the General Court delivered on Wednesday in a case called Sped Pro v Commission. It justifies ordering the Commission to look afresh at a rejected complaint by reference to the imperfect judicial and regulatory situation in Poland. It shows that the weakness of the rule of law in Poland reaches not just courts but other official entities.

Prof. Takahiro Shinyo (Kwansei Gakuin University)

Comments and questions:

1. The Polish case is a serious violation of the EU treaty. However, there are major hurdles to the suspension of the rights of a member country based on Article 7 of the EU Treaty, and it seems that there may be opposition from Hungary and others. Therefore, it seems that the solution to this problem will eventually have to be done politically rather than legally, but what kind of political solution is possible? Is there a politician who can mediate conflicts with Poland and Hungary in Europe without Chancellor Merkel? Isn't it difficult for President Macron alone?
2. Differences in the judicial and political cultures of former communist countries such as Hungary and Poland that are not 100% familiar with “West European” values are becoming increasingly imminent. This could deepen east-west confrontation in Europe and could bring about a serious division of EU. What must be done to stop the erosion of EU after BREXIT? Is the frustration of those former East European countries attributed to the fact the current EU is dominated by a small number of major powers such as Germany and France, or to the EU's structural problem called the “Deficit of Democracy”? Will this be resolved by amending the Treaty of Lisbon and stipulating the “Primacy of EU Law” clause in the treaty?

Prof. Katsuhiro Shoji (Chuo University)

Professor Deguchi, thank you very much for inviting me to such an interesting lecture by Professor Reiterer. As a humble professor I would like to throw one short question at him, as follows:

“I think Professor Reiterer is right in pointing out that ‘non-respect cannot become a bargaining chip or a token for blackmail’ and that ‘the primacy of EU law is not an issue for specialists and seminars but an important legal and political issue for all members of the

European Union and its citizens'. In the meantime, I wonder how you think the EU could, or should, solve the problem of rule of law caused by Poland or Hungary ultimately. Would there be a change of the governments in those countries by election (a bottom-up approach) or any chance that the EU could enforce them (a top-down approach)?"
I do hope that the online-lecture by Professor Reiterer which you kindly organised will be a great success.

Prof. Koji Fukuda (Waseda University)
Comments and Questions:
The EU is a community aimed at peaceful coexistence based on the rule of law open to European liberal democratic countries. In the basic idea of European integration, there is a big difference in the perception and position regarding the EU's organizational objectives and functions between the original member states and the Central and Eastern European countries. Pis, Poland's right-wing nationalist government, has been defied by the EU's basic principles since it began reforming the justice system in 2015. Furthermore, Last October 7, Polish Constitutional Court ruled that domestic law took precedence over EU law, which raised serious problems.
Therefore, I have the following three questions.
First, is there any reason why the judgment of the EUCJ can be justified and can claim legitimacy in accordance with the principle of proportionality? I would like to hear if you think whether or not the means of imposing a fine of the 1 million Euros per day is considered effective measure in the light of the purpose of maintaining EU integration.
Second, the decision of the EUCJ is a legal ex post facto response. From a political science standpoint, I think it is important to establish for the EU to have regulatory governance system that embodies rules for each presumed case of a preventive measure that will be a deterrent to member states. I would like to receive the opinions of the professor.
Third, Poland is the highest recipient of EU subsidies among the 27 member states. According to the latest Eurobarometer survey, 80% of Polish citizens say that the EU's basic values and rule of law are very important or important in the light of the relationships with hegemonic countries such as the United States, Russia and China. Looking at this reality, it is hard to think of a "Polexit ". Therefore, please tell us what kind of institutional reforms are necessary for discussions on future reforms of the EU Basic Law after the Lisbon Treaty.

Prof. Kimio Yakushiji (Ritsumeikan University)
Thank you very much Prof. Dr. Michael Reiterer for your stimulative and informative lecture. While Poland is a member States of the EU, it is also the member of the Council of Europe

and a State party to the European Convention on Human Rights. Recent violent interventions by the legislative and executive powers of Poland to the impartiality and independence of judiciary through the reorganization of the judiciary as well as the decision of the Poland's Constitutional Tribunal of 7 October 2021 declaring that articles 1, 2 and 19 of the Treaty on European Union is unconstitutional, are really dangerous attacks to the most essential principles of the EU such as supremacy of EU law, the rule of law and so on. But at the same time, as you have pointed out in your conclusion, the reorganization has destroyed the independence of judiciary and the recent decision of the Grand Chamber of the European Court of Human Rights found that the Civil Chamber of the Supreme Court of Poland lost the quality as a tribunal established by law with impartiality and independence required by the European Convention on Human Rights. This means that a lot of persons are now robbed of the right to fair trial before the independent court and the opportunity to acquire effective remedies against violations of human rights. I think that the crisis recently caused by Poland and Hungary is not only a crisis of the EU but also a crisis of international protection of human rights. From this viewpoint I would like to ask a few questions.

