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The Growing Influence of European Union Law

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Abstract

This Essay discusses a number of themes which show the growing influence of European Union ("EU") law. Four themes were chosen to illustrate that influence. The themes are interconnected, and hopefully bringing them together allows the reader to get a sense of the unique experiment which this "new legal order" continues to conduct. Part I examines the EU's own "federal question:" what exactly is the scope of EU law, and how is it determined? How does the case law, in particular that of the EU's supreme court, the European Court of Justice ("ECJ"), determine the boundaries of the EU law territory? These questions are examined in various parts of EU law, including, for example, rights of free movement, residence, and non-discrimination conferred on EU citizens. Part II then looks at the other side of the coin: the relationship between EU law and international law. The focus of this section is the recent *Kadi* judgment concerning counterterrorism. This judgment confirms the autonomy of EU law, even in the face of United Nations ("U.N.") Security Council resolutions and the absence of fundamental rights in the decision. Part III concerns the relationship between economic freedoms and the protection of human rights. This is an area in which the ECJ is able to make a specific contribution, as it is often confronted with questions of how to balance free trade and free movement with human rights protection. Part IV focuses on the cardinal principle of EU law: its primacy over conflicting national law.

THE GROWING INFLUENCE OF EUROPEAN UNION LAW

Piet Eeckhout[*]

INTRODUCTION

This Essay is based on a paper presented at a conference in London, organized jointly by the Centre of European Law of King's College London and by the U.K. judiciary. The theme of the conference was "Legal Boundaries, Common Problems and the Role of the Supreme Court." It brought together leading judges and academics from around the globe. Lord Slynn was President of the Centre of European Law for more than a decade, and sat on the European Court of Justice ("ECJ") and the House of Lords (now the Supreme Court of the United Kingdom).[1] He was, sadly, no longer around at the time of the conference, but he would surely have enjoyed its purpose and focus. This Essay—which focuses on the growing influence of European Union ("EU") law and its relationship with other legal systems, both national and international—is dedicated to this eminent judge, who made such a tremendous contribution to legal dialogue and integration.

This Essay discusses a number of themes which show the growing influence of EU law. The four themes were chosen to illustrate that influence, also for those less familiar with EU law. The themes are interconnected, and hopefully bringing them together allows the reader to get a sense of the unique experiment which this "new legal order" continues to conduct.

Part I examines the EU's own "federal question:" what exactly is the scope of EU law, and how is it determined? How does the case law, in particular that of the EU's supreme court, the ECJ, determine the boundaries of the EU law territory? These questions are examined in one particular area of EU law, for

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1. *See Lord Slynn of Hadley: Astute Counsel and Law Lord who Represented the Treasury as its 'Devil' Early in his Career and was the UK's Advocate General at the European Court of Justice*, TIMES (London), Apr. 9, 2009, at 67.

example, rights of free movement, residence, and non-discrimination conferred on EU citizens. Part II then looks at the other side of the coin: the relationship between EU law and international law. The focus of this section is the recent *Kadi* judgment concerning counterterrorism. This judgment confirms the autonomy of EU law, even in the face of United Nations ("U.N.") Security Council resolutions and the absence of fundamental rights in the decision. Part III concerns the relationship between economic freedoms and the protection of human rights. This is an area in which the ECJ is able to make a specific contribution, as it is often confronted with questions of how to balance free trade and free movement with human rights protection. Part IV focuses on the cardinal principle of EU law: its primacy over conflicting national law.

I. *EU LAW AND THE FEDERAL QUESTION*

The reach and scope of EU law keep expanding, in a process which has been called "competence creep."[2] This expansion is partly caused by the successive treaty amendments, the latest through the Treaty of Lisbon,[3] which entered into force on December 1, 2009.[4] No major new areas of EU action are opened up by that treaty. However, it will contribute to competence creep. The EU's trade policy will be expanded to

2. *See* Stephen R. Weatherill, *Competence Creep and Competence Control*, 22 Y.B. OF EUR. L. 1, 5 (2004).

3. The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1 [hereinafter Reform Treaty]. The Treaty of Lisbon partially renamed the founding European Union treaties—Treaty Establishing the European Community ("EC Treaty") and Treaty on the European Union ("TEU")—and renumbered all of their provisions entirely. However, the text of the articles referred to in the published form of the treaties is largely left unchanged. *See generally id.*

To avoid confusion, all references in this Essay to the EC Treaty and TEU use a parallel citation format and provide numbering both before and after the entry into force of the Treaty of Lisbon. The EC Treaty was renamed the Treaty on the Functioning of the European Union ("TFEU"). While the TEU has kept its original name, for the purpose of clarity this Essay will refer to the original version as "TEU pre-Lisbon" and the updated version as "TEU post-Lisbon." *See generally* Consolidated Version of the Treaty on European Union, 2008 O.J. C 115/13 [hereinafter TEU post-Lisbon]; Consolidated Version of the Treaty on European Union, 2006 O.J. C 321 E/5 [hereinafter TEU pre-Lisbon]. The consolidated version of the treaties with the new numbering is available at http://eur lex.europa.eu/en/treaties/index.htm. The new, consolidated version of the treaties entered into force on December 1, 2009, and contains a table of equivalences between pre-Lisbon and post-Lisbon numberings.

4. Reform Treaty, *supra* note 3, art. 6(2), 2007 O.J. C 306, at 135.

include matters of foreign direct investment, thereby including international investment law.[5] The EU's criminal policies are moved from the third pillar (intergovernmental) to what is now the first. This means that there will be greater judicial involvement, the EU courts acquiring full jurisdiction in criminal matters. It may also lead to more EU legislation in this area.

Earlier treaty amendments set in motion new policies that are gradually expanding. For judicial purposes, the most significant ones are those brought together under the heading "Area of Freedom, Security and Justice."[6] Those policies include criminal law cooperation, alluded to above, but also immigration and asylum, and so-called judicial cooperation in civil matters (mainly conflicts of law and jurisdictional matters).[7] Also of great importance is the EU's policy to fight discrimination. Originally limited to nationality and sex discrimination, EU legislation, called directives, adopted in 2000, extended antidiscrimination policy to cover race, sexual orientation, religion or belief, age, disability, and the like.[8] The EU legislation establishes broad principles, casting the courts in a central role. As can be seen from this brief overview, the days that the EU courts dealt mainly with economic matters are long gone.

These new policies considerably expand the EU's federal territory. There is, however, more to the EU's federal question. The nature of the relationship between EU law and the laws of the Member States keeps evolving, and some deeper questions are embedded in that relationship. Those questions are connected to determining the proper scope of EU law. To which persons and to what set of facts does EU law apply? This short Essay explores such questions by reference to case law in one particular, but important, area: EU citizenship.

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5. *See* Commission Press Release, Treaty of Lisbon Enters into Force—Implications for the EU's Trade Policy (Dec. 1, 2009).

6. *See, e.g.*, Reform Treaty, *supra* note 3, art. 2(63)–(64), 2007 O.J. C 306, at 57–59 (stating the limits of the European Court of Justice ("ECJ") in the "area of freedom, security and justice"); *see also* Andrew Duff, Alliance of Liberals and Democrats for Europe, *True Guide to the Treaty of Lisbon*, at 9, Dec. 12, 2007, *available at* http://www.alde.eu/fileadmin/files/Download/True-Guide-NEW.pdf.

7. Reform Treaty, *supra* note 3, art. 2(67), 2007 O.J. C 306, at 63–67.

8. *See* Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation, No. 2000/78, 2000 O.J. L 303/16; Council Directive Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, No. 2000/43, 2000 O.J. L 180/22.

A. *Defining EU Citizenship*

Citizenship of the EU was established by the Treaty on European Union, commonly called the Maastricht Treaty.[9] Citizenship is conferred on all nationals of the Member States.[10] From a judicial perspective, the most significant rights conferred on EU citizens are those to move and reside freely in any of the Member States.[11] Whereas prior to Maastricht such rights of movement and residence were limited to the economically active, they can now be exercised by any national of a Member State, subject to mild conditions.[12] The ECJ is developing a substantial body of case law about the scope of these rights of free movement and residence, and seems intent on putting them at the center of the EU law experiment. Indeed, it consistently calls EU citizenship the "fundamental status" of the nationals of the Member States.[13] Let us look at some examples of case law in which the court pushes these rights to their boundaries.

