

Kadi and Al Barakaat: Luxembourg is not Texas - or Washington DC

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The European Court of Justice's approach in the Kadi decision has already been described as sharply dualist (see Professor Joseph Weiler's EJIL editorial, and Gráinne de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*", Jean Monnet Working Paper No. 01/09). The Court emphasises the autonomy of the Community legal order. Judicial review in the light of fundamental rights is the expression of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system, a guarantee which is not to be prejudiced by an international agreement. Not even the UN 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 Community 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 Community legal order. However, I find the notion of dualism much less helpful for the purpose of characterising the Court's reasoning. The interactions between international law and municipal law in today's world have too many different dimensions for blunt concepts such as monism and dualism to be helpful. This means that *Kadi needs* to be put in perspective. It is very tempting to argue that the judgment is groundbreaking, perhaps even revolutionary, the most important judgment handed down by the Court in decades. Alas, my academic assessment is that this is exaggerated. On a dispassionate reading the Court simply confirms established rules and principles concerning (a) judicial review, (b) the importance of fundamental rights, and (c) the relationship between international law and Community law. All acts of the institutions adopted under the EC Treaty are subject to judicial review (*Les Verts*) - undisputed to my knowledge. All such acts need to comply with general principles of Community law, including fundamental rights (*Opinion 2/94*) - undisputed. When the Community acts under international law, for example by concluding an international agreement, the EC Treaty needs to be respected (all the judgments on external competence) - undisputed. The norms of an international agreement which the EC concludes need to be compatible with the Treaty, as the Treaty itself clarifies in Art 300(6) (see also *Commission v Germany*) - again undisputed. It seems to me that the only point which the *Kadi* judgment adds is that those rules and principles extend to UN law, notwithstanding the primacy of the Charter under international law, notwithstanding Article 103 of the Charter.

Of course, that is an important point to add, and it needs to be looked at a little further. Most international lawyers are no doubt critical of the Court's silence on Article 103. The only reference which the Court makes to that provision is a tacit one: "any judgment given by the Community judicature deciding that a Community measure intended to give effect to ... a resolution is contrary to a higher rule of law in the Community legal order

would not entail any challenge to the primacy of that resolution in international law”. There is no further analysis of the primacy rule. Nor is there in the Opinion of AG Maduro. Is this not an approach which is too cursory, sweeping Article 103 under the carpet, as it were? Well, as a matter of positive law, the answer is: no it is not. As I have argued before, 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 or the EC are not of course such members), and provides that, in the event of a conflict with obligations under any other international agreement, the Charter prevails. Article 103 therefore speaks to the obligations of the EU Member States, but not to those of the EC. If we are serious about the autonomous nature of international organizations as international legal persons - and I would argue that international law itself is most serious about that, see for example the ILC work on the responsibility of international organizations - then as a matter of positive law it is difficult to see what effect Article 103 can have for the EC. Moreover, in *Kadi* the Courts were not looking at measures adopted by the EU Member States, which are of course bound by Article 103. The Courts were looking at an EC measure, a measure adopted under the EC Treaty - and is it not the most basic principle of international law that a treaty, also the EC Treaty, needs to be respected? Can you expect a court such as the ECJ, which by the EC Treaty is instructed to ensure that acts of the institutions are in conformity with that Treaty, to disregard that instruction, on the basis of another treaty provision which, on its terms, does not apply? I don’t think so. I might change my view only if international lawyers convince me that the norm of Article 103 goes beyond its positive terms; that it binds all international legal persons, and is a kind of *ius cogens* norm, an absolute peremptory norm which is all-pervasive. That is a sincere invitation.

In *Kadi* the Court of Justice adopts a constitutional rather than an international perspective. That is undeniable. The Court uses the term “constitutional” in several paragraphs, when referring to the kind of judicial review and respect for fundamental rights which the EC Treaty mandates. The judgment is constitutional by characterising the EC Treaty as containing constitutional norms which cannot be derogated from. It is constitutional in its approach of allowing the penetration of international law only in compliance with the relevant rules and principles of Community law. Here is, in the Court’s conception, a kind of municipal legal system, with its own constitution (notwithstanding the rejection of the Constitution by voters in some Member States); EC law is not a mere branch of international law.

Three comments on that constitutional discourse. First, again, there is nothing new in it. All of the Court’s case-law on the protection of fundamental rights displays this strong constitutionalist perspective. And to those who do not like that: perhaps its origins lie more in the pressure exercised by Member States’ constitutional courts, than in an autonomous decision of the Court of Justice. Second, it is a discourse which, frankly, is well suited for addressing the issues which the *Kadi* case raises; better suited, I would argue, than an internationalist discourse. The case is about individuals subject to intrusive governmental action, making the argument that their fundamental rights are not protected. This is of course classic constitutional stuff. My third comment is a little more tentative. Let us for a moment imagine that in *Kadi* the Court of Justice had considered its function to be that of a standard international court or tribunal. An international court

operating under one Treaty (the EC Treaty), and faced with a conflict with another treaty, the UN Charter. I don't think it could simply be taken for granted that the Court would confirm that the Charter takes precedence. International lawyers worry about the fact that international law is fragmented, and that treaty regimes do not always display great openness to other such regimes. I am reminded of the debates in WTO law. There many commentators are of the opinion that a WTO panel cannot apply 'external' treaty norms. Whether that insulation extends to the UN Charter, may be a further point; but it is in any event clear that an international law approach does not automatically guarantee that a court applies norms external to its treaty system.

The *Kadi* judgment is compared to *Medellin*. To me there are very important differences. In *Medellin* international law conferred rights on individuals; in *Kadi* it was argued that international law precluded the protection of individual rights. In *Medellin* the Supreme Court was asked to give effect to a ruling of the highest international court; in *Kadi* the Court of Justice intervened against a form of executive action. In a purely domestic context such factors would make anyone distinguish the two cases. We should also do so in an international context.

My last comment on *Kadi* and the relationship between EC law and international law, concerns the actual review by the Court in the light of fundamental rights. One commentator has said that the Court chose "to express important parts of its reasoning in rather chauvinist and parochial tones" (Gráinne de Búrca, Jean Monnet Working Paper No. 01/09). But I do not see what is chauvinist and parochial about the Court applying fundamental rights norms which are shared between 27 European countries, Member States of the EC; norms which are largely derived from the ECHR, which has 47 Contracting Parties; norms, lastly, which are very similar to those which one finds in UN human rights instruments such as the International Covenant on Civil and Political Rights. 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 UN 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 UN itself promotes and seeks to enforce.

The main lesson which international law needs to draw from the *Kadi* judgment is that, since it increasingly affects, in ever more direct ways, the position of individuals, it needs to develop much better mechanisms for the protection of individual rights. If such better protection had been afforded in *Kadi*, I am convinced that the Court would have been much more inclined to defer to the Resolution. In fact, the Court intimated that a kind of *Solange* approach towards international law is not excluded. It devoted eight paragraphs to the Commission's argument that the UN sanctions system allows for the individuals or entities concerned to be heard. The Court considered that the current re-examination procedure does not offer the guarantees of judicial protection. But it did expressly refer to the "so long as" terminology which the Commission put forward at the oral hearing (not in its written submissions). And 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, I expect the Court of Justice to defer to the UN system of protection. But for now, the Court's position is akin to the first *Solange* judgment of the BvG: as long as the UN 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.

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