1. It seems that the crisis of the supremacy of the EU law, rule of law, independence of judiciary and even the respect of the fundamental human rights mainly comes from the eastern European countries which became member States through enlargement of the EU. What is the crucial cause of fragility of these countries in respecting the basic principle of the EU such as supremacy of the EU law, the rule of law, independence of judiciary?

2. In my impression, it would be important to show this "battle" as one for maintaining and strengthening the basic values of the EU enunciated in article 2 of the Treaty on European Union and basic human rights defined in EU Huan Rights Charter and ECHR not only by EU but also all persons constituting EU communities. In this connection, what sort of cooperation has been made between the EU and the Council of Europe?

Justice Ilwon Kang (Former Judge of the Constitutional Court of Korea)

Comments: The primacy of EU law over national law

After the fall of the Berlin Wall in 1989 almost all major countries in the world began to share the same idea of constitutionalism. At that time, we were full of hope that all the people in the world would live in more democratic societies. Most countries welcomed the idea of global constitutionalism.

EU has been the best existing model of constitutional globalization.

Unfortunately, we are facing the backlash from nationalism, populism, and sectionalism all around the world. The Polish and Hungary cases seem to be the worrying sign of the regression of global constitutionalism even in the EU.

Questions:
What is your perspective of the future of EU? Return to the expansion of the EU? Or Polexit followed by Hungarian withdrawal from the EU?
What is the impact of the Brexit on the power of the ECJ and ECtHR? I wonder whether judges of the ECJ and ECtHR become more cautious in imposing the supremacy of EU law over national law or not.

Prof. Shimon Shetreet (Hebrew university, President of the International Association of Judicial Independence and World Peace)

Questions from Shimon Shetreet (my apologies for the 2-page long statement preceding the first question)

Regarding the international constitutionalism and the relationship between international and supranational courts and top national courts
The International Association of Judicial Independence (JIWP) developed a guideline or standard in an Amendment to the Mount Scopus Standards of Judicial Independence in 2011, which reads as follows
1.3 It is vital that supranational and international Tribunals respect the fundamental principles of the legal systems of the Member States and to that end acknowledge the collegiality of the traditions of the courts of both the municipal and extra municipal courts .

See https://www.jiwp.org/_files/ugd/a1a798_21e6dfdcb80a44d388ed136999ddf63d.pdf

Later in 2022 the JIWP adopted the following text to further detail the guidelines for international or supranational review of domestic top courts and suggested the desired approach between the international Universal rules and the particular circumstances of the domestic jurisdiction.

See below the text as approved in **Jerusalem in JIWP conference 4-6 January 2022**

The rule of universality and particularity

1.3A (a) The task of creating international standards requires taking into account not only judicial independence but also the other fundamental values of the justice system such as accountability of the judiciary, efficiency of the judicial process, accessibility of the courts and public confidence in the courts.

(b) A central challenge of drafting international standards of judicial independence is to formulate standards, which will reflect the values of universal desired standards. At the same time, the standards must take into account the particular circumstances of the domestic jurisdictions and the different legal cultures and traditions in the various countries This challenge is met by careful deliberation.

(c) It was decided [1] that in order to properly analyze compliance with judicial independence in matters of judicial process and judicial terms, we must consider two main approaches, universality and particularity.[2] Universal Theory, or "universality," holds that an independent judiciary is necessarily a shared value of all legal systems, essential to the Rule of Law. Universality calls for defining a universal model of judicial independence, reflected in legal rules and other formal institutional arrangements—including judicial appointments process and the rules for terms of appointment, review, retention, and recall of judges.[3]

(d) Alongside the universality approach, we must take into account circumstances in each jurisdiction and recognize that, in some countries, it is justified to exempt certain practices from the universal standards. This is what we call the approach of "particularity."

(e) The universality and particularity rule should be qualified so as not to accept legislation or judicial decisions that, when carefully examined, are predominantly motivated by improper aims to interfere with judicial independence.

(f) Measures taken by government in countries that changed the system of governments [4]must meet the test of predominantly valid aims to prevent actions with predominant improper aims.

(g) Similarly, in the case of long-established practices, if such predominant improper aims can be shown in the use of the long-established practices to the detriment of judges and judicial independence, such measures should be equally declared as being in violation of judicial independence. Being and long-established practice cannot be a shield from an adverse

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[1]Elsewhere this issue is examined in detail in: Shimon Shetreet, *The Rule of Universality and Particularity, in*: CHALLENGED JUSTICE: IN PURSUIT OF JUDICIAL INDEPENDENCE, 68-119 (Shimon Shetreet, Hiram E. Chodosh and Eric Helland Eds., Brill 2021.

[2] Ibid., p. 116.

[4] Such as the legislation and court decisions in the new democracies in Europe which changed from communist rule to democratic system of government .

judgment regarding actions of the legislature or judicial decision that violate judicial independence.