In earlier case law on EU citizenship, the court often applied article 18 of the Treaty Establishing the European Community ("EC Treaty" or "EC") (article 21 of the Treaty on the Functioning of the European Union ("TFEU"))[14] together with article 12 EC (article 18 TFEU), which prohibits any discrimination on grounds of nationality "within the scope of this Treaty."[15] Citizens exercising their rights of free movement were entitled not to be discriminated against on grounds of their nationality. However, for such discrimination to be caught by article 18 EC in conjunction with article 12 EC, it had to be within the scope of the treaty. The court has stated that this

9. Treaty on European Union, July 29, 1992, 1992 O.J. C 191/1.

10. *Id.* art. G(C), 1992 O.J. C 191, at 7.

11. Consolidated Version of the Treaty on the Functioning of the European Union art. 21, 2008 O.J. C 115/47, at 57 [hereinafter TFEU]; Consolidated Version of the Treaty Establishing the European Community art. 18, 2006 O.J. C 321 E/37, at 17–18 [hereinafter EC Treaty].

12. *See* Council Directive on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, No. 2004/38, art. 7, 2004 O.J. L 158/77, at 93 (referring to the need to have sufficient resources as well as sickness insurance).

13. *See, e.g.*, Grzelczyk v. Centre Public (Belg.), Case C-184/99, [2001] E.C.R. I-6193, ¶ 31.

14. TFEU, *supra* note 11, art. 21, 2008 O.J. C 115, at 57; EC Treaty, *supra* note 11, art. 18, 2006 O.J. C 321 E, at 45.

15. TFEU, *supra* note 11, art. 18, 2008 O.J. C 115, at 56; EC Treaty, *supra* note 11, art. 12, 2006 O.J. C 321 E, at 15.

involved both a personal and a material element.[16] The personal scope was limited to nationals of the Member States. But cases also needed to come within the scope of EU law in a material sense, because it concerned certain benefits covered by EU legislation.[17] Moreover, some form of discrimination on grounds of nationality had to be demonstrated.[18] These various elements limited the scope of article 18 EC.[19]

In more recent case law, by contrast, the court is happy to apply article 18 EC on its own. It continues to speak about the personal and material scope of this provision. However, the latter aspect is subsumed in an analysis of the effect of a particular national measure on the exercise of free movement rights. It is sufficient that such a measure may have some detrimental effect for the "moving" EU citizen, for article 18 EC to apply. No further link with EU law is required. The best examples of this effective expansion of article 18 EC are probably the cases on benefits for civilian war victims. *Tas-Hagen & Tas* concerned Dutch nationals who were recognized in the Netherlands as civilian war victims of the Japanese occupation of the Dutch East Indies (now Indonesia) during World War II.[20] This status entitled them to benefit payments, if since 1987 they were living in the Netherlands.[21] The Dutch legislation required the beneficiaries to reside in the Netherlands.[22] In reply to the question of whether this legislation came within the material scope of EU law, the court recognized that these kinds of war benefits are within the competence of the Member States;[23] there is no EU legislation in the matter. Nevertheless, the Member States had to respect article 18 EC,[24] and this provision was applicable simply because Tas-Hagen and Tas had moved to

16. *See, e.g.*, Sala v. Bayern, Case C-85/96, [1998] E.C.R. I-2691, ¶ 28.

17. *Id.*

18. *Id.* ¶ 64.

19. EC Treaty, *supra* note 11, art. 12, 2006 O.J. C 321 E, at 48 (prohibiting discrimination based on nationality and permitting the Council to adopt rules proscribing discrimination).

20. Tas-Hagen v. Raadskamer WUBO van de Pensioen-en Uitkeringsraad, Case C-192/05, [2006] E.C.R. I-10,451.

21. *Id.* ¶¶ 7, 13.

22. *Id.* ¶ 5.

23. *Id.* ¶ 21.

24. EC Treaty, *supra* note 11, art. 18, 2006 O.J. C 321 E, at 45.

Spain.[25] The court then stated that "[n]ational legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union."[26] That was the case here: the residence condition was liable to dissuade Netherlands nationals who are civilian war victims from exercising their free movement rights.[27]

These judgments establish a broad principle, which considerably expands the scope of EU law. National measures which hamper free movement or place moving EU citizens at a disadvantage are caught by article 18 EC and no further connection with EU law is required.[28] On a continent where people increasingly move around, the principle is likely to become ever more significant. Fundamentally, it raises the question of how territorially-based national legislation interacts with globalization. Indeed, the basic issue in many of the free movement cases is whether a condition of residence can be imposed for the award of a social security or other benefit, scholarship, student loan, tax advantage, etc. What connection with a particular country is required, and when is such a requirement justified?

B. *The Role of "Purely Internal Situations"*

This case law on EU citizenship also puts pressure on what could be called a counter-federal principle of EU law: the principle that "purely internal situations" are not caught by EU free movement law. Such situations concern facts and issues confined to a particular Member State. A recent case which exemplifies the strain on this principle is the Flemish *Care*

25. *Tas-Hagen*, [2006] E.C.R. I-10,451, ¶¶ 25–26.

26. *Id.* ¶ 31.

27. *See* Nerkowska v. Zakład, Case C-499/06, [2008] E.C.R. I-3993, ¶ 33. Other cases exemplifying that a mere effect on rights of free movement and residence is sufficient relate to national legislation on surnames. *See* Grunkin-Paul v. Standesamt Niebüll, Case C-353/06, [2008] E.C.R. I-7639, ¶ 39; Garcia Avello v. Belgium, Case C-148/02, [2003] E.C.R. I-11,613, ¶ 45.

28. *See Nerkowska*, [2008] E.C.R. I-3993, ¶ 32.

Insurance case.[29] This was a reference to the ECJ from the Belgian Constitutional Court, about Flemish legislation limiting a kind of social security benefit to those living and working in Flanders (a region of Belgium).[30] In fact, the limitation flowed from Belgian constitutional law, which restricts the law-making powers of the Belgian regions to their respective territories.[31] In response to a European Commission ("Commission") complaint, the legislation had been amended to ensure that migrant workers, in particular those EU citizens working in Flanders but residing in another Member State, could also benefit from the care insurance.[32] However, the question then arose whether the benefit should also be extended to EU citizens working in Flanders, but residing in the Walloon Region (the other main Belgian region).[33] The ECJ confirmed that EU law required such extension, notwithstanding the Belgian constitutional arrangements.[34] Moreover, those benefiting from the extension included not only nationals of other Member States, but also Belgian citizens who had previously exercised their European free movement rights.[35] EU law protects all moving EU citizens.[36] The net result is that all those working in Flanders benefit from the care insurance, *except* Belgian citizens who do not reside in Flanders *and* who have never worked or resided in another Member State. EU citizens are better protected than Belgian citizens. The ECJ was asked whether this was justified, but stuck to the principle that purely internal situations are not within the scope of EU law.[37] It did however point out that the interpretation of EU law could be relevant also to purely internal situations,

> in particular if the law of the Member State concerned were to require every national of that state to be allowed to enjoy the same rights as those which a national of another Member

29. Government of the French Community v. Flemish Government (*Care Ins.*), Case C-212/06, [2008] E.C.R. I-1683.

30. *Id.* ¶ 37.

31. *See* DE BELGISCHE GRONDWET [Constitution] art. 35 (Belg.).

32. *Care Ins.*, [2008] E.C.R. I-1683, ¶¶ 37–52.

33. *Id.* ¶¶ 46–60.

34. *Id.*

35. *Id.*

36. *Id.* ¶¶ 33–34.

37. *Id.* ¶¶ 38–40.

> State would derive from Community law in a situation considered to be comparable by [the referring] court.[38]

In other words, national principles of nondiscrimination and equal treatment could universalize the EU law solution, but this is considered a question of national, not EU law. Advocate General Sharpston went further. She found that there was

> something deeply paradoxical about the proposition that, although the last 50 years have been spent abolishing barriers to freedom of movement *between* Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them *within* Member States.[39]

She drew on case law regarding the EU customs union, according to which no customs duties and charges having equivalent effect can be imposed on trade between and within Member States. In that case law the ECJ refers to article 14(2) EC (article 26 TFEU),[40] which defines the internal market as "an area without internal frontiers," and "draws no distinction between inter-State frontiers and frontiers within a single State."[41] The Advocate General argued that the case law on citizenship should move in a similar direction of not permitting internal borders which hinder rights of free movement and residence.[42]

Even if the court did not follow the Advocate General's reasoning, the case shows how principles of EU law have the potential of becoming more pervasive, and how they may interfere with domestic constitutional arrangements.

II. *EU LAW AND INTERNATIONAL LAW—THE EFFECT OF* KADI

The autonomous nature of EU law is its very foundation. It all started in *Van Gend en Loos*, where the ECJ established that the Treaty Establishing the European Economic Community had

38. *Id.* ¶ 40.

39. Opinion of Advocate General Sharpston, *Care Ins.*, [2007] E.C.R. I-1683, ¶ 116 (emphasis added).

40. TFEU, *supra* note 11, art. 26, 2008 O.J. C 115, at 59; EC Treaty, *supra* note 11, art. 14, 2006 O.J. C 321 E, at 48–49.

41. Opinion of Advocate General Sharpston, *Care Ins.*, [2007] E.C.R. I-1683, ¶ 128.

42. *Id.* ¶¶ 135–44.

created a new legal order.[43] The norms of that legal order have a direct effect on the laws of the Member States, and prevail over any incompatible national laws. Those principles concerning the relationship between EU law and national law are firmly established. But what does the autonomy of EU law mean for its relationship with international law? That fundamental question was raised in *Kadi & Al Barakaat v. Council*, a case putting in issue a U.N. Security Council resolution concerning counterterrorism.[44] As is well known, the Security Council has broad powers under the United Nations Charter to maintain peace and international security.[45] Moreover, the charter as a whole takes precedence, in case of conflict, over any other treaty obligations of U.N. members.[46]

A. *Autonomy of EU Law in* Kadi

Yassin Abdullah Kadi and the Al Barakaat International Foundation were listed in an EC regulation as associated to Usama bin Laden.[47] The regulation froze all their assets.[48] It was adopted to give effect to a common position adopted by the EU under the second pillar.[49] The common position, in turn, implemented U.N. Security Council resolutions, which listed all known associates of Usama bin Laden, including Kadi and Al Barakaat.[50] Kadi and Al Barakaat brought actions for annulment before the EU Court of First Instance ("CFI") (now the General Court).[51] That court turned down their applications on the ground that any review of the lawfulness of the regulation on the basis of general principles of EU law (fundamental rights, such as the right of defence, the right to effective judicial protection, and

43. N.V. Algemene Transport-en Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Admin. (*Van Gend en Loos*), Case 26/62, [1963] E.C.R. 1.

44. Kadi v. Council (*Kadi & Al Barakaat*), Joined Cases C-402 & C-415/05, [2008] E.C.R. I-6351, ¶ 299.

45. *Id.* ¶¶ 293–94.

46. U.N. Charter art. 103.

47. *See* Council Regulation Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated With Usama bin Laden, the Al-Qaida Network and the Taliban, No. 881/2002, annex 1, 2002 O.J. L 139/9, at 12.

48. *Id.* art. 2(1), 2002 L 139/9, at 10.

49. *Id.* pmbl., 2002 L 139/9, at 9.

50. *Kadi & Al Barakaat*, [2008] E.C.R. I-6351, ¶ 23.

51. *See* Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649; Ali Yusuf v. Council (*Al Barakaat*), Case T-306/01, [2005] E.C.R. II-3533.

the right to property) was precluded given the U.N. origin of the sanctions. Such review would constitute indirect review of a U.N. resolution, and the court considered that U.N. law had the effect of circumscribing the powers of the EU institutions.[52] Only review on grounds of breach of peremptory norms of international law (*ius cogens*) was permissible.[53] However, such review did not lead to a finding of illegality.[54]

On the consolidated appeal, the ECJ overturned the CFI decision. It did not consider the U.N. origin of the sanctions to preclude review of the regulation on grounds of general principles of EU law, in particular, fundamental rights.[55] It found that Mr. Kadi's and Al Barakaat's rights were indeed violated, and struck down the regulation.[56] The court's reasoning is extensive, but can be summarized as follows:

- The EU is based on the rule of law, and that principle includes judicial review of all EU acts.[57]
- An international agreement cannot affect the autonomy of EU law—which the court must uphold.[58]
- All EU acts must respect fundamental rights, and international obligations cannot prejudice this constitutional principle.[59]
- The judicial review in issue is limited to the EC regulation and does not affect the primacy of a U.N. resolution under international law.[60]
- EU law respects international law, and this extends to observance of undertakings given in the context of the U.N.; the EU should take due account of the terms and objectives of U.N. resolutions.[61]
- However, the U.N. Charter does not impose a particular model of transposition of U.N. resolutions,

52. *Kadi & Al Barakaat*, [2008] E.C.R. I-6351, ¶ 84.
53. *Id.* ¶ 86.
54. *Id.* ¶ 156.
55. *Id.* ¶¶ 281–84, 290, 304–19.
56. *Id.* ¶¶ 328, 372.
57. *Id.* ¶ 281.
58. *Id.* ¶ 282.
59. *Id.* ¶¶ 283–85.
60. *Id.* ¶¶ 286–89.
61. *Id.* ¶¶ 291–97.

and leaves U.N. members a free choice among the various possible models.[62]

- Immunity of jurisdiction finds no basis in the EU Treaties. Article 347 TFEU (article 297 EC)—EU Member States are allowed to give effect to international obligations concerning international peace and security[63]—and article 351 TFEU (article 307 EC)—EU Member States are allowed to give effect to treaty obligations preceding their accession[64]—cannot be understood to authorize any derogation from the principles of liberty, democracy, and respect for human rights and fundamental freedoms which are a foundation of the EU.[65]
- If U.N. Charter obligations were placed in the hierarchy of norms within the EU legal order, they would have primacy over EU legislation, but not over EU primary law, in particular fundamental rights.[66]
- These findings are consistent with case law of the European Court of Human Rights.[67]
- The argument that the court should defer to the Security Council because the current U.N. reexamination procedure of terrorism listings offers adequate protection of fundamental rights is rejected: that procedure does not offer the guarantees of judicial protection.[68]

The Court's approach has been described as sharply dualist.[69] The Court emphasizes the autonomy of the EU legal order. Judicial review in the light of fundamental rights is the expression of a constitutional guarantee stemming from the EU treaties as an autonomous legal system, a guarantee which is not to be prejudiced by an international agreement. Not even the

62. *Id.* ¶ 298.

63. TFEU, *supra* note 11, art. 347, 2008 O.J. C 115, at 194; EC Treaty, *supra* note 11, art. 297, 2006 O.J. C 321 E, at 174.

64. TFEU, *supra* note 11, art. 351, 2008 O.J. C 115, at 196; EC Treaty, *supra* note 11, art. 307, 2006 O.J. C 321 E, at 178.

65. *Kadi & Al Barakaat*, [2008] E.C.R. I-6351, ¶¶ 302–04.

66. *Id.* ¶¶ 305–09.

67. *Id.* ¶¶ 310–17.

68. *Id.* ¶¶ 318–25.

69. *See* Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1, 2 (2010).

U.N. Charter is capable of interfering with that guarantee, notwithstanding the charter's primacy under international law, a primacy which the court accepts.

The strong confirmation of the autonomy of EU law is undeniable. But there is of course nothing new in that autonomy: since *Van Gend en Loos*, this is the very premise of the EU legal order.[70] However, the notion of dualism is much less helpful for the purpose of characterizing the court's reasoning. Generally speaking, the concepts of monism and dualism are outdated and inadequate for a proper reflection on the relationships between legal systems.[71] Monism means that international law and municipal law are automatically integrated, with international law taking precedence.[72] Dualism means that international law can only be effective when incorporated in municipal law, by means of some act of transformation.[73] In *Kadi*, such acts of transformation had already been adopted when the court was asked to review: they are the EU common position, and the EC regulation listing Mr. Kadi and Al Barakaat, which the court annulled.[74] The Security Council resolution was thus incorporated in the EU legal order, and it is the EU legislature that took a dualist approach.