My question:

To what extent it will be helpful to try to develop more detailed guidelines for the review constitutional domestic measures in light of EU rule of law values and principles such as the independence of the judiciary

Second question

In the European Arrest Warrant cases similar dilemma arose -

To what extent those cases can be useful for understanding the present crisis following the Polish and Hungarian conflict with EUCJ and the European Commission

Prof. Athanassios Kaissis (President of International Hellenic University)

First, I would like to thank you again for organizing this important online Lecture.

Many thanks to Prof Dr Reiterer for the extensive, analytical, balanced excellent presentation.

My short comment:

In my view the dictate of the moment is de-escalating the conflict. At the same time, we have to strengthen determined and resolute the primacy of the EU Law, the independence of the Judiciary and the separation of powers.

Mr. Yoichi Yamano (Senior Representative Government and External Relations Group Hitachi, Ltd.)

As for primacy of EU laws over national laws, I do believe this is the core corollary of the European Union (the European Community) at its foundation as Prof. Reiterer has argued.

As the former student of public international law, I would strongly like to share the view of Prof. Reiterer.

Since I am from business sector, therefore,

let me put my thoughts from business point of view as well. As Prof. Reiterer mentioned the international system referring to liberal international order, I also think if nationalistic approach prevails over international system including EU system, that endangers the international legal system which is the very basis for trade and business.

Having said that, I would like to ask one question to Prof. Reiterer.

Usually, I understand the distinguished judges of the Court of the European Union are obviously highly qualified and expected to give their professional legal opinions, but in case

they face extremely difficult issues and they may give controversial opinions, then is there any remedy on the part of the individual or the state or any measures to check those judges?

Prof. Omi Hatashin, Osaka Jogakuin University, to comment.

Question 1 by Omi Hatashin

I am pleased to be invited to ask a question. In the previous lecture by Professor Dr Reiterer, I asked him whether or not it would be better for the European Union to keep the case law principle of the primacy of EU law as it is, rather than making it a clear treaty provision of the EU, because the primacy of EU law over national laws is politically controversial from the point of view of national sovereignty. The jurisprudential principle being applied on the case-by-case basis in court tend to meet lesser resistance than presenting the principle in a draft treaty before a conference table at which delegates of national governments take their seats. Please let me explain my question further.

The political ambiguity of the UK constitutional doctrine of Parliamentary sovereignty had led me to ask that question, because I do believe that if the United Kingdom had prevented Brexit by invoking Parliamentary sovereignty after the critical outcome of the EU referendum was published in 2016, Poland would not have taken the matter this far. I have a couple of reasons to believe so. First, during the Lisbon treaty negotiations, Poland followed the United Kingdom's initiative in the adoption of Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union (EUR -Lex 12016E/PRO/30). Poland seems to have learned how to pick and choose. Second, the United Kingdom would not support the current Polish policy of undermining the independence of the judiciary. If the UK had stayed within the EU, it would have retained greater influence on Poland. Moreover, the risk of compelling Poland out of the EU would have been felt substantially smaller for the EU today in enforcing its rules on Poland.

The crux of the matter is this. The theory of popular sovereignty which some of the textbook writers adopted dictated Brexit. But the doctrine of Parliamentary sovereignty was providing the Prime Minister with a leeway to stay in the EU. He could have thanked the electorate for expressing their critical attitude in the referendum, which he should duly take into account and use as a bargaining tip with which to help his EU colleagues make the EU better from within. Of course, David Cameron was not obliged to invoke Parliamentary sovereignty, because it has never been reduced to positivist, blackletter law, but I believe that he ought to have done so at the right moment immediately after the outcome was published. He had the help of the Fixed-Term Parliament Act 2010 to ride roughshod over the Brexiteers for further

four years up to May 2020. Such seems to me to be an example of the constructive use of the ambiguity of sovereignty. Brexit has made the risk of breaking up both the UK and the EU greater, making both unions more susceptible to intimidation by dictators, than ever before.

Question 2

How would the EU maintain the primacy of EU law against Strasbourg, perhaps by disapplying some controversial Strasbourg rulings? Examples are Christine Goodwin v The United Kingdom [2002] (28957/95) ECHR 588 (the right of a person who, underwent transsexual surgery on his own volition and choice, to marry and to obtain the other entitlements as a person of the acquired gender) and Hirst v The United Kingdom (No. 2) (74025/01) [2005] ECHR 681 (the right of a person, who was convicted of manslaughter and sentenced for life, to vote despite his continued danger to the public due to his clinically diagnosed state of mental health). The recent hate campaigns against J. K. Rowling (the author of Harry Potter) for her twitter comment, "'People who menstruate'; I'm sure there used to be a word for those people; someone help me out" have led me to ask this question. Such a witch-hunting by so-called transsexual right activists would not have gained such a force without a series of Strasbourg rulings in their favour which have spurred legislative adjustments among some member states of the European Convention. J. K. Rowling speaks of the fear inherent in her gender which she could not have chosen, while the alleged transsexual "rights" are matters of choice.