The interactions between international law and municipal law in today's world have too many different dimensions for blunt and abstract concepts such as monism and dualism to be helpful. The *Kadi* judgment therefore needs to be put in perspective, for it discusses but one type of relationship between international law and EU law. In other judgments, the court displays considerable openness towards international norms. Most international agreements concluded by the EU are considered to have direct (self-executing) effect, and the court has been willing to apply norms of customary international law.[75] Even in *Kadi*, the court on a dispassionate reading simply

70. *See id.* at 7.

71. *See* Armin Von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. OF CONST. L. 397, 399–400 (2008).

72. *See* Thomas M. Franck & Arun K. Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. INT'L L. 467, 470 (2003).

73. *See id.*

74. *See* de Búrca, *supra* note 69, at 17–18.

75. *See* PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN—LEGAL AND CONSTITUTIONAL FOUNDATIONS 274–344 (2004).

confirms established rules and principles concerning: (a) judicial review; (b) the importance of fundamental rights; and (c) the relationship between international law and EU law.[76] All acts of the institutions adopted under the EC Treaty (now the TFEU)[77] are subject to judicial review.[78] All such acts need to comply with general principles of EU law, including fundamental rights.[79] When the EU acts under international law, for example by concluding an international agreement, the EC Treaty needs to be respected including all the judgments on external competence. The EU concludes that the norms of an international agreement need to be compatible with the EU treaties,[80] as the TFEU itself clarifies in article 218(11) (article 300 EC).[81] The only point which the *Kadi* judgment adds is that those rules and principles extend to U.N. law, notwithstanding the primacy of the charter under international law, embodied in article 103 of the charter.[82]

B. *Article 103 in* Kadi

Most international law commentators are critical of the court's silence on article 103 of the U.N. charter.[83] The only reference which the court makes to that provision is an implicit one:

> any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the

76. Kadi v. Council (*Kadi & Al Barakaat*), Joined Cases C-402 & C-415/05, [2008] E.C.R. I-6351.

77. TFEU, *supra* note 11, art. 218(11), 2008 O.J. C 115, at 146; EC Treaty, *supra* note 11, art. 300, 2006 O.J. C 321 E, at 176–77.

78. *See* Les Verts v. Parliament, Case C-294/83, [1986] E.C.R. 1339, ¶ 23.

79. *See, e.g.*, Opinion 2/94: Accession by the Cmty. to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] E.C.R. I-1759, ¶ 34.

80. *See, e.g.*, Germany v. Council, Case C-122/95, [1998] E.C.R. I-973, ¶ 62.

81. TFEU, *supra* note 11, art. 218, 2008 O.J. C 115, at 145–46; EC Treaty, *supra* note 11, art. 300, 2006 O.J. C 321 E, at 176–77.

82. Kadi v. Council (*Kadi & Al Barakaat*), Joined Cases C-402 & C-415/05, [2008] E.C.R. I-6351, ¶ 10.

83. *See, e.g.*, Andrea Gattini, *Annotation of* Kadi *and* Al Barakaat, 46 COMMON MKT. L. REV. 213, 226 (2009).

> Community legal order would not entail any challenge to the primacy of that resolution in international law.[84]

There is no further analysis of the primacy rule. Nor is there analysis in the opinion of Advocate General Maduro.[85] Is this not an approach which is too cursory, sweeping article 103 under the carpet, as it were? As a matter of positive law, the answer to that question is negative.[86] It is difficult to see the relevance of article 103 in the kind of proceedings leading to the judgment in *Kadi*. Article 103 addresses the obligations of the members of the United Nations under the charter (and the EU is not of course such a member), and provides that, in the event of a conflict with obligations under any other international agreement, the charter prevails.[87] Article 103 therefore speaks to the obligations of the EU Member States, but not to those of the EU. International law is itself most serious about the autonomous nature of international organizations: see, for example, the International Law Commission's work on the responsibility of international organizations.[88] In the light of such autonomy, it is difficult to see what effect article 103 can have for the EU, as a matter of positive law. Moreover, in *Kadi* the courts were not looking at measures adopted by the EU Member States, which are of course bound by article 103. They were scrutinizing an EU measure, adopted under the EU treaties. It is the most basic principle of international law that a treaty needs to be respected. One cannot expect a court, such as the ECJ, which the EU treaties instruct to ensure that acts of the institutions are in conformity with those treaties,[89] to disregard that instruction simply on the basis of a provision in another treaty which, on its terms, does not apply.

Admittedly, it is not surprising that the CFI referred to article 103, and that prima facie the provision appears relevant in

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84. Kadi v. Council (*Kadi & Al Barakaat*), Joined Cases C-402 & C-415/05, [2008] E.C.R. I-6351, ¶ 288.

85. Opinion of Advocate General Maduro, *Kadi & Al Barakaat*, [2008] E.C.R. I-6351, ¶¶ 18, 20.

86. *See generally* Piet Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions—In Search of the Right Fit*, 3 EUR. CONST. L. REV. 183 (2007).

87. U.N. Charter art. 103.

88. *See generally* U.N. Int'l Law Comm'n, *Report of the International Law Commission: 56th Session (3 May - 4 June and 5 July - 6 August 2004)*, U.N. Doc. A/59/10 (2004).

89. TFEU, *supra* note 11, art. 263, 2008 O.J. C 115, at 162–63; EC Treaty, *supra* note 11, art. 230, 2006 O.J. C 321 E, at 146.

Kadi. If a case were to arise in, for example, the United States, about whether freezing measures implementing a U.N. resolution need to conform to the U.S. Constitution, the answer would be quite obvious: of course they need to be in conformity. Article 103 would be regarded as irrelevant because the U.S. Constitution is a constitution, not a treaty. The EU treaties are, again in positive law terms, treaties, not a constitution. However, in *Kadi* the Court of Justice undeniably adopts a constitutional perspective.[90] The court uses the term "constitutional" in several paragraphs when referring to the kind of judicial review and respect for fundamental rights which the treaties mandate.[91] The judgment is constitutional because it characterizes the EU treaties as containing constitutional norms that cannot be derogated.[92] It is constitutional in its approach of allowing the penetration of international law only in compliance with the relevant rules and principles of EU law. Here is, in the court's conception, a kind of municipal legal system, with its own constitution (notwithstanding the rejection by voters in some Member States); EU law is not a mere branch of international law.[93]

C. *Fundamental Rights in* Kadi

A last comment on *Kadi* and the relationship between EU law and international law concerns the actual review by the court in the light of fundamental rights. One commentator has said that the court "expressed important parts of its reasoning in chauvinist and parochial tones."[94] However, one cannot see what is chauvinist and parochial about the court applying fundamental rights norms which are shared between the twenty-seven Member States of the EU; norms which are largely derived from the European Convention on Human Rights ("Convention"),[95]

90. Kadi v. Council (*Kadi & Al Barakaat*), Joined Cases C-402 & C-415/05, [2008] E.C.R. I-6351, ¶¶ 4–5, 81.

91. *Id.* ¶¶ 5, 81, 202, 281.

92. *Id.* ¶ 202.

93. *Id.* ¶ 316.

94. de Búrca, *supra* note 69, at 3–4.

95. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

which has forty-seven contracting parties;[96] norms, lastly, which are very similar to those which one finds in U.N. human rights instruments such as the International Covenant on Civil and Political Rights ("ICCPR").[97] In fact, it might have been preferable for the court to have pointed out that the human rights norms which it was applying are by no means alien to the U.N. legal system. Such a statement is absent from the judgment, which is perhaps deplorable. But the point remains that the court applied norms which the U.N. itself promotes and seeks to enforce.

The main lesson which international law needs to draw from the *Kadi* judgment is that, because international law increasingly affects the position of individuals in ever more direct ways, it needs to develop much better mechanisms for the protection of individual rights. If improved protection had been afforded in *Kadi*, the court would have been much more inclined to defer to the resolution. In fact, the court intimated that a kind of "Solange"[98] approach towards international law is not excluded. It devoted eight paragraphs to the Commission's argument that the U.N. sanctions system allows for the individuals or entities concerned to be heard.[99] The court considered that the current reexamination procedure does not offer the guarantees of judicial protection.[100] But it did expressly refer to the "so long as" terminology which the Commission put forward.[101] There would have been no need to engage with the argument if no "Solange" approach were conceivable. If the Security Council puts its house in order, one would expect the Court of Justice to defer to the

96. Eur. Ct. of Human Rights, *The European Court of Human Rights: Some Facts and Figures 1998–2008*, at 1 (2008).

97. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-2 (1978), 999 U.N.T.S. 171.

98. The "Solange" doctrine (German for "as long as") is increasingly employed as a method for courts to accept and apply the norms of another legal system, as long as the fundamental norms of the court's own system, in particular those concerning fundamental rights, are respected. *See* Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] May 29, 1974 (*Solange I*), 37 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 271 (F.R.G.), *translated in* [1974] 2 C.M.L.R. 540; BverfG Oct. 22, 1986 (*Solange II*), 73 BverfGE 339 (F.R.G.), *translated in* [1987] 3 C.M.L.R. 225

99. Kadi v. Council (*Kadi & Al Barakaat*), Joined Cases C-402 & C-415/05, [2008] E.C.R. I-6351, [2008] E.C.R. I-6351, ¶¶ 319–26.

100. *Id.* at ¶ 322.

101. *Id.* at ¶ 319.

U.N. system of protection. But for now, the court's position is akin to the first "Solange" judgment of the Federal Constitutional Court of Germany:[102] as long as the U.N. does not itself guarantee effective judicial protection, the court will enforce European human rights norms, as it does in all other circumstances. The court's judgment should be seen as an incentive for the further development and improvement of international law, and not as a retreat from international law.

III. *BALANCING ECONOMIC FREEDOMS AND HUMAN RIGHTS*

In today's globalized world, there is ever greater scope for tension between the economic freedoms of trade and investment, and the protection of human rights. At the international level, there is an extensive debate about this, particularly focused on the World Trade Organization.[103] However, that debate continues to be largely theoretical in the absence of disputes and rulings. The law of the EU's economic freedoms is more mature than its international counterpart, and the EU's internal market is more integrated than the world market. These may be some of the reasons why this tension has resulted in EU case law. There is now a considerable body of ECJ judgments grappling with how to balance economic freedoms and human rights; or in some cases, with how they may reinforce each other. Again, the ECJ is in a rather unique position. The EU legal system is quasi-federal, but it also needs to accept and accommodate the diversity which the non-unified European polity represents. Notwithstanding the common human rights standards emanating from the European Convention on Human Rights and assimilated into EU law, the Member States continue to harbour different concepts of human rights protection. One need only think of the debate about social rights, for example, the right to take collective action ("to strike"), which is strongly resisted in Member States such as the United Kingdom, and seems to be a near inalienable right in others.

How does the ECJ approach these questions of balancing? Let us look at some of the leading cases.

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102. *Solange I*, 37 BverfGE 271 (F.R.G.), *translated in* [1974] 2 C.M.L.R. 540.

103. *See, e.g.*, HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds., 2005).

In *Schmidberger*[104] the ECJ was asked to examine whether the Austrian authorization of a blockade of the Brenner Autobahn (a vital transit route from Germany to Italy) could be justified on grounds of freedom of expression and the right of assembly. Schmidberger, a transport company, had suffered damage as a result of the blockade, which was the work of Austrian citizens and groups protesting against the environmental degradation of the Alps, resulting from excessive road transport.[105] The Austrian authorities had allowed the protests, and Schmidberger argued that this authorization was in breach of the free movement of goods, and claimed compensation for the damage caused.[106] The ECJ decided that the human rights at issue could justify trade restrictions, and that in the circumstances of the case the restrictions were not disproportionate, and therefore had to be tolerated.[107] This judgment clarified that respect for human rights can justify a trade restriction. Human rights, one could say, may trump free trade. However, the principle of proportionality fully applies. This means that at least those human rights which are not absolute in nature need to be balanced with safeguarding the economic freedoms guaranteed by the EU treaties.

In this judgment, as in others concerning human rights, the ECJ applied common standards of EU human rights protection. It is in the very nature of human rights as "general principles of EU law" to be a shared set of principles which underpin the EU legal system. However, this common character of human rights in their EU law version does not remove the diversity that exists across the EU Member States. EU human rights are not a federal law standard which trumps all national law.

An important judgment that illustrates this point is *Omega Spielhallen*.[108] Omega ran a so-called laserdrome in Bonn with equipment supplied by a U.K. company under a franchising contract.[109] The Bonn municipal authorities intervened, however, claiming that allowing people to "play at killing" each other

104. Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria, Case C-112/00, [2003] E.C.R. I-5659.

105. *Id.* ¶ 16.

106. *Id.* ¶ 20.

107. *Id.* ¶¶ 74, 91.

108. Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, [2004] E.C.R. I-9609.

109. *Id.* ¶ 3.

constituted an affront to human dignity, which is a cardinal constitutional principle protected by article 1 of the German *Grundgesetz* (Basic Law).[110] The case was referred to the ECJ, which first established that there was a restriction of the freedom to provide services, because of the involvement of the U.K. firm.[111] It then analyzed whether the restriction could be justified on grounds of public policy under article 46 EC (article 52 TFEU).[112] The court noted that, although public policy may be relied upon only if there is a genuine and sufficiently serious threat to a fundamental interest of society, the specific circumstances which may justify recourse to that concept may vary from one country to another and from one era to another.[113] A margin of discretion must therefore be allowed. The ECJ then described how the German authorities and courts considered that the simulated killing constituted a breach of the constitutional human dignity principle.[114] It emphasized the importance of respect for human rights in EU law, and found that such respect undeniably encompassed respect for human dignity. Protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the freedom to provide services.[115] Then, importantly, the court clarified that "[i]t is not indispensable . . . for the restrictive measure . . . to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected."[116] The need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another Member State. The court finally noted that the prohibition at issue corresponded to the level of protection of human dignity which the German *Grundgesetz* sought to guarantee; the prohibition, by

110. *Id.* ¶ 11.

111. *Id.* ¶ 25.

112. TFEU, *supra* note 11, art. 52, 2008 O.J. C 115, at 69; EC Treaty, *supra* note 11, art. 46, 2006 O.J. C 321 E, at 61.

113. *Omega Spielhallen*, [2004] E.C.R. I-9609, ¶ 31.

114. *Id.* ¶ 32.

115. *Id.* ¶ 35.

116. *Id.* ¶ 37.

being restricted to the "play at killing" variant of the laser game, did not go beyond what was necessary.[117]

The judgment adds a further layer to the balancing of human rights and economic freedoms. In its earlier case law, the ECJ had always emphasized that justifications that a Member State invokes for restricting the treaty's freedoms have to comply with the EU law version of human rights (as general principles of EU law).[118] *Schmidberger* then showed that protection of human rights could itself constitute such a justification. *Omega Spielhallen* goes one step further by allowing diversity in how the Member States apply their human rights law, as long as the human right at issue is recognized by EU law. This is reminiscent of the "margin of appreciation" which the Convention also permits. It is not wholly clear, however, in which cases the court would allow such diversity, or when it would insist on respect for a common, shared standard, which it would itself determine.

More recently, the court has been confronted with even more sensitive cases, which expose the tension—also at a political level—between the protection of social rights and the EU's free market principles. The cases are linked to the 2004 expansion of the EU, which enabled Central and East European countries to fully benefit from the EU internal market, but also led to fears of "social dumping" and protectionist policies in the "old" Member States. The clearest case is *Int'l Transport Workers' Fed'n v. Viking Line ABP*.[119] Viking Line is a Finnish ferry operator which had decided to reflag one of its vessels, the *Rosella*, by registering it in Estonia or Norway.[120] The reason for this was that the company suffered from Estonian competition, and sought to enter into a new collective agreement with a trade union in one of those states, so that it could reduce wages.[121] Both the Finnish Seamen's Union ("FSU") and the International Transport Workers' Federation ("ITF") objected to this reflagging and took action against it (the ITF, for example, issued a circular to its

117. *Id.* ¶ 39.

118. *See* Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis, Case C-260/89, [1991] E.C.R. I-2925, ¶¶ 42–44.

119. Int'l Transport Workers' Fed'n v. Viking Line ABP, Case C-438/05, [2007] E.C.R. I-10,779; Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Case C-341/05, [2007] E.C.R. I-11,767.

120. *Viking Line*, [2007] E.C.R. I-10,779, ¶¶ 6, 9.

121. *Id.* ¶ 9.

affiliate trade unions asking them to refrain from entering into negotiations with Viking).[122] Viking then brought proceedings against ITF and FSU in the United Kingdom, arguing that their actions were in breach of the right of establishment (article 43 EC (article 49 TFEU)),[123] and the case was referred to the ECJ.[124]

The ECJ first established that the collective action undertaken by the trade unions fell within the scope of article 43 EC.[125] This concerns the horizontal effect of that provision. It binds not only public authorities, but also applies where working conditions are governed by collective agreements, and therefore extends to action by trade unions. The court agreed that the right to take collective action, including the right to strike, is a human right which forms an integral part of the general principles of EU law.[126] However, it did not accept that this took those rights outside the scope of the right of establishment.[127] The court subsequently established that there was a restriction of the right of establishment: the collective actions by FSU and ITF had the effect of making less attractive, or even pointless, Viking's exercise of its right of establishment.[128]

The next question was whether the restriction was justified. The ECJ accepted that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction.[129] It referred to the fact that the EU pursues both economic and social aims, and therefore considered that the economic freedoms must be balanced against the objectives of social policy.[130] In the case, the actual balancing (proportionality test) had to be done by the referring court.[131] But the ECJ did establish the parameters for that exercise.[132] The main parameter is that the collective action could only be justified if the jobs or conditions of employment at issue were

122. *Id.* ¶¶ 11–13.

123. TFEU, *supra* note 11, art. 52, 2008 O.J. C 115, at 67; EC Treaty, *supra* note 11, art. 43, 2006 O.J. C 321 E, at 59.

124. *Viking Line*, [2007] E.C.R. I-10,779, ¶ 22.

125. *Id.* ¶ 55.

126. *Id.* ¶ 44.

127. *Id.* ¶ 74.

128. *Id.* ¶ 72.

129. *Id.* ¶ 77.

130. *Id.* ¶ 79.

131. *Id.* ¶ 80.

132. *Id.* ¶¶ 80–90.

jeopardized or under serious threat.[133] Even if that was the case, the collective action had to be proportionate, meaning both suitable and necessary.[134]

This line of case law illuminates the relationship between human rights and the EU's economic freedoms in a number of ways. The priority of human rights is not unconditional, but subject to the principle of proportionality. That is not particularly remarkable. The human rights which the ECJ is asked to enforce or respect can all be restricted on public interest grounds.[135] At an EU level, free trade and free movement constitute such a public interest. The Member States must, even when taking measures justified on human rights grounds, take into account the EU public interest embodied in the economic freedoms.[136] Their measures must be proportionate to the human-rights aim pursued.[137]

However, not all questions have been answered. The principle of proportionality is a flexible tool, which in itself does not determine how the balancing act is to be conducted. The ECJ has developed an extensive body of case law on proportionality, and it is fair to say that the concept is employed in all kinds of shapes and forms.[138] The case law on human rights and economic freedoms does not as yet create a particular type of proportionality, adjusted to the specific issues that arise. Nor does it clarify to what extent the human rights norms relied upon are determined by EU law, or by national law.

IV. *PRIMACY*

The fourth theme which this Essay seeks to explore briefly is the primacy of EU law over national law. The reasons for this are twofold.

First, the kind of primacy which EU law has managed to establish continues to be unique. The Author is not aware of any

133. *Id.* ¶ 81.

134. *Id.* ¶ 84.

135. Steve Peers, *Taking Rights Away? Limitations and Derogations*, *in* THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS 141, 142–43 (Steve Peers & Angela Ward eds., 2004).

136. *Id.* at 142–43, n.5.

137. *Id.*

138. TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 140 (2d ed. 2006).

other international or supranational legal system that: (a) is based on the principle that, in case of conflict with national or municipal law, the international/supranational norm prevails; and (b) makes that principle part of municipal law, both in theory and in practice. The unique character of the primacy principle continues to be a contested and sensitive issue, notwithstanding the fact that it was established as long ago as 1964.[139] This was witnessed when the ill-fated constitutional treaty[140] attempted to codify this principle: that effort was seen by many as a bridge too far in the direction of building a European state.[141] The codification was abandoned in the Treaty of Lisbon as one of the "constitutional symbols" that the negative referenda in the Netherlands and France had rejected.[142]

Second, while the ECJ steadfastly confirms the absolute and unqualified character of the principle of primacy, national supreme and constitutional courts continue to emphasize that primacy has its basis in national constitutional norms, and is, therefore, not absolute and unqualified.[143] The relevant national case law continues to evolve, whereas the ECJ's case law is fixed and intransmutable, at least on the face of things.

So what are some of the recent developments in the case law of national supreme and constitutional courts? Some courts are moving in the direction of greater acceptance of the special status of EU law. For example, subsequent to an important constitutional amendment which appeared to put EU law in the same category as other international obligations, the Italian Constitutional Court nevertheless confirmed the special status of EU law.[144] The amendment could have been read as limiting EU

139. *See generally* Costa v. Ente Nazionale per l'Energia Elettrica (*ENEL*), Case C-6/64, [1964] E.C.R. 585.

140. *See* Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 304/1.

141. *See, e.g.*, Stephen Charles Sieberson, *How The Constitutional Treaty Identifies Dividing Lines*, *in* DIVIDING LINES BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES—ASSESSING THE IMPACT OF THE CONSTITUTIONAL TREATY 59, 63, 75, 199 (2008).

142. *See* Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights*, *in* THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? 235, 239 (Stefan Griller & Jacques Ziller eds., 2008).

143. *See* Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267, 267–68 (1981) (calling this the dual nature of supranationalism).

144. *See* L.S. Rossi, Annotation, *Corte Costituzionale (Italian Constitutional Court): Decisions 348 and 349/2007 of 22 October 2007, and 102 and 103/2008, of 12 February 2008*, 46 COMMON .MKT. L. REV. 319, 319–20 (2009).

law primacy to a principle binding the Italian legislature, yet fully subordinating EU law to the Italian Constitution itself. The Constitutional Court, however, did not adopt such a reading. The court differentiates between EU law obligations, which have a constitutional status, and other international obligations (including those flowing from the Convention) whose role is subconstitutional.[145] The court does, however, maintain the concept of "counter-limits" (*controlimiti*), according to which there continues to be review, at least in theory, of EU law compliance with fundamental constitutional norms.[146]

Another example is the case law of the Belgian Constitutional Court, which not only accepts the primacy of EU law, but makes EU law part of its constitutionality review of Belgian federal and subfederal legislation.[147]

There is, however, also more critical recent case law. A couple of years ago, several constitutional courts looked into the domestic implementation of the European Arrest Warrant ("EAW"), a so-called third pillar legislative instrument, which facilitates the "surrender," instead of extradition, of criminal suspects between EU Member States.[148] The Polish Constitutional Court simply established that the legislative implementation of the EAW was unconstitutional, because the Polish Constitution prohibits the extradition of Polish citizens.[149] Effectively, it was confirming a conflict between the EAW itself, and the Polish Constitution. The Polish Constitutional Court did not accept the argument that Poland's Constitution could be read in conformity with EU law.[150] This somewhat confrontational approach is in

145. *See id.* at 324.

146. *See* Corte cost., 27 dec. 1973, n.183 (*Frontini*), Foro It. 314 (1974) (Italy), *translated in* [1974] 2 C.M.L.R. 372; *see also* Rossi, *supra* note 144 at 320.

147. *See* Thomas Vandamme, Annotation, *Case C-212/06, Government of the French Community and the Walloon Government v. Flemish Government, Judgment of the Court of Justice (Grand Chamber) of 1 April 2008*, 46 COMMON MKT. L. REV. 287, 294–95, 299–300 (2009).

148. *See* Jan Komárek, *European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles,"* 44 COMMON MKT. L. REV. 9, 9–10 (2007) (providing an overview and analysis).

149. *See* Trybunał Konstytucyjny [TK] [Polish Constitutional Tribunal] Apr. 27, 2005 (*EAW Decision*), No. P 1/05, 4 Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy [Z.U.] [Official Collection of the Jurisprudence of the Constitutional Tribunal] (ser. A) 42 (2005), ¶ 1.1. A full text English translation is available on the court's website at http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/p_1_05_full_gb.pdf.

150. *See id.* ¶ 5.4.

line with the accession treaty decision of the Polish Constitutional Court, in which it rejected, as a matter of principle, the primacy of EU law in cases of conflict with the Polish Constitution.[151] On the other hand, in the EAW decision the court maintained the legal effects of the challenged legislation for eighteen months, allowing—indeed instructing—the Polish constitutional legislator to remove the conflict with EU law.[152]

The German Federal Constitutional Court ("FCC") was equally critical of the domestic implementation of the EAW, regarding the terms under which it permitted the surrender of German citizens.[153] A complete analysis of the judgment is outside the scope of this Essay, but the court expressed a measure of distrust of other Member States' criminal justice systems, contrary to the basic premise of mutual recognition on which the EAW is based.[154] It required the German legislature to provide for a case-by-case examination of requests for the extradition of German citizens, so as to ensure that the requesting authorities comply with the prerequisites of the rule of law.[155] The FCC did not accept that article 6 TEU[156] (now article 6 of Charter of

151. *See* TK May 11, 2005, No. K 18/04, 5 Z.U. (ser. A) 49 (2005), ¶ 11. An English summary of the case is available on the court's website at http://www.trybunal.gov.pl/eng/summaries/documents/k_18_04_gb.pdf.

152. *See EAW Decision*, 4 Z.U. (ser. A) 42 (2005), ¶ 5.2.

153. BVerfG July 18, 2005 (*European Arrest Warrant Act Case*), 58 BVerfGE 2289, ¶ 119 (F.R.G.), *translated in* [2006] 1 C.M.L.R. 16.

154. *Id.*

155. *Id.* ¶ 78.

156. Article 6 TEU pre-Lisbon provides:

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
>
> 3. The Union shall respect the national identities of its Member States.
>
> 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

TEU pre-Lisbon, *supra* note 3, art. 6, 2006 O.J. C 321 E, at 12.

Fundamental Rights of the European Union)[157] and preamble paragraph 8 TFEU[158] offers sufficient guarantees.[159] It stated that

> [t]he mere existence of this provision . . . and the existence of an all-European standard of human rights protection established by the [Convention] do not, however, justify the assumption that the rule-of-law structures are synchronized between the Member States of the European Union as regards substantive law and that a corresponding examination at the national level on a case-by-case basis is therefore superfluous. In this respect, putting into effect a strict principle of mutual recognition, and the extensive statement of mutual confidence among the states that is connected with it, cannot restrict the constitutional guarantee of the fundamental rights.[160]

The FCC also made critical statements regarding the concept of EU citizenship, and its interpretation.[161] Effectively, the court said that the rights of EU citizenship and the corresponding principle of nondiscrimination on grounds of nationality need to be limited in scope, or else they might fundamentally undermine the legal system of the German Constitution by leading to a loss of the core elements of statehood.[162] In the same passage, the court confirmed that the EU respects national identities, which find their expression in their respective fundamental political and constitutional structures.[163] It further pointed out that the core elements of German statehood are beyond constitutional amendment.[164]

This reasoning was disputed in the dissenting opinion of Judge Lübbe-Wolff. She criticized the majority for considering that the scope of the principle of non-discrimination on grounds

157. Charter of Fundamental Rights of the European Union art. 6, 2007 O.J. C 303/1, at 4 ("Everyone has the right to liberty and security of person.")

158. TFEU, *supra* note 11, art. 6, 2008 O.J. C 115, at 52–53. TFEU Preamble Paragraph 8 provides: "[Member States] Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts." TFEU, *supra* note 11, 2008 O.J. C 115, at 49.

159. BverfG July 18, 2005 (*European Arrest Warrant Act Case*), 58 BVerfGE 2289, ¶ 119 (F.R.G.), *translated in* [2006] 1 C.M.L.R. 16.

160. *Id.*

161. *See supra* Part I.

162. *European Arrest Warrant Act Case*, 58 BVerfGE 2289, ¶ 119.

163. *Id.*

164. *Id.*

of nationality in article 12 EC (article 18 TFEU) was relevant to the issues at hand.[165] She continued:

> Moreover, the information that following the principle of conferral, the ban on discrimination only applies to specific objectives set out in the Treaty deviates, in a manner that is hard to understand, from the wording of Article 12.1 of the Treaty establishing the European Community, which requires interpretation. Federal Constitutional Court judgments should not be used to send dark signals, which have no connection to the case at hand, to the Court of Justice of the European Communities, which recently applied this provision somewhat extensively.[166]

The French *Conseil d'État* also had the opportunity, recently, to consider the constitutionality of the implementation of an EU directive. The *Arcelor* case involved a challenge to a French decree giving effect to the directive establishing a greenhouse gas emission allowance trading scheme,[167] in so far as the decree extended to the steel sector. The challenge was in effect an indirect challenge to the conformity, with the French Constitution, of the directive itself.[168] The *Conseil d'État* pointed out that the acceptance by the authors of the Constitution of the participation of the French Republic in the making of Europe created a constitutional obligation to transpose directives, which could not in principle be obstructed.[169] The administrative judge, when faced with a claim of breach of a provision or principle of constitutional value, has to examine whether EU law offers a rule or a general principle which, through its application, guarantees the effectiveness of the constitutional provision or principle relied upon.[170] In the case at hand, the claimant referred to the right to property, the freedom of business, and the principle of

165. *Id.* ¶ 160 (Lübbe-Wolff, J., dissenting).

166. *Id.*; *see also* Queen v. London Borough of Ealing, Secretary of State for Education and Skills (*Bidar*), [2005] E.C.R. I-2119, (concerning the right to nondiscrimination on grounds of nationality, applied to student loans).

167. *See* Conseil d'État [CE] [highest administrative court], Feb. 8, 2007 (*Arcelor*), CE Ass. Feb. 8, 2007, Rec. Lebon. 56, *translated at* [2007] 2 C.M.L.R. 28; *see also* Société Arcelor Atlantique et Lorraine v. Premier Ministre, Case C-127/07, [2008] E.C.R. I-9895, ¶ 7.

168. *Arcelor*, CE Ass. Feb. 8, 2007, Rec. Lebon. 56, ¶ 3.

169. *Id.* ¶ 4.

170. *Id.*

equality, all recognized in EU law.[171] Where the administrative judge establishes that there are corresponding rules or principles of EU law, the judicial inquiry should turn to whether the directive complies with these rules or principles, and in case of serious doubt, a reference to the ECJ must be made.[172] On the other hand, where there is no corresponding rule or principle of EU law, the judge needs to directly examine the constitutionality of the implementing decree.[173] In other words, the *Conseil d'État* reserves the right to intervene, and to apply the French Constitution, where the relevant constitutional rules or principles have no counterpart in EU law.

In *Arcelor*, the *Conseil d'État* made a reference to the ECJ, asking whether the directive was in breach of the principle of equal treatment by including the steel sector, and by not including other, competing sectors (plastic and aluminium).[174] The ECJ found that there was no breach, and did not in its judgment refer to the constitutionality test which the *Conseil d'État* employed.[175] Advocate General Maduro, however, discussed this, and eloquently argued that the concurrent claims to legal sovereignty, the protection of the national constitution, and respect for EU law primacy could be reconciled.[176] The EU and the national legal orders, he pointed out, are founded on the same fundamental legal values.[177] Article 6 TEU expresses the respect due to national constitutional values, and indicates how best to prevent any real conflict with them, by anchoring the constitutional foundations of the EU in the constitutional principles common to the Member States.[178] The Member States are thus reassured that EU law will not threaten the fundamental values of their constitutions. But they need to recognize that the task of reviewing EU acts in the light of those values is transferred to the Court of Justice, and cannot be done on the basis of national constitutions. Otherwise, there could be a lack of

171. *Id.*.
172. *Id.*
173. *Id.*
174. *Arcelor*, [2008] E.C.R. I-9895, ¶¶ 5–21.
175. *Id.* ¶ 73.
176. Opinion of Advocate General Maduro, *Arcelor*, [2008] E.C.R. I-9895, ¶ 15.
177. *Id.*
178. *Id.*

uniformity which would undermine the idea that the EU is based on the rule of law:

> In other words, the effect of being able to rely on national constitutions to require the selective and discriminatory application of Community provisions in the territory of the Union would, paradoxically, be to distort the conformity of the Community legal order with the constitutional traditions common to the Member States.[179]

The primacy of EU law is therefore a primordial requirement of the EU legal order. All of this does not mean that the national constitutional courts have no role to play in the interpretation of EU general principles and fundamental rights:

> On the contrary, it is inherent in the very nature of the constitutional values of the Union as constitutional values common to the Member States that they must be refined and developed by the court in a process of ongoing dialogue with the national courts, in particular those responsible for determining the authentic interpretation of the national constitutions. The appropriate instrument of that dialogue is the reference for a preliminary ruling and it is in that context that the question raised here must be understood.[180]

CONCLUSION

Advocate General Maduro refers to the concept of legal pluralism as a broad denominator for the relationship between EU law and national law.[181] Indeed, in European academic literature, legal or constitutional pluralism has become the predominant concept, or even theory, for the study of the relationships between different legal systems.[182] It has not, however, managed to resolve all issues. Advocate General Maduro rightly emphasizes that EU law is fundamentally based on the constitutions and constitutional traditions of the Member States, and that it offers full guarantees of respect for a European

179. *Id.* ¶ 16.

180. *Id.* ¶ 17.

181. *Id.* ¶ 15.

182. *See, e.g.*, NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE & NATION IN THE EUROPEAN COMMONWEALTH 123–36 (1999); Miguel Pioares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 501, 501–37 (Neil Walker ed., 2003); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 317–59 (2002).

constitutional common law. The *Kadi* judgment, discussed above, confirms that the Court of Justice takes very seriously its task of ensuring respect for fundamental rights.[183] Indeed, if one reads the judgment from this European common law perspective, and against the backdrop of the court's relationship with national constitutional courts, the need for intervention in the U.N. system of listing individuals stands out even more. Whether the idea of pluralism is sufficient for explaining the level of integration between EU law and national law is perhaps doubtful. There is more to the relationship between EU law and national law than a mere mutual respect for constitutional identity. This concept of respect is adequate as an indicator and instruction for how EU law approaches national constitutional identity. *Omega Spielhallen*, analyzed above,[184] constitutes one of the best applications of this concept. The court is willing to accept that the German constitutional principle of human dignity leads to an interpretation and application of the EU law public policy exception specific to Germany, and not necessarily shared by other Member States.[185] However, when the reverse question arises, namely to what extent national law needs to respect EU law, the answer is not simply respect for the EU's constitutional identity. The answer is that all of EU law prevails over all national law, all of the time. *Omega Spielhallen* shows that EU law has room for diversity, but that room depends on chapter and verse of the specific EU law provisions in issue.[186]

In so far as the concept of pluralism suggests that EU law and national law are autonomous, perhaps even self-contained legal systems, it is not an appropriate expression of their relationship. The degree of integration is such that any autonomy is seriously curtailed. This is not limited to the developing constitutional common law. The very mechanisms of implementation and application of EU law make it very difficult to draw boundaries between EU law and national law. The EU's main legislative instrument, the directive, is the clearest exponent of the level of legal integration. All directives need to be transposed in national law and Member States need to achieve

183. *See supra* Part II.
184. *See supra* text accompanying notes 102–11.
185. *See supra* text accompanying notes 112–13.
186. *See supra* text accompanying notes 112–13.

the prescribed results, but are free to decide about form and methods. Anyone who has been faced with interpretative questions about directives and their national implementation realizes the difficulty of drawing boundaries. Moreover, at a jurisdictional level, the preliminary rulings procedure embodies the level of integration, by ensuring a constant, wide-ranging, and deep cooperation between the Court of Justice and national courts.

What about the reservations against absolute EU law primacy that national supreme and constitutional courts continue to harbor? Commentators assume too readily that there is a fundamental conflict between national constitutional case law and ECJ case law. The absolute and unconditional character of the primacy principle, as established by the ECJ, is quite simply determined by the limited jurisdiction of the court. It can only interpret the basic treaties, and has absolutely no interpretative authority over national constitutions.[187] In one sense, the court is merely behaving like an international court when emphasizing primacy: domestic law is never an excuse for non-performance of international obligations.[188] Of course, the fundamental difference with international law is that the court has ruled that this rule of primacy must be respected within national law.[189] But the domestic constitutional basis for this is outside the court's jurisdiction. National constitutional courts, on the other hand, are only acting within their jurisdiction when analyzing the constitutional basis for giving effect to EU law. Where they state that there may be limits to EU law primacy, there is as such no conflict. Conflict only arises where domestic courts decide, in a

187. *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

188. *See id.*; *see also* Mattias Kumm & Victoria Ferreres Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, INT'L J. CONST. L. 473, 473 (2005).

> It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defense that it was unable to fulfil them because its internal law . . . contained in rules in conflict with international law; this applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement.

OPPENHEIM'S INTERNATIONAL LAW: PEACE 84–85. (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

189. *See* Kumm & Comella, *supra* note 188, at 473.

specific case, not to apply EU law, for example, by declaring it unconstitutional.

However, the absolute and unconditional character of the primacy principle can only be reconciled with national constitutional law as long as the scope and reach of EU law are themselves limited. This is probably the most important constitutional EU law principle. It is not restricted to an appropriate interpretation of the principle of conferred powers. The overall scope of the EU treaties is subject to constitutional limitations. The case law on EU citizenship, analyzed above, and criticized by the German Constitutional Court, is an example of how substantive interpretations of treaty provisions are also relevant to the question of drawing the boundaries of the EU legal order.

Lastly, Advocate General Maduro correctly emphasizes that primacy is, in practice, not a one-way street, but is subject to a fundamental constitutional dialogue between national courts and the ECJ.[190] In that respect it is noteworthy that we are entering a new phase: at least some constitutional courts have started to refer certain cases to the ECJ. This is a most welcome development. Too much dialogue has been conducted by means of the "dark signals" to which Judge Lübbe-Wolff referred.[191] It would be much preferable, also for constitutional courts, to develop a more direct and open dialogue by means of referring cases to the ECJ. Such references should not be limited to mailing a couple of questions of EU law. Supreme and constitutional courts should take the opportunity to clarify their own thinking about the issues to which the case gives rise, including the issues of EU law. A good example is a recent reference by the U.K. House of Lords (now the Supreme Court of the United Kingdom), to which Lord Slynn devoted so much judicial energy.[192]

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190. Opinion of Advocate General Maduro, Société Arcelor Atlantique et Lorraine v. Premier ministre, Case C-127/07, [2008] E.C.R. I-9895, ¶ 15.

191. *See* Queen v. London Borough of Ealing, Secretary of State for Education and Skills (*Bidar*), [2005] E.C.R. I-2119; BVerfG July 18, 2005 (*European Arrest Warrant Act Case*), 58 BVerfGE 2289, ¶ 119 (F.R.G.), *translated in* [2006] 1 C.M.L.R. 16.

192. *See* R (M) v. Her Majesty's Treasury, [2008] UKHL 26, [2008] 2 All E.R. 1097 (appeal taken from U.K